

PUBLIC LAW BOARD NO. 2439

Award No. 149
Case No. 149

PARTIES
TO
DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Southern Pacific Transportation Company (Western Lines)

STATEMENT
OF CLAIM:

"That the Carrier violated the Current Agreement when it dismissed Mr. R. L. Malone from its service, said action being excessive, unduly harsh and an abuse of discretion.

"That the Carrier reinstate Mr. R. L. Malone to his former Carrier position with seniority and all other rights restored unimpaired, with pay for all loss of earnings 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 had been employed by Carrier on May 14, 1984. By letter dated September 9, 1986 Claimant was charged with dishonesty in that he allegedly submitted conflicting accident reports with respect to a personal injury. Following the formal investigatory hearing held on September 23, 1986 Claimant was found guilty of the charges and dismissed from service by letter dated November 4, 1986.

The record indicates that on the morning of August 27, 1986 at about 6:30 a.m. Claimant reported to the Assistant Roadmaster, Mr. Arroyo, that he had a pain in his back and wished to see a doctor. When Arroyo asked him how the pain occurred Claimant indicated that he had hurt his back and that it was an off-duty injury. Arroyo then contacted his Roadmaster, Mr. Frates, and Frates wanted to know how Claimant was injured. After talking to Claimant once again Arroyo advised Frates that Claimant stated it was an off-duty injury and that he wanted to see a doctor. Claimant's request to see

the doctor was granted. He was asked whether he wished to be driven to the hospital to the doctor but indicated that he could drive himself. On the same date he allegedly told his Foreman, Mr. Davis, that he had hurt his back and when questioned indicated that it was as a result of an off-the-job injury.

The record indicates further that on August 28 when Claimant reported to work with a light-duty release from the hospital he later phoned Roadmaster Frates and advised him of the status of his injury. At that time he told Frates that it was an on-the-job injury and that he had told Arroyo about a former injury on August 19. Claimant had not filled out an accident report since Arroyo had told him that it was unnecessary at that time and that it would be done later.

The testimony at the investigation reveals that Claimant indicated that his conversation with both his Foreman and with Arroyo was different from that indicated above. In both instances according to Claimant he had told the Carrier Officials that he had injured his back due to an on-the-job situation which involved lifting a sack of creepers. Further the record indicates that as a result of the alleged injury Claimant filed a lawsuit against the Carrier on December 18, 1987 and contends that he is still unable to work and under doctor's care for his alleged injury. Thus should Claimant prevail in this dispute he will still not be able to be reinstated in view of his continuing alleged injured status.

The crux of this dispute is the testimony of the three Carrier Officials and that of Claimant. It is well-established that the Hearing Officer in circumstances such as this must make the credibility determination and it is improper for this Board to do so. The Hearing Officer concluded that the Carrier Officials' version of the incidents was correct and that the Claimant's version was not accurate. Based on this decision the facts as indicated above from the Carrier standpoint were substantiated. This Board has no choice but to accept the credibility finding of the Hearing Officer and thus there is no doubt but that Claimant changed his story from that of an off-duty to an on-duty injury which was an

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act of dishonesty. Based on this violation of the rules Carrier was within his rights in determining that he be dismissed from service. The Claim must be denied.

AWARD

Claim denied.



I. M. Lieberman, Neutral-Chairman



R. J. Stuart--Carrier Member



C. F. Foose--Employe Member

San Francisco, California
August 31, 1989