

PUBLIC LAW BOARD NO. 5396

Parties
to the
Dispute

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES

and

SOUTHERN PACIFIC TRANSPORTATION
COMPANY
(Western Lines)

PLB Case No. 12
NMB Case No. 12

STATEMENT OF CLAIM

1. That the Carrier violated the current Agreement when it disqualified Track Laborer J.A. Tirado, Jr based on unproven charges. Said action being excessive, unduly harsh and in abuse of discretion.
2. That the Carrier now reinstate Claimant to the Class 17 Tractor-Bulldozer Operator Seniority Roster, San Joaquin Division, with a seniority date of April 1, 1981, and his record cleared of all charges.

FINDINGS

On May 13, 1991, while transporting 39 foot railroad sections (panels) down a temporary ramp, Claimant's end loader fell off the ramp onto its side. Claimant was not hurt and the end loader sustained only a broken mirror and

Company time and in a Company vehicle, R-11 Freon, which may be used in the manufacture of illegal drugs or substances, on April 25, 1991, May 3, 1991, and May 9, 1991, and for your alleged insubordination when you allegedly refused to submit to a toxicology test ordered by R.N. Peterson, Superintendent on Friday, August 16, 1991, at approximately 3:15 PM., while you were employed by the Southern Pacific Transportation Company at West Colton, California.

Claimant was charged with the violation of six rules of the Safety and General Rules Governing All Employees of the Southern Pacific Lines: Rules 1101, 1011, 1013, 1016, 1019 and 1007. On October 21, 1991, following three days of investigation, Claimant was dismissed from Carrier's employment.

At the hearing before this body, the Board was informed that Claimant had returned to work on May 18, 1992. Thus, what is at issue here is a period of approximately seven months during which Claimant was withheld from service.

It appears from the record of this case that Carrier's interest in Claimant, who was assigned as a Tinner in the Water Service and Fuel Sub-department, was peaked when a Special Agent was notified that Claimant had purchased a large quantity of R-11 Freon from a company in Yuma, Arizona. Carrier was informed that Freon may be used in the manufacturing of illegal drugs.

Claimant acknowledged its purchase and said that he was reselling it to a third party who was going to use it to clean computers and computer parts. When he was ordered to take a drug test, he refused.

Although this Board does question Claimant's decision to transport the Freon using a Carrier truck, in general, we cannot conclude that his actions here constitute grounds for his termination. The suspicion that purchased goods may be used for an illicit purpose is not sufficient to prove that an illegal act occurred. More is required of Carrier to sustain its burden. At the same time, given that Carrier was acting solely on the basis of suspicion, it lacked reasonable or probable cause to order a drug test.

For all of these reasons, the claim must be upheld.

AWARD

Claim sustained. Claimant is to be compensated for lost wages and benefits between the date of his termination in October 1991 and his return to employment in May 1992.

C.H. Gold
C.H. Gold, Neutral Chairman

C.F. Foose
C.F. Foose, Employee Member

John H. Martin
J. Martin, Carrier Member

2-28-94
Date of Approval