

PUBLIC LAW BOARD NO. 3836

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

-and-

SOUTHERN PACIFIC TRANSPORTATION
COMPANY (WESTERN LINE)

CASE NO. 7: Appeal of L.R. Below from discipline by suspension from service for a period of twenty (20) days commencing October 25, 1985 through and including November 17, 1985.

Violation of Rule 801:

"Employees will not be retained in the service who ... conduct themselves in a manner which would subject the railroad to criticism."

BACKGROUND:

On September 24, 1985 a Tie Contractor complained to the SOPTC Railroad Police that L.R. Below had contacted him and requested gratuities for stacking ties.

Below was removed from service on October 29, 1985 pending formal Hearing.

A formal Hearing was conducted by Assistant Division Engineer -- G. Manon at Dunsmuir, California on November 14, 1985.

Below was notified, in writing, on December 4, 1985 that he had been adjudged guilty of violating Rule 801, "Employees will not be retained in the service who ... conduct themselves in a manner which would subject the railroad to criticism."

Below was suspended from service for a period of twenty (20)

days commencing October 29, 1985 through and including November 17, 1985.

L.W. Glaspey, Lieutenant of Police, SOPTC-PD, was called by the Employer as a witness on its behalf. A summary of Glaspey's unsworn testimony is set forth below: (TR 16-19)

Glaspey was assigned to investigate certain allegations made by one Jim Holt, owner of Highland Reforestation, Inc. Holt told Glaspey that Below had contacted him [Holt] and requested that Holt pay Below "...gratuities for his [Below's] help in stacking ties so that they would be easier for Holt to pick up." Holt further alleged that Below said if he did not receive these gratuities Below would put the ties in positions that would be hard for him to pick up.

Holt told Glaspey that; he was "...under the impression that Below wanted to be paid \$40 per day." (underlining by Arbitrator)

At another time Holt told Glaspey; Below had changed his request for five ties per day with receipt of ownership of these ties...." (TR 6)

On October 9, 1985 Glaspey together with another SOPTC Police Officer, F.E. Woolwine, interviewed Below and obtained a signed "Voluntary Statement" in which Below stated that Holt's organization, someone named "Mike", a relative of Holt's, contacted him asking for help in stacking ties in bundles; Holt's representative offered ties in exchange; "No Deal Was Struck." Below told Holt's representative he would "...see what I could do...." Below stated he "...helped out when I could and stacked ties...but never received anything." Below

further stated he contacted Holt "...after stacking ties for a number of weeks...he said he would take care of me but he did not." Below avers; "...I made no threats whatsoever...they asked for my help and I asked for theirs in return - but I never received any gratuities." Below avers he did not threaten to "...make the job harder than it already is...."

Below stated that; he was "...again approached in Oregon by Dave Reed...they talked about 'helping' each other...." Below "suppositioned" the amount of "5 ties or 10." Reed said he would see what he could do. Below said he would see what he could do, "...no deal was made."

Further, no threats were made.

Below acknowledged that the amount of \$40 per day did come up in their conversation as a result of Below's inquiry to Reed concerning the wages Reed was paying to his men. Below said to Reed, "You want to hire men and machine and subcontract me for less than you pay your own men and jeopardize my job." "No deal was struck." (Exhibit A)

Glaspey testified that his investigation failed to establish whether Below had "...acquired any ties..." from Holt.

Below did tell Glaspey that he had "...piled the ties for approximately five weeks expecting to be paid but was never paid for this work." After the five week period Below indicated to Glaspey that he had stopped "stacking the ties."

Under cross-examination by BMW Representative Douglas, Glaspey

stated categorically that "there was no evidence that a deal had been struck by Holt and Below." (TR 8) (underlining by Arbitrator)

R.E. Tirri, Truck Driver - Crane Operator, appeared as a witness for the Appellant, "...also...on behalf of the Southern Pacific Transportation Company." A summary of his unsworn testimony follows (TR 10-11):

Tirri stated that he was east of Culp in June when "...Mike... I don't have his last name...but I was told he was the son-in-law of Mr. Holt, the contractor, and he came up to us...to me and asked me who the Tie Handler Operator was...and I indicated Louis Below.... I went and got Louis or waved him over...then the man asked Louis if we could work out a deal." "At that time Louis said, 'I don't know what you are talking about.' He [Mike] came back with 'On previous occasions I have paid up to \$20 a week to previous employees.'"

