PUBLIC LAW BOARD NO. 2439

Award No. 43
Case No. 43

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

STATEMENT OF CLAIM

"1. That the Carrier violated the provisions of the current Agreement when on February 18, 1981 it dismissed Track Laborer E.J. Reynolds from its service without first according him a fair and impartial hearing.

2. That Mr. E.J. Reynolds now be reinstated to former Track Laborer position with seniority and all other rights restored, unimpaired and compensated for any and all time lost as a result of the Carrier's action."

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 Board No. 89-456 and has jurisdiction of the parties and the subject matter.

The record indicates that Claimant herein was employed by Carrier as a Fireman and Oiler in the Mechanical Department in March of 1979. Due to reduction in force, he was placed on a furloughed status in early 1981. In February of 1981 Claimant was re-called to service on a temporary vacancy as a Track Laborer and performed service as a Track Laborer until removed by written notice delivered to him on February 18, 1981. At that point Claimant reverted to his furloughed status.

Petitioner argues that Claimant was terminated without benefit of being first accorded a fair and impartial hearing as is the right of an accepted employee of the Company. The Petitioner argues that Claimant was an employee coming under the permissive features of Rule 4 of the Schedule Agreement in view of the provisions of Rule

4 in pertinent part as follows:

> "Employee Accepted (a) An employee who enters the service of the Company shall be accepted or rejected within sixty (60) days from the date he begins work. If not notified to the contrary within the time stated, it shall be understood that he becomes an accepted employee ...."

Petitioner insists that with this Rule together with the fact which is accepted by both parties that he had indeed been an employee of the Company prior to his re-call for more than sixty days, he was entitled to the rights provided for an accepted employee in the Rule cited above, which included an investigatory hearing prior to termination. Petitioner argues that Carrier was incorrect in its argument that Claimant's application was merely rejected for employment within the Track Sub Department; he was entitled to a fair and impartial hearing prior to being terminated.

Carrier maintains that Claimant was not disciplined or dismissed. Carrier points out that it could not have taken such action as dismissal with Claimant since he was protected by the Firemen and Oilers contract and did not violate any rules of that Agreement. On the other hand, Carrier argues that Claimant simply did not adapt to the type of work in the Maintenance of Way Department and did not qualify for the work which he was offered on a temporary basis. Hence, he simply reverted to his furloughed status in the Mechanical Department and was not dismissed. His period of work was considered to be, by Carrier, a trial period as a Track Laborer and it was not satisfactory. Carrier points to the fact that the utilization of furloughed employees for temporary positions is not mandated but is a procedure extended to furloughed employees as a courtesy from other crafts rather than Carrier seeking new employees off the street. Carrier would prefer to offer its own furloughed employees temporary employment if indeed they are qualified for such work. Under such circumstances Carrier argues, that if the employee satisfactorily performs, they are allowed to do so as long as the work exists. If not, they simply revert to the status of the craft in which they hold seniority in, in this instance, the Firemen and Oilers craft.

The Board, after carefully examining the record and the arguments advanced, concludes that there was an error in the logic of Petitioner in this instance. The reference to Rule 4 of the Agreement with respect to the sixty day probationary period is not correct. The fallacy is in the definition of the word employee. Obviously, an employee under this Agreement is not any employee of Carrier. For example, an individual employed as a clerical employee would not be presumed to have completed his probationary period under this Agreement after sixty days with Carrier. Further, obviously an employee in another craft or in an excepted position would not be deemed to be covered by the benefits and wage scale prevalent under this Agreement. Thus it is erroneous to assume that an individual employed by Carrier is automatically covered by the provisions of Rule 4 only of the Agreement and not by the other terms of the Agreement in question. The conclusion is apparent that an employee must be within the scope of the Agreement to be covered by the Agreement's terms. Thus, Rule 4 applies to employees in the Maintenance of Way Department only and not to employees in other crafts. This logic appears to be inescapable when viewed in the context of the application of benefits, for example, under various contracts. Thus, in this instance, the Board concludes that the Claimant with seniority in the Firemen and Oilers craft under the Mechanical Department was not an employee for purposes of the sixty day period under the Maintenance of Way Agreement until such time had elapsed while working in the Maintenance of Way Department. In this instance, after two weeks Claimant was found not to be qualified and reverted to his furloughed status. Such action was not a violation of the Agreement herein for the reasons indicated.

AWARD

Claim denied.

I.M. Lieberman, Neutral-Chairman

L.C. Scherling, Carrier Member

S.E. Fleming, Employee Member

San Francisco, CA