

PUBLIC LAW BOARD NO. 2439

Award No. 122
Case No. 122

PARTIES Brotherhood of Maintenance of Way Employees
TO and
DISPUTE: Southern Pacific Transportation Co. (Western Lines)

STATEMENT
OF CLAIM:

1. That the Carrier violated the provisions of the current Agreement when, in a letter dated December 10, 1985, it dismissed Track Laborer D. E. Lakey from its service on the basis of unproven charges, said action being in abuse of discretion.
2. Carrier shall now exonerate Mr. Lakey of all charges and reinstate him to his former position with the Carrier with seniority and all other rights restored unimpaired and compensation for all wage loss suffered."

FINDINGS

Upon the whole record, after hearing, the Board finds that the _____ parties herein are Carrier and Employees within the meaning of the _____ Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the _____ parties and the subject matter.

Claimant was employed by Carrier on June 20, 1973. By Award No. 86 of this Board, Claimant was reinstated to service, without compensation for time lost, based on infractions which he had been involved in prior to that time. As a result of that Award, he was instructed to contact Carrier's office for a reinstatement physical examination prior to returning to service. On November 1, 1985, Mr. Lakey submitted to and did take a urinalysis test, as

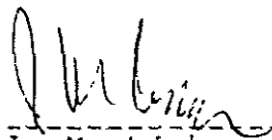
part of his physical examination and that test showed positive for marijuana. As a result, Claimant was charged with violation of Rule G - Alleged Use of an Illegal Drug, Narcotic or Other Substance and was offered the opportunity for a hearing. His violation of Rule G was involved. The hearing was held on December 4, 1985 and, subsequently, he was advised on December 10 that, as a result of the hearing and investigation, he had been terminated from Carrier's service. The record indicates that, in the course of the investigation, Claimant's only defense was that he was in the presence of others who smoked marijuana and he could only have been exposed to the substance on a "passive" basis. The record also indicates that Mr. Lakey, in the course of the investigation, did offer participation in the Employee Assistance Program for drug rehabilitation purposes. He indicated, at that time, that he was interested in participating in that Program but the record shows he never did indeed avail himself of that opportunity.

It is noted that the Board may not make credibility findings as the parties are well known. In this instance, the Hearing Officer determined that Claimant's statements, that he never smoked marijuana, were not to be credited and, also, the fact of his alleged passive inhalation, in order for the test to be positive, was also not credited. Thus, the Board is simply faced with the problem of whether indeed the guilt for failure to pass the reinstatement physical examination was appropriate in terms of the

remedies sought by Carrier. As the Board views it, there is no question but that Claimant was required to pass a reinstatement physical examination in order to go back to work. He did not do so. Furthermore, he did not avail himself of the opportunity to participate in the Drug Rehabilitation Program which might have affected his opportunity to return to work. There is no recourse but to deny the claim.

AWARD

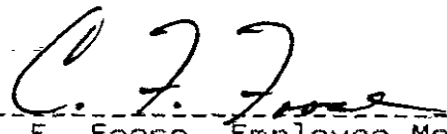
Claim denied.



I. M. Lieberman, Neutral-Chairman



R. J. Stuart, Carrier Member



C. F. Foote, Employee Member

San Francisco, California
September 15, 1988