

PUBLIC LAW BOARD NO. 2439

Award No. 130
Case No. 130

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

STATEMENT "1. That the Carrier violated the provisions
OF CLAIM: of the current Agreement when, in a letter
 dated May 9, 1986, it dismissed Track Laborer
 Joe O. Tamez from its service on the basis of
 unproven charges, said action being excessive,
 unduly harsh and in abuse of discretion.

 2. Carrier shall now exonerate Mr. Tamez of all
 charges and reinstate him to his former
 position with the Carrier with seniority and
 all other rights restored unimpaired and
 compensated 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.

On April 11, 1986, Claimant reported for duty at 6:00 a.m. Following a truck trip to the work site with other employees, Mr. Tamez attended a safety meeting. At that meeting, his Foreman was concerned with respect to his behavior and appearance. The Foreman indicated that Claimant's eyes were red and his pupils were particularly small. The Foreman's observations were corroborated by three other members of the crew. The Foreman then

asked Mr. Tamez twice to take the urinalysis to indicate whether indeed he was under the influence of any drug or alcohol. Mr. Tamez refused, on constitutional grounds, feeling that such a test would violate his right of privacy. Since he would not agree to the test, he was removed from service. Following a formal investigation, held on April 25, 1986, Carrier concluded that he was in violation of Rule G, being under the influence of alcohol and, furthermore, he was insubordinate in refusing to provide a urine sample for toxicological testing. He was dismissed from service.

Carrier believed that Claimant's behavior on the morning in question was unusual, he was hyper and overtalkative and constantly interrupted his Foreman. In addition, he was insubordinate, as the Carrier views it, in his refusal to give a sample for urinalysis testing. Therefore, Carrier believes that its decision to terminate Mr. Tamez was justified.

The Organization maintains that Carrier's basis for sustaining the charges against Mr. Tamez were insufficient and merely superficial. For example, the Organization argues that Carrier based its case on suspicion of unnamed employees, in a rather crude test, trying to measure the pupils of Mr. Tamez's eyes. The fact of the matter was, according to the Organization, that Claimant was under treatment by an eye doctor for a growth in his eyes, and therefore, this could explain the blood-shot appearance.

Furthermore, according to the Petitioner, his refusal to submit to the urinalysis was because he felt that it violated his constitutional right to privacy and should not be held against him. It is far from an adequate basis for termination, according to the Petitioner.

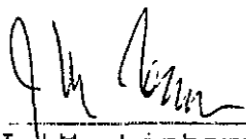
As the Board views it, the refusal of Claimant to take the urinalysis test was, at least, marginal in terms of its materiality with respect to termination. Many individuals feel that such tests violate their rights of privacy. Of course, the presumption also exists that such action, on the part of employees, is damaging with respect to the possibility of their being under the influence of an intoxicant. In this instance, as the Board views it, there was enough suspicion to warrant Carrier's conclusion that Claimant was under the influence of some intoxicant and, hence, violated Rule G. However, this evidence was not substantial and, as the Board views it, was insufficient to justify the ultimate penalty of dismissal. This is also supported by the fact that, during the previous 12 months, Claimant had missed but two days of work, which hardly seems to indicate that he was an alcoholic or had any other habitual problem. The record indicates, the Board believes, that his time out of service is sufficient penalty, under all the circumstances, and, therefore, he should be put back to work subject to a return-to-work physical but without pay for time lost which will constitute a disciplinary lay-off.

AWARD

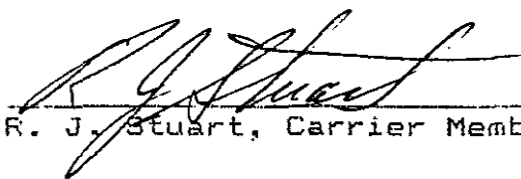
1. Claim sustained in part; Claimant shall be returned to work with all rights unimpaired but without payment for time lost.
2. Claimant's time out of service shall constitute a disciplinary lay-off. His return to work shall be subject to a return-to-work physical examination.

ORDER

Carrier will comply with the Award herein within 30 days from the date hereof.



I. M. Lieberman, Neutral-Chairman



R. J. Stuart, Carrier Member



C. F. Foose, Employee Member

San Francisco, California
September 15, 1988