

PUBLIC LAW BOARD NO. 2439

Award No. 162
Case No. 162

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. Shepherd from its service, said action being excessive, unduly harsh and an abuse of discretion.

"That the Carrier reinstate Mr. R. L. Shepherd 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.

At the time of the incident herein Claimant had been an employee of Carrier for some 15 years. On the morning of March 10, 1986 he was instructed by his Track Foreman, Mr. Zermeno, to unload spikes. At that time Claimant was not wearing his safety glasses and was informed by his Foreman to wear them when performing his work. Claimant went to his truck and retrieved his glasses and put them on. A little later when Zermeno entered the boxcar where Claimant was working he found that Claimant did not have his safety glasses on and again instructed Claimant to wear them. Claimant argued that it was too dark in the boxcar to wear safety glasses and he couldn't see when he wore them. When his Foreman insisted he complied with the instructions. However a few minutes later he told his Foreman "You better get out of here before I knock you on your ass, you Mexican son-of-a-bitch," and threatened and came close to Zermeno with clenched fists. On the following morning in the course of an investigation conducted by the Roadmaster, Claimant indicated that he not only called him the epithet indicated above but furthermore said "I called him a no-good, stupid Mexican mother

fucker." The Roadmaster asked Claimant whether he was aware that the vulgar language was against the rules and Claimant indicated that he was aware of that fact.

The record indicates further that there had been bad blood between the Foreman and Claimant in the past. Based on the incident in question, Claimant was charged with being insubordinate, quarrelsome, careless of the safety of himself and refusing to wear appropriate protective equipment on March 10, 1988. Following an investigative hearing Claimant was found guilty of the charges and dismissed from service. Carrier also indicated that it took into consideration four prior disciplinary episodes in determining to dismiss Claimant.

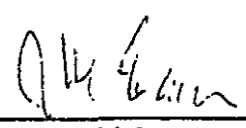
A careful examination of the record indicates that there was more to this incident than meets the eye. There is obviously bad blood between the two participants and the Foreman was not entirely blameless in this particular interaction. Clearly, however, Claimant did violate Carrier's rules by his refusal to wear safety glasses after being instructed to do so, and even though he called it a matter of judgment he should have followed his Foreman's instructions. Furthermore he was abusive to the Foreman, for which there is no excuse. However a careful examination of the record also reveals that the ultimate penalty of dismissal is inappropriate in this instance. The language used was not wholly inconsistent with what is normally considered to be "shop talk" and therefore in itself should not have provoked the ultimate penalty. His refusal to obey his Foreman's instructions is a more serious matter, however that type of infraction normally would not warrant dismissal, which should be reserved for much more serious infractions. In the Board's view in this instance it was excessive. However in determining the Claimant should be reinstated to his former position based on the arbitrary assessment of dismissal the Board views this reinstatement as a last-chance for Claimant to conform to Carrier's rules of conduct. He shall be reinstated to his former position with all rights unimpaired but without compensation for time lost. His time out of service shall be considered to have been a disciplinary lay-off.

AWARD

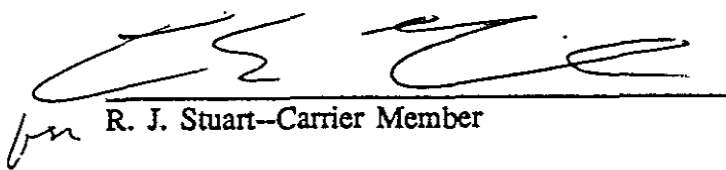
Claim sustained in part. The Claimant shall be returned to service with all rights unimpaired but without compensation for time lost, which shall be recorded as a disciplinary lay-off.

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--Employe Member

San Francisco, California
August 31, 1989