

PUBLIC LAW BOARD NO. 3836

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

-and-

SOUTHERN PACIFIC TRANSPORTATION
COMPANY (WESTERN LINES)

Case No. 4: Appeal of Track Laborer R.L. White from discipline by suspension for a period of thirty (30) days from June 26, 1985 through July 25, 1985.

PREFACE

P.L. Board No. 3836 was established pursuant to the Railway Labor Act, as amended by Public Law 84-456 and, that certain Agreement entered into by and between the parties at San Francisco, California, April 1, 1985.

Jurisdiction of P.L. Board No. 3836 is confined to appeals involving disciplinary actions of six (6) months or less.

In deciding whether the discipline assessed is to be upheld, modified or set aside, the Board must decide:

1. whether there was compliance with the provisions of Rule 45 of the parties' collectively bargained agreement;
2. whether substantial evidence was adduced at the investigation(s) to prove the charge(s) made;
3. whether the discipline assessed was "Excessive."

The Board's Awards shall contain only the Neutral Chairman's signature and copies of the Awards shall be furnished to each party.

BACKGROUND

On June 25, 1985, at approximately 2:00 P.M. (TR-4), General Track Foreman N. Jacquez directed the appellant, Robert L. White, Track Laborer T11, to "...stay late after quitting time to unload ties off the work train...." (TR-4).

The normal quitting time for Gang T11 was 2:30 P.M. (TR-4).

White acknowledged that Jacquez did "ask" him to work overtime on June 25, 1985, and; that, he was not going to work overtime on that day. (TR-11).

White did not remain on duty to perform overtime on June 25, 1985 and, accordingly, the appellant was withheld from service commencing with his next scheduled work period June 26, 1985 pending the conclusion of a disciplinary proceeding commenced at a "Hearing" conducted by C.W. Barnum, Regional Maintenance of Way Manager on July 5, 1985.

Appellant was represented at the July 5, 1985 proceeding by District Chairman G.L. Nelson, BMW.

Appellant called Albert C. Henry as a witness on his behalf.

Both Nelson and White examined and cross-examined the witnesses without interference from Barnum.

Pursuant to the joint recommendation of Barnum and Earls (P.R. Earls, General Foreman, Training) which Regional Engineer R.E. Cox adopted, Cox notified White by letter dated July 18,

1985, in pertinent part, that:

"Evidence adduced at...hearing held...
July 5, 1985...established your responsibility...[for]...your failure to comply
with a direct order of the General Track
Foreman.

Your actions...were in violation of
Rule 801...'Employees will not be retained
...who are insubordinate....'

...You are suspended...for thirty
(30) days...."

General Chairman Miguel Goicoa, BMW, instituted proceedings
before this P.L. Board by letter dated September 9, 1985.

The undersigned received the "Hearing" transcript and related papers on December 16, 1985.

OPINION

This is a Disciplinary matter, consequently, the burden of proof is with SOPTC.

Absent an agreed upon definition, in the parties' Agreement, or the applicable Rules and Regulations, Arbitrators broadly define "Insubordination" as the intentional disregard of a proper order or instruction, or an intentional failure to perform properly assigned tasks.

Clearly, based upon the undisputed record before this P.L. Board, White intentionally disregarded Jacquez's instruction to remain on duty to unload ties. (TR-11, Testimony of White).

It is also clear that; based upon this record there was no

serious issue of "personal safety" involved.

White sought to excuse his refusal to work overtime on the basis of not having gotten "...much sleep last night and I'd rather not work...."

That; he was "too tired" and it was "...unsafe." (TR-13).

Standing alone, unsupported by collaborating evidence, these are transparently trivial excuses unworthy of serious consideration.

Further, it is irrelevant, whether Jacquez, pursuant to the terms of the parties' Collectively Bargained Agreement, or the mutual interpretations thereof, or the mutually agreed upon practices thereunder, correctly directed White to perform overtime in other than an "Emergency." ^{1/}

Clearly this situation, based upon the record, did not constitute an "Emergency." ^{1/}

Further, White acknowledged he was aware that he would be regarded as having been "insubordinate" if he refused to comply with "an order or directive..." (TR-11).

Finally, unless the record established a bona fide personal safety question, and this record does not, White was obligated to obey Jacquez and grieve later.

^{1/} "Emergency." A sudden unexpected happening; an unforeseen occurrence or condition; specifically, perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency - pressing necessity..." (Black's Law Dictionary - Revised Fourth Edition)

It is axiomatic that unless the employee obeys the proper directives of the employer Industrial Relations anarchy will ensue.

Accordingly, based upon this record, there was justification for the imposition of some discipline.

Turning now to the question of whether, based upon this record, the imposition of a thirty (30) day suspension without pay was "Excessive." 2/

Based upon this record, there was no "Emergency." 1/

Based upon this record, White's refusal to work overtime, by itself, taken alone, did not impede the off-loading of the ties from the work train; there was an adequate pool of alternate manpower available at the work site.

Based upon the Barnum-Earls memorandum of July 10, 1985 to Cox, their recommendation was based solely upon their judgement of White's conduct on June 25, 1985 without reference to White's prior performance record. 3/

Since there is no evidence before this P.L. Board that White's prior record was considered when determining the disci-

2/ "Excessive." Greater than what is usual or proper; overmuch; a general term for what goes beyond just measure or amount. Tending to be marked by excess, which is the quality or state of exceeding the proper or reasonable limit or measure. (Black's Law Dictionary - Revised Fourth Edition)

3/ If White's prior record had been considered by Barnum and Earls in making their recommendation a statement to that effect should have been contained in their July 10, 1985 memorandum to Cox.

pline to be imposed ^{4/} this P.L. Board will consider only the record before it in determining whether the suspension of thirty (30) days without pay was "Excessive." ^{2/}

Based solely on the record before this P.L. Board the discipline imposed upon R.L. White was "Excessive." ^{2/}

Accordingly, this P.L. Board will reduce the original suspension to a suspension of three (3) working days without pay.

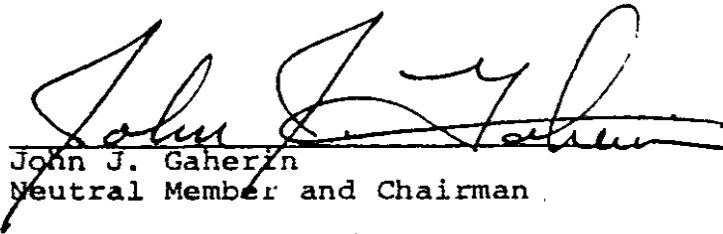
AWARD

1. The suspension imposed upon the appellant (R.L. White) is reduced from a suspension for thirty (30) days to a suspension of three (3) working days without pay.
2. SOPTC shall forthwith correct all personal records relating to R.L. White accordingly.
3. SOPTC shall compensate R.L. White, within ten (10) working days of the receipt of this order, for all loss of earnings sustained by R.L. White during the period June 26, 1985 through July 25, 1985 -- Except, for three (3) working days.

^{4/} If Cox considered White's prior performance record in determining the severity of the discipline to be imposed, that fact should have been recorded in his July 18, 1985 letter to White; the fact it was not permits this P.L. Board to conclude White's previous performance record was not a factor in shaping Cox's decision.

4. It is the intent of this ORDER that R.L. White shall be made whole for all loss of earnings and credits for benefits he would have been entitled to receive during the period June 26, 1985 through July 25, 1985 -- Except, for three (3) working days.

IT IS SO ORDERED.



John J. Gaherin
Neutral Member and Chairman

At Bradenton - Manatee County - Florida,
this 5th day of January, 1986.