

PUBLIC LAW BOARD NO. 3558

PARTIES)
 TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
 SOUTHERN PACIFIC TRANSPORTATION COMPANY
 EASTERN LINES

AWARD

STATEMENT OF CLAIM:

"1. Carrier violated the effective Agreement when Laborer Driver J. R. Flowers was unjustly dismissed from service.

2. Claimant Flowers shall now be reinstated to his former position with all seniority, vacation rights and any other rights accruing to him unimpaired, in addition to all pay lost commencing March 2, 1987, and to run concurrently until such time that Mr. Flowers is rightfully restored to service." (MW-87-58)

OPINION OF BOARD:

Claimant has been a laborer-driver since May 12, 1980. As a result of charges dated March 4, 1987, investigation held March 12, 1987 and by letter dated March 17, 1987, Claimant was dismissed from service for failing to conduct himself in a manner so as not to subject the Carrier to criticism or loss of good will, conduct of an immoral nature by continued DWI charges, failing to provide such information concerning irregularities in employment to proper Carrier authority, absenting himself from assigned duties without proper authority, failing to protect his assignment for approximately four months and falsification of his employment application.

Claimant has a substantial criminal record for driving while intoxicated. Specifically, on October 12, 1978, Claimant was convicted on a DWI charge and was fined, incarcerated for thirty days and placed on probation for one year. On September 30, 1981, Claimant was indicted for involuntary manslaughter for a death to an individual which occurred while Claimant was driving while intoxicated. On October 4, 1982,

Claimant was convicted of the involuntary manslaughter charge and was sentenced to ten years in prison, which sentence was suspended. Claimant was then placed on ten years probation. On February 15, 1986, Claimant was again driving while intoxicated. By judgment dated September 15, 1986, Claimant's probation was officially revoked and he was ordered to serve two years in prison. Claimant was incarcerated commencing on September 5, 1986 and, as a result, did not thereafter come to work. Claimant was subsequently released from prison prior to serving the entire sentence.

On February 2, 1987, Claimant was placed in a furloughed status due to a force reduction. In mid-February 1987, Claimant submitted a recall letter. According to the Carrier, this was the first knowledge it had that Claimant was absent from his assigned duties subsequent to September 5, 1986. The Carrier commenced an investigation and learned of Claimant's criminal record. Further checking of Claimant's employment application submitted on July 14, 1979 showed that in the application Claimant stated that he was never convicted of a crime. That statement was made notwithstanding the earlier-mentioned 1978 conviction.

The Organization has raised an issue concerning the timeliness of the charges since it contends that the Carrier had to be aware that Claimant was missing from work after September 5, 1986, in part, due the Carrier's having bulletined a job vacancy for Claimant's position in September 1986 and its processing a leave of absence request made by the Organization on Claimant's behalf shortly thereafter. Hence, according to the Organization, the Carrier did not bring the instant charges within sixty days as is required by Article 14, Section 2(D). We find that it is not necessary for us to address those assertions or the underlying charges that the Organization claims are barred by such an argument. We find sufficient basis to uphold the dismissal in light of Claimant's failure to disclose the prior DWI conviction on his employment application. The court records obtained by the Carrier are dated in February and March 1987 and therefore show that the Carrier did not become aware of Claimant's criminal record until after Claimant submitted

his recall letter. The charges were issued on March 4, 1987, thus clearly within the sixty day period specified in Article 14, Section 2(D) and outside of the procedural issue raised by the Organization.

With respect to Claimant's failure to disclose a previous DWI conviction on his employment application, the record shows that Claimant was convicted and incarcerated for DWI in October 1978 and did not disclose the same in his employment application completed the following year. In his employment application, Claimant denied ever being convicted of a crime. However, in his application, Claimant further declared "that the information given in the foregoing is true and correct and that any misrepresentation or false statement herein will justify and cause termination of my service regardless of when such fact may be discovered by the Company." Upon discovery of the fact of the previously undisclosed conviction for DWI, the Carrier issued charges for the falsification.

Article 2, Section 4 does not insulate Claimant's omission. Although the Organization is correct that the section states that an employee accepted for employment "will not be terminated or disciplined by the carrier for furnishing incorrect information in connection with an application for employment or for withholding information therefrom", the section further states "unless the information involved was of such a nature that the employee would not have been hired if the carrier had had timely knowledge of it." We believe that the failure to disclose a DWI conviction and incarceration falls within the caveat in Section 4. Therefore, substantial evidence exists to support the conclusion that Claimant was dishonest within the meaning of Rule 607 (4).

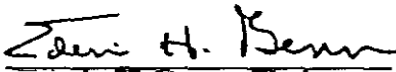
Claimant is a laborer-driver. He repeatedly has been convicted and incarcerated for DWI, one such incident resulting in death. Putting aside the issue that Claimant's propensity for driving while intoxicated probably violates the prohibition against conduct that subjects the Carrier to criticism or loss of good will found in Rule L (another issue we ultimately need not decide), the fact of such convictions effectively precludes any finding of

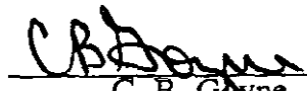
dismissal as arbitrary, capricious or excessive discipline for someone in a laborer-driver's position who has been convicted of driving while intoxicated.


In light of the above, we need not address the remaining allegations against Claimant and the Organization's procedural arguments concerning those allegations since sufficient basis exists to uphold the Carrier's actions on the above discussion concerning the DWI conviction. Further consideration of the other allegations would only be cumulative and redundant.

AWARD:

Claim denied.


Edwin H. Benn, Chairman
and Neutral Member


C. B. Goyne
Carrier Member


S. A. Hammons, Jr.
Organization Member

Houston, Texas
August 31, 1988