

PUBLIC LAW BOARD NO. 2439

PARTIES
TO
DISPUTE:

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

STATEMENT OF CLAIM:

1. That the Carrier violated the current Agreement when it dismissed Laborer, D. L. Sched, without first being accorded a fair and impartial investigation. Said action being excessive, unduly harsh and in abuse of discretion.
2. That the Carrier reinstate Claimant to his former Carrier position with seniority and all other wage rights restored unimpaired, with compensation for all wage loss 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.

The record indicates that on June 28, 1989, Claimant was involved in a personal injury situation. As a result of that injury, he was required, among other things, to submit to toxicological testing. The report back indicated that he tested positive for cocaine, and furthermore the confirmatory test indicated the same result. In addition, Claimant was charged with dishonesty in his telling an untruth to

Carrier's officials with respect to having a current driver's license, which he needed as part of his job, when in fact he did not have one. Following the investigation, Claimant was found guilty of the charges and dismissed from Carrier's service. The record indicates that as part of Carrier's normal policy, it would consider reinstating an employee to service if he participated in Carrier's Employee Assistance Program and received a favorable recommendation from that program. In this instance, since this was Claimant's first drug violation, he was offered the opportunity to meet with the Employee Assistance Counselor and arrange for entrance into the program. Several appointments were set up for him to meet with the Assistance Counselor and he did not appear, and in fact, over a two-year period following his dismissal he did not attempt to contact the counselor to enter the program.

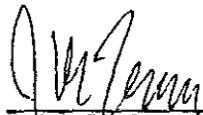
The record is clear and unequivocal with respect to the fact that Claimant was found to have substantial traces of cocaine, as indicated by the toxicological tests. Further, there is no doubt but that he falsified his response to Carrier's questions concerning his driver's license. Petitioner takes the position, however, that the merits need not be examined since the Carrier violated Claimant's due process rights. The Organization insists that Claimant was not accorded a proper investigation since the Officer who charged him with the violation also testified against him, and finally sent him the letter indicating that he was dismissed. Carrier on the other hand insists that there was adequate due process accorded Claimant, and there was no violation of the rules by the transgression alleged by the Organization.

From the standpoint of due process, the fact that the same Carrier official levied the charge against Claimant, and then testified against him, is not at all uncommon, nor is it in violation of the rules with respect to investigations. The fact that he

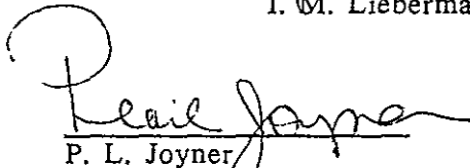
signed the letter indicating the dismissal as a penalty for the violations, also is not at all uncommon. In this case the same officer did not act as the hearing officer, nor did he rule on the evidence. That was reserved to another official who served as the hearing officer. Even in accordance with the award cited by the Organization, the Board finds that Petitioner's position is not supported by either the facts or precedent. For example, in Fourth Division Award No. 2167, the Board indicated that the violation of the rule was improper because "the roles occupied by superintendent. . . . permitted him, among other things, to pass judgement on his own testimony." Further, in that same Award, the Board found that it was "violative of the basic concept of a fair and impartial trial to have the same Company official act as 'accuser', 'witness', and 'judge' of the accusations or charges." In this instance since the same Company official did not act as judge, and did not rule on his own testimony, obviously this was not a parallel situation. From the entire record, therefore, the Board concludes that the disciplinary decision made by Carrier was a correct one, and under the circumstances, with particular reference to Claimant's failure to avail himself of the program for rehabilitation, the claim must be denied.

AWARD

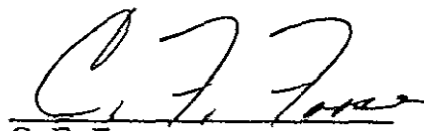
Claim denied.



I. M. Lieberman, Neutral-Chairman



P. L. Joyner
Carrier Member



C. F. Foote
Employee Member

San Francisco, California
April 30, 1993