

PUBLIC LAW BOARD NO. 2439

Award No. 133
Case No. 133

PARTIES Brotherhood of Maintenance of Way Employees
 TO and
DISPUTE: Southern Pacific Transportation Company

STATEMENT
OF CLAIM:

- "1. That the Carrier violated the current Agreement when it dismissed Foreman A. Jimenez without a fair and impartial investigation. Said action being excessive, unduly harsh and in abuse of discretion.
2. That the Carrier shall reinstate Claimant to his former position with seniority and all other rights restored unimpaired with pay for all wage loss suffered and his record cleared of all charges.

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 herein, Foreman A. Jimenez, had been employed by Carrier in 1971. He had an unblemished record up to the time of the

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incident herein. He had been promoted to Foreman in 1981. Claimant had been charged with selling waste oil and diesel fuel to an outside (non-employee) individual over a period of many months in 1986. These charges resulted from an investigation by Carrier's special agents who were concerned about the theft of waste oil from the West Colton yard. Following a hearing, Claimant was found to be responsible for accepting payment for personal gain in exchange for Company property, namely, the waste oil and diesel fuel, and also for making false and misleading statements. He was thereafter dismissed from service.

The record of the hearing in this matter is the crux of this dispute. It appeared that the only witnesses on behalf of Carrier were two special agents, Lieutenants Frye and Travino, of the Carrier's police department. These officers presented as their testimony an interview which they had had with an outside individual who allegedly had paid Claimant for the waste oil. This outside individual, as the interview indicates, was confused, was not sure of Claimant's name, was not sure of the dates of the incidents and indeed was not sure whether he paid in cash or checks, but claimed to have used both over a period of time. No cancelled checks were presented as part of the evidence. He even indicated that he couldn't remember, but believed, that

the checks were made out to Southern Pacific Transportation Company. Claimant denied any wrong doing whatever and denied that he had sold Company waste oil to any outside vendor or individual.

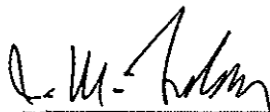
It is clear that Carrier's case is bottomed on a credibility finding by the hearing officer. In this instance, that credibility finding credits an interview conducted by two Carrier police officers against the testimony and veracity of the Claimant. It must be observed as a fundamental matter of both equity and due process that the Claimant must be given an opportunity to confront his accuser and cross-examine him, if required. In this instance there was nothing but hearsay on the part of the two police officers who could not indeed be cross-examined with respect to the facts. There was no attempt whatever to accord Claimant proper due process in the course of this investigation. He could not respond to a written statement, for that statement could not be cross-examined. It is apparent from an analysis of the entire record that Carrier has not established by substantial evidence guilt on the part of Claimant. His Claim must be sustained.

AWARD

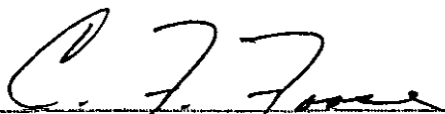
Claim sustained; Claimant shall be reinstated to his former position with all rights unimpaired and made whole for all losses sustained (less outside earnings).

ORDER

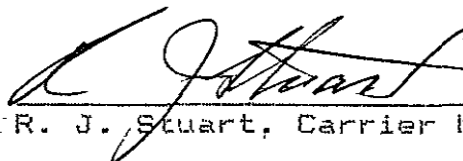
Carrier will comply with the Award herein within 30 days from the date hereof.



I. M. Lieberman, Neutral-Chairman



C. F. Foose, Employee Member



R. J. Stuart, Carrier Member

San Francisco, California
December 6, 1988