

PUBLIC LAW BOARD NO. 2439

Award No. 63

Case No. 63

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

STATEMENT
OF CLAIM

"1. That the Carrier violated the provisions of the Agreement when on April 15, 1982, track laborer D. J. Rodriguez was suspended from the service of the Carrier for a fifteen (15) day period and track foreman Jack R. Rogers was suspended from the service of the Carrier for a thirty (30) day period as a result of evidence adduced at a hearing held on March 8, 1982, wherein the Carrier determined that Claimants were found to be in violation of its Rules 801 and 802, said action being excessive, unduly harsh and in abuse of discretion.

2. That Claimants Rodriguez and Rogers each be compensated for all time lost from their respective positions as a result of their improper suspension from the Carrier's service, and that the charges placed on their respective personal records be expunged therefrom."

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 Claimants herein were employed in the track department of the Carrier on extra gang on Carrier's San Joaquin Division in California. By letter dated February 4, 1982, the two men were notified to be present for a hearing "...to develop the facts and place responsibility, if any, in connection with your allegedly reporting at 7:00 A.M. January 13, 1982, train crew extra 8637 East appeared to be asleep January 12, 1982, at approximately 9:35 A.M. as train passed MP342, near Cliff, California, then denying subject reporting an investigation conducted February 2, 1982." This was alleged to be a violation of two of Carrier's rules, Rule 801 and Rule 802 of the General Rules and Regulations of the Maintenance of Way and Structures Department.

The record indicates that at approximately 9:35 A.M. on January 12, 1982, the train

extra 8637 East went through Claimants' territory. Claimants gave the train the required rolling inspection and attempted to give the crew a signal signifying that all was well with the train. There were no answers to the "high ball" and Claimants were of the opinion that the members of the train crew were sleeping, or gave the appearance of sleeping. Subsequently, on January 13, Claimants reported to the District Maintenance of Way Manager that members of the train crew in question appeared to be asleep as the train passed Mile Post 342. As a result of this report, members of the train crew in question were cited for a formal hearing into the occurrence. At that investigation, on February 2, 1982, Claimants herein were asked to testify. At that hearing, Claimants failed to recollect their observations in reporting of the occurrence. Their testimony was characterized as being evasive and imprecise. An examination of the transcript of that initial investigation does reveal that the two men changed their testimony from their earlier statements to Company officials when they appeared at the ultimate investigation. Based on the change in testimony, the investigation of the train crew was abruptly stopped and the hearing was closed.

Carrier insists that the evidence is quite clear that the two Claimants herein were not truthful in the investigation of February 2, 1982, relating to the train crew being asleep. While the two men told the officials of the Company that they witnessed members of the train crew sleeping, in fact Mr. Rogers testified that "The crew member was stretched out with his head over against the glass....and....he was either asleep or checking the inside of his eyelids." With respect to the second helper or locomotive engineer, Rogers stated that he "was even flatter than the first". Rogers also stated that the "trainman in the caboose was asleep also." Nevertheless, at the formal hearing on February 2 Rogers merely admitted seeing crew members in a reclining position or, in the case of the trainman on the caboose, in a slump position, and did not testify as to anything more than that. Rodriguez, who had corroborated Rogers' observations in his conversations with Carrier officials, at the February 2 hearing, testified that he didn't observe the crew at all and remembered nothing except seeing the train. Carrier argues that the testimony makes it obvious that Claimants were not truthful at the investigation on February 2, 1982. For that reason, according to Carrier, the discipline assessed was totally justified. Further, since Rogers, the foreman, was the leader in reporting the incident and was the more responsible of the two Claimants, a greater penalty was properly allocated to him.

The organization argues that Rogers never stated earlier that the train crew was

asleep but "appeared to be asleep". Furthermore, he insisted that he never stated that the train crew was asleep but was in a reclining position. Also, according to the organization, Rodriguez took the position consistently that he had not paid much attention to the crew but was merely checking the train as it passed through his limits. He indicated that he did not view anything improper on the rollby by virtue of not receiving an acknowledgment. Petitioner maintains that there was apparently a misunderstanding or misinterpretation of what Claimants actually reported to the Carrier officers involved in this dispute. Thus, it was improper to cause them to suffer the consequences of loss of work in their efforts to be useful and proper employees. In this case, Rodriguez lost actually 11 working days (15 calendar days' suspension), in addition to any overtime. Therefore, his straight time loss amounted to over \$800. Rogers suffered a loss of work for a period of 30 days; which cost him in excess of \$1,900 at straight time. Petitioner consider this to be improper and requests that the charges be expunged from their records, and that they be made whole.

An examination of the transcript of the February 2 investigation indicates that both Claimants gave virtually no information concerning the alleged problem with the train during the rolling inspection. Their testimony was accurately described as evasive at best. The Board notes further that their denial at their own investigation that they had ever alleged that the trainmen had been asleep is not persuasive. That conclusion was reached by the hearing officer who made the ultimate determination with respect to credibility. From the evidence adduced and in view of the credibility findings which were explicit in the conclusion reached by Carrier, it is apparent that Claimants pulled back their horns and did not tell the same story at the February 2 investigation which they had earlier relayed to Carrier officials. Hence, they were guilty of the charges of being dishonest in this rather unusual circumstance.

The guilt of Claimants must be examined a bit more closely, however. It is quite apparent from examination of the entire record that Foreman Rogers took the lead throughout the handling of this matter prior to the February 2 investigation of the trainmen. Rodriguez was merely a bystander corroborating some of the things which his foreman stated. The degree of his culpability was obviously substantially less than that of Rogers. The Board is of the opinion that with respect to the discipline in this case, Rodriguez should not have been given more than a five-day

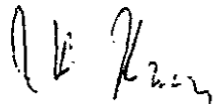
suspension for his participation in this incident. Thus the discipline which he received was harsh and excessive. On the other hand, Carrier's decision with respect to Foreman Rogers must be permitted to stand since it appears to be totally justified.

AWARD

Claim sustained in part; the discipline accorded D. J. Rodriguez was harsh and excessive and will be reduced to a five (5) day suspension; he shall be made whole for all loss sustained in excess of that amount of time. The remainder of the claim is denied.

ORDER

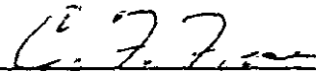
Carrier will comply with the Award herein within thirty days of the date hereof.



I. M. Lieberman, Neutral-Chairman



L. C. Scherling, Carrier Member



C. F. Foote, Employee Member

San Francisco, CA

October 12, 1983