

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's disqualification of Track Foreman, S. R. Cohen, on July 5th, 1988, was improper, without just, sufficient or reasonable cause, and in violation of the Agreement.
2. The Carrier shall now return the Claimant to his position as Track Foreman, and shall compensate him at the Track Foreman's rate of pay beginning July 5th, 1988, until such time as he is restored to the position as Track Foreman.

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.

The record indicates that Claimant had entered Carrier's service in July of 1984. He was a graduate of Carrier's Student Foreman Program and had been working as a Foreman for over 2 years prior to his disqualification. On July 5th, 1988, Claimant was disqualified by Carrier by receipt of the following letter:

Since establishing your Foreman's seniority of June of 1968 your performance in this class has been less than satisfactory. A rundown of reports and comments from various supervision is as follows:

|               |                                                                                                                                                                                   |
|---------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| June, 1986    | Complaints from members of your gang of your being boisterous and using profanity.                                                                                                |
| October, 1987 | Your remaining in motor car, failing to divide gang and make proper inspection of passing train.                                                                                  |
| June, 1988    | Your failure to follow safe work practices while setting spikes and operating jacks at derailment.                                                                                |
| June, 1988    | Your allowing two men to be absent from your gang, leaving your territory virtually unprotected over the weekend and your failure to report the gang's time to DAR as instructed. |

Although you were not working as a foreman, there was also an instance in January of 1987 wherein you were argumentative to your Foreman and fellow employees and had difficulty receiving instructions from your Foreman. Also, in 1986, you were absent without authority and were dishonest about your reasons for absence.

Although you have been counseled on various occasions by various Roadmasters, the behavior you have demonstrated is not appropriate for a Maintenance of Way Foreman and it has not improved.

You are hereby disqualified as Maintenance of Way Foreman.

'Carrier states that Claimant's disqualification was triggered by his failure to follow safe work practices while setting spikes and operating jacks while he was a Track Foreman at a derailment near Eddyville, Oregon. Carrier insists that the record indicated that Claimant was incapable of efficiently performing the duties of a track foreman. Carrier notes that numerous awards of many Boards hold that it is the sole responsibility of Carrier to determine the fitness and ability of an

employee. In this instance, Carrier believes that its decision was appropriate, and denies the Petitioner's argument that Claimant was assessed with a disciplinary penalty, when indeed he was merely disqualified.

As in Award Number 170 of this Board, Petitioner argues that Carrier is confusing its rights to discipline with those of disqualification. In the current case, as Petitioner views it, the Claimant had 2 years of successful operations as a Foreman and a disqualification in this instance was merely an extension of Carrier's right to discipline and was wholly inappropriate and contrary to the rules. It is important to note, as from Claimant's point of view, that he was not accorded the right to a hearing, which the disciplinary process requires.

As the Board views it, similar to the reasoning expressed in Award Number 170, Carrier in this instance is confusing its right to discipline, with its right to disqualify. It is apparent from the letter of disqualification that Claimant's behavior and various transgressions of good conduct were at stake rather than his inability to perform. In that context the Award of the Board, in Public Law Board 526, is pertinent. In that Award the Board stated:

It cannot fairly be said that the above reasons for removal relate to "qualifications". The Claimant could have done everything that the Carrier asked him, and was capable of refraining from doing those things which Carrier told him not to do. He was removed, not because he couldn't but because he didn't. Under those facts, the Board has no doubt that the removal was disciplinary in nature.

In this instance it is apparent, as was true in the prior Award of this Board, that Claimant was improperly disqualified, in fact disqualified instead of being disciplined, which was the thrust of the accusations made against him. There was nothing in the record to indicate that he was incapable of performing his duties, and Carrier misinterpreted its role in this instance and its rights. The Claim must

be sustained. Claimant shall be restored to his former position with all rights unimpaired and made whole for all differences in compensation from that which he would have earned had he remained as a Track Foreman, and that which he indeed did earn during the period in question until reinstatement.

AWARD

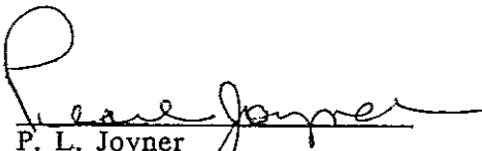
Claim sustained as indicated in Findings above.

ORDER

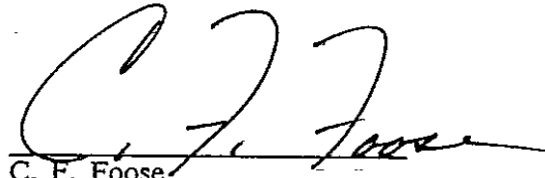
Carrier will comply with the Award herein within 30 days from the date hereof.



I. M. Lieberman, Neutral-Chairman



P. L. Joyner  
Carrier Member



C. F. Foote  
Employee Member

San Francisco, California  
May 20, 1991