

PUBLIC LAW BOARD NO. 2439

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

STATEMENT OF CLAIM:

1. That the dismissal of spike driver (dual) B. L. Nestle, was in violation of the Agreement and without just and sufficient cause, arbitrary and on the basis of unproven charges.
2. That the Carrier violated Rule 44 of the current Agreement, when the Carrier's superintendent failed to give a reason for denying the claim during the handling on the property.
3. That the Carrier now reinstate Claimant to his former position, with seniority, and all other rights restored unimpaired and that he be compensated for all wage loss suffered, as a result of the Carrier's violation as mentioned above.

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.

Based on an incident, which occurred on March 21st, 1988, Claimant herein was charged with allegedly being insubordinate, quarrelsome and failing to comply with instructions given to him by the Assistant Roadmaster. Following a postponement, a hearing was held on March 21st, 1988, and following the hearing, Claimant was found guilty of the charges and dismissed from service.

Petitioner takes the position that Carrier was in violation of the Agreement by failing to accord Claimant a fair and impartial investigation. In addition, the Organization insists, that the Agreement was also violated when Carrier failed to give a reason for the declination of the claim in this dispute. As a third matter, the Organization argues, that Carrier failed to prove that Claimant was guilty as charged, with respect to insubordination.

Carrier maintains that the record of this dispute indicates that Claimant was clearly insubordinate and quarrelsome on the date in question by refusing to obey instructions given to him by proper authority. Carrier also notes that it offered to reinstate Claimant on a leniency basis, with the matter of compensation not subject to appeal, but this Agreement was not reached with Claimant.

A review of the record of this dispute reveals two significant flaws in the handling of the matter on the part of Carrier. First, and most significant, at the investigation Carrier refused to, and did not indeed, call two key witnesses who were requested in writing prior to the hearing by Claimant. One of those witnesses was indeed the foreman who had given Claimant instructions concerning his work on the morning in question. It is quite apparent, that Claimant was denied the very fundamental aspect of a fair investigation by Carrier's failure to produce the witnesses who were involved in this matter, who obviously were necessary for a proper defense by Claimant. It is Carrier's responsibility to conduct a hearing in a fair and impartial manner, and in failing to produce all the witnesses who were involved in the matter, Claimant's right to a full and fair investigation was abridged, and the entire matter must be declared null and void, and the claim sustained on that basis alone (see for example, First Division Award 20466 and also First Division Award 20094).

As an additional matter, Carrier in its declination of the initial claim in this matter, after restating the claim, stated as follows:

Your request is denied, as I am not agreeable to reinstating Mr. Nestle at this time.

The Organization properly raised the point that Rule 44 of the Agreement provides that Carrier shall, within 60 days from the date of the claim, file a response "in writing of the reasons for such disallowance". It is apparent that Carrier's response to the claim in this instance simply was not responsive and not in conformity with the specific requirements of the rule cited. As such, the claim again must be sustained as presented.

Based on the reasoning above, the merits of this dispute, cannot be reached. Claimant shall be reinstated to his former position, with all rights unimpaired, subject to a return-to-work physical examination. He shall receive back pay for all losses sustained, less any outside earnings during the period in question.

AWARD

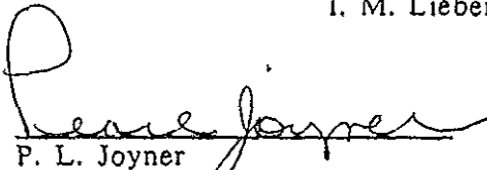
Claim sustained in accordance with the Findings above.

ORDER

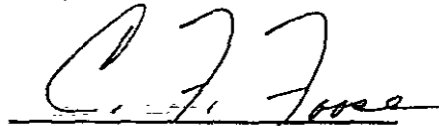
Carrier will comply with the Award herein within 30 days from the date hereof.



I. M. Lieberman, Neutral-Chairman



P. L. Joyner
Carrier Member



C. F. Foose
Employee Member

San Francisco, California
May 20, 1991