

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 Carrier violated the provisions of the Agreement when it dismissed Mr. T. G. Amaya without a fair and impartial investigation and on unproven charges, said action being unduly harsh and in abuse of discretion.
2. That Claimant now be reinstated with seniority all other rights restored because of the wrongful dismissal and that his record be 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 involved in this disciplinary matter, Claimant had worked for Carrier for some 35 years. He was a track laborer working the position of a truck driver at the time of the incident. At approximately 4:30 P.M. on March 21st, 1988, Claimant was driving his truck after work on overtime, getting supplies. This was a company-owned vehicle. He experienced a tire blow out on the way back to his headquarters point, which caused him to veer and the

truck to roll over, in the course of which Claimant received some rather serious injuries. A California patrol officer, who investigated the accident, indicated he was able to interview Claimant at the rear of the ambulance, while he was being loaded into that ambulance. The officer's interview indicated that he asked Claimant whether he had been drinking, and Claimant responded that he had had one beer at a store after work. As a result of this incident, the officer who had detected an odor of alcoholic beverages on his breath, stated that he was of the opinion that Claimant was under the influence of alcohol. In a supplemental report, the California patrol officer stated that the County Hospital Laboratory Test showed no alcohol in his blood at all.

As a result of this incident, Claimant was charged with violation of Carrier's Rule G, in that he was under the influence of alcohol while on duty, and in a company vehicle. Following an investigative hearing, Claimant was dismissed from service. The record indicates that the sole evidence with respect to Claimant's alleged violation of Rule G, was the record of the report of the patrol officer who indicated that Claimant had told him that he had one beer after work prior to taking the truck out on this particular assignment. It must be noted that Claimant indicated that he had no recollection of telling the patrol officer this, since he was in trauma at the time, having just experienced the accident. Furthermore, he denies that he was under the influence of alcohol or had consumed any beer following work. It must be noted that Claimant simply did not recall having told the patrol officer that he had had a can of beer. Carrier's officers were only involved to the extent of attempting to check out the patrol officer's statement. There was no other evidence of record.

In addition to its position that Claimant was not guilty, the Organization insists that the record of this dispute indicates that there was a miscarriage of justice. The hearing officer led the witnesses in an effort to convict Claimant, and, as a matter of fact, his actions were tantamount to his testifying. In addition, as the Organization views it, the discipline accorded Claimant even if he were guilty, was excessive in view of his many years of service and the minor aspect of the alleged transgression.

Carrier takes the position that Claimant was guilty of violation of Rule G by the clear cut evidence, and furthermore, it is obvious that in a situation such as this, particularly when driving a vehicle, the discipline imposed in this instance was justified. Furthermore, Carrier notes that it attempted to reinstate Claimant subject to receiving a favorable recommendation from the employee assistance counselor in view of his long service. However, as of January 15th, 1990, Claimant had not contacted the employee assistance counselor.

A careful examination of the transcript of the investigation in this matter indicates that the hearing officer was indeed dangerously close to testifying in this dispute. His conduct was far from appropriate in terms of his role. He did in part lead witnesses, which was almost testifying, in a couple of instances. Furthermore, it appeared from the questions that he asked, that he had drawn certain conclusions inappropriately prior to the conclusion of the hearing. However, in essence, the Board believes that the conduct of the hearing officer, though highly questionable, did not per se, violate the due process rights of Claimant. More significantly, however, the nature of the testimony, and the remedy imposed by Carrier in terms of discipline, are subject to considerable question.

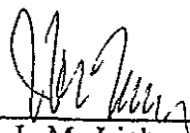
This dispute is quite similar to that dealt with involving the same parties, by Public Law Board 1795, in Award Number 18. In that case as well, an employee with long service, had been dismissed for drinking one beer with his lunch and then returning to work. As in that case, the question, which must be examined by this Board, is whether the penalty in this instance was commensurate with the nature of the violation or infraction. Even if one assumes that the Carrier indeed was justified in concluding that Claimant had had a beer prior to driving his truck, as the police officer's report indicated, first it is apparent, that even if Claimant had a beer prior to his handling his assignment, there was no alcohol found in his blood upon examination at the hospital following the accident. More significantly, even if he had consumed a beer, which was improper under the circumstances, the discipline accorded him was far in excess of that which can reasonably assumed to be appropriate under the circumstances. It would seem to be somewhat beyond the realm of reasonableness for an employee with 35 years of services to be terminated for drinking one beer. While the Board recognizes the importance of retaining Carrier's principles, concerning the non-use of alcoholic beverages while on duty, the discipline is far in excess of that, which the Board can assume is appropriate. Further, there is no evidence to indicate that it is necessary for Claimant to receive any type of counselling or treatment as an alcoholic, as suggested by the Company's refusal to reinstate him on a leniency basis. Clearly, one beer does not constitute alcoholism. Thus, the conclusion is that the penalty in this case was excessive. It will be reduced to a 90-day suspension. Claimant shall be reinstated to his former position with all rights unimpaired and made whole for all losses sustained (minus outside earnings) for the period in excess of the 90-day suspension.

AWARD

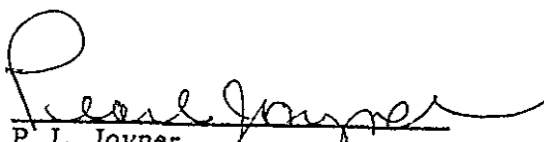
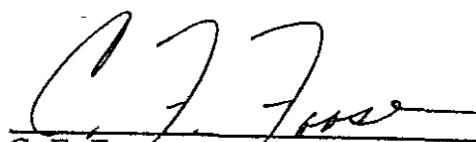
Claim sustained as indicated in Findings above.

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