

PUBLIC LAW BOARD NO. 2439

Award No. 59
Case No. 59

PARTIES
TO
DISPUTE

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

STATEMENT
OF CLAIM

- "1. That the Carrier violated the provisions of the current Agreement when on December 8, 1981, it suspended Mr. Frank R. Lucio from its service pending formal hearing and, as a result thereof, subsequently held Mr. Lucio suspended from service until February 5, 1982, or a period totaling sixty (60) days, after which he was to exercise his seniority rights on his home seniority district, said action by the Carrier being excessive, unduly harsh and in abuse of discretion.
2. That Claimant now be paid all wage loss suffered during the suspension period and the alleged Carrier rule infraction be expunged from his personnel record."

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 Claimant herein was employed by Carrier in 1969 and, at the time of the incidents involved in this dispute, had been promoted to the job of Assistant Element Manager which was a Carrier Officer's position. On December 8, 1981, Claimant was relieved of his duties as a District Manager and held out of service pending formal charging and a hearing. By letter dated December 17, Claimant was appraised that a charge had been lodged against him in that he was allegedly guilty of selling Company material without authority and keeping the money, and further had authorized the use of Company equipment and personnel on projects not being performed by or for the Company. Following the hearing, Claimant was told that the evidence established his responsibility in connection with the allegations and he was suspended from service for a period of 60 days after which he was instructed to exercise his seniority on his home seniority district. The record indicates that Claimant had been working on a special rehabilitation project on the Rock Island former property, employed by one of Carrier's subsidiaries, The St. Louis

Southwestern Railway. The particular problem herein involved the disposition of scrap railroad cross ties. The crux of the matter was that Claimant indicated that he had been given 1,000 scrap ties by the President of the Mid-western Railway Company, a contractor involved with Carrier herein, in clearing the right of way. Claimant admitted selling some 800 railroad ties for approximately \$2,000 in August and October of 1981. In the course of that transaction, the evidence indicates that he had used a truck leased from the Mid-western Railway Company by Carrier with the use of Carrier's tie handlers and drivers in making the deliveries. The record also indicates that the President of Mid-western Railway Company corroborated the fact that Claimant had asked for 1,000 scrap ties and was given about 100 only.

Carrier argues that the record contains substantial evidence to support the conclusion that the Claimant was guilty. Specifically, according to Carrier, it is apparent that Claimant was given 100 ties, but sold well over 800 for his personal gain. Further, Carrier notes that the ties belonged to it rather than anyone else until actually picked up by a contractor. Further, it is apparent and undisputed that Claimant used a Carrier truck leased from Midway Leasing Company to move the ties in question and also used Carrier personnel for the purpose of loading and delivering the ties. Thus, Claimant did not have authority to sell the ties, nor to use Carrier personnel and equipment for purposes of disposing of them, as well. Carrier notes that for such a serious offense, permanent dismissal would normally be warranted. However, due to circumstances with respect to the trial and Claimant's past record, Carrier decided that his removal from Officer Position and a sixty-day suspension would be appropriate, although lenient.

Petitioner notes that it questioned the fact first whether the circumstances surrounding this particular incident were sufficient to require suspension of Claimant pending the investigation. The petitioner felt that the circumstances did not require such dramatic action. Further, the organization insists that Claimant was subjected to a double penalty in this particular situation. First, he was reduced in rank from Carrier Officer to an employee within the Agreement and, secondly, was assessed a sixty-day suspension. The organization also notes that one of Carrier's witnesses, who submitted a statement, was not present for purposes of examination by Claimant or his representative at the trial. Furthermore, Claimant had just suspended that employee for a five-day period, approximately a month before the incident involved in this dispute. Most significantly, the organization

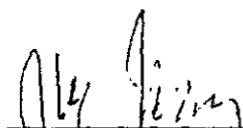
maintains that Carrier failed to prove that the ties in question were not given to Claimant by the contractors involved. The evidence was apparent, according to the organization, that Claimant had indeed been granted authority to take at least 100 ties by one contractor. For this reason, the organization maintains guilt was neither proven nor supported by the record of the hearing and the discipline assessed was excessive and unduly harsh under all the circumstances, not being supported by the facts.

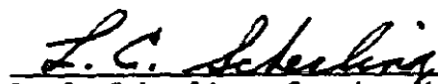
The Board notes, initially, that although there were some deficiencies at the hearing (notably the lack of opportunity to interrogate Mr. Wright), there were sufficient opportunities for Claimant to present his defense and adequate evidence, other than Mr. Wright's testimony, to support the conclusion that Claimant was guilty. The real issue comes down to the matter of how many ties Claimant was given and whether the ties in excess of 100 were the property of Carrier or someone else, namely contractors. It is this Board's conclusion, therefore, that the Claimant was not deprived of his due process by the course of the trial on the issue involved in this matter. The evidence indicates that he did, indeed, use Company property, as well as help, to dispose of certain railroad ties, at least part of which were not given to him by the one contractor whose testimony appeared in the investigation. That contractor indicated that he was given 100 ties (even though many were burned each day) but no where does the ownership of the other 700 plus ties appear to be substantiated by the Claimant.

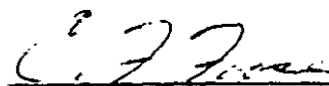
With respect to the penalty assessed, the Board is of the opinion that under all the circumstances it was not harsh. Claimant could well have been dismissed from service for the infraction for which he was found guilty. Under all the circumstances herein, however, the Board will not substitute its judgment for that of Carrier in the determination of the degree of guilt and, hence, the penalty to be accorded Claimant. He was guilty and the penalty assessed should be considered to be lenient under the circumstances.

AWARD

Claim denied.


I. M. Lieberman, Neutral-Chairman


L. C. Scherling, Carrier Member


C. F. Foose, Employee Member

San Francisco, CA
October 12, 1983