Z.H. Robinson, Laborer, appeared on behalf of the Appellant. A summary of his unsworn testimony follows (TR 12-15):

The incident occurred "...near the end of May or the first of June." Robinson was uncertain of the exact date. He noticed a civilian truck drive up to the railroad tracks east of his machine. Robinson went up to see who was in the truck, he found Louis Below, Doug Tirri "and a tall, blond-haired gentleman who identified himself as 'Mike'." Mike told the Railroad people he was "...the son-in-law of Mr. Holt who owned Highland Reforestation."

Mike had a problem; his crew were stacking and banding ties "...miles behind us and would never catch up." Mike asked Louis if

he could help him by stacking ties, so that Mike's crew could catch up. "For doing this he offered Louis a unit of ties each day."

Louis admitted the proposal seemed lucrative but he would have to see how it went. Mike distributed several of his business cards to the Railroad employees. (Exhibit B)

Robinson, when cross-examined by the Hearing Officer, responded to Mahon's question as to whether he had ever been "approached by a contractor with the opportunity of gratuities," by relating an incident in which he was offered, but refused a \$100 bill for stacking ties.

Douglas, BMWE, elicited from Robinson that it was not an unusual thing for Tie Handler Operators, as a friendly gesture, to stack ties, when they could.

Proceeding with his cross-examination of Robinson, Mahon asked whether Robinson "had ever been told by a supervisor where to place ties while working as a Tie Handler." Robinson responded, "I have definitely been told where to put ties on various occasions and various situations. I have been told to put them on either side of the track." "I have been told to disregard where they go and just get them out of the way for the sake of saving time. I have also been told to stack them more conveniently for tie contractors. In several years of being with the tie gang, I have been told to put them just about everywhere they can go along the track, neatly or scattered at different times." Finally, unless the Foreman designates where he wants the ties dropped it is left up to the handler's discretion.

L.R. Below, Tie Handler Operator, the Appellant in this matter, testified on his own behalf. A summary of his unsworn testimony follows:

Below avers; "Mike", a representative of Highland Reforestation, Inc., approached him in the vicinity of Culp, California and informed Below that his laborers "were way behind in picking up the scrap ties and he ['Mike'] offered me [Below] a unit of ties a day to stack the ties or pile them in separate piles so that the clean-up job could be done a little quicker."

Mike did not offer Below any money. Below had no idea of the value of a "unit of ties", he was not familiar with the term. Below recalls one previous contract with a Highland Reforestation representative. While working in Oregon he was contacted by a "Dave Reed". Below told Reed he would help him if he could but that the job came first. "I was not going to accept any kind of gratuities for any kind of help...."

Under "soft cross" by Douglas, BMWE, Below categorically denied that he had initiated the contact with "Highland", "...I was approached from the very beginning by a representative of Mr. James Holt.... I had not initiated any contact." (TR 17) Below also categorically denied he had received anything from "Highland", "I have never received anything, money or ties, for helping out this man in any manner." (TR 17)

Mahon resumed cross-examination, asking Below if "at any time [he] deliberately placed any ties in a position that made it difficult for the contractor to remove the ties from the property." Below replied "No".

Mahon asked Below if he was aware that SOPTC pursuant to its contract with "Highland" is "supposed to assist in the placing of the ties or/and removal of the ties from SOPTC property and assist in any way possible to help the contractor." (TR 18) (underlining by Arbitrator) Below replied that; "I have never been informed about the stipulation in any contract between SP and any outside contractor; and I don't believe it was ever anyone's intent to inform me if they had a specific requirement. I just carry it out cause that's my duty."

OPINION AND FINDINGS:

At the threshold, this PLB is confronted with the issue of whether the provisions of Rule 45 of the parties' collectively bargained agreement were complied with by SOPTC, i.e. was the "Hearing" conducted by Assistant Division Engineer G.D. Mahon on November 14, 1985 a "Fair and Impartial Hearing."

BMWE contends it was not, "it's impossible to receive a fair investigation without the ability to cross-examine the 'accusor.'" (TR 19)

The "accusor" is, of course "Jim Holt, owner of Highland Re-forestation." (Glaspey TR 6)

Mr. Mahon stated SOPTC's position concerning the absence of Holt, the "accusor", at the "Hearing". "...both sides had sufficient time to prepare for this investigation...and had you [Douglas, BMWE] seen it necessary you should have requested Mr. Holt's presence." "The Company having Mr. Glaspey as investigator on behalf of the

Southern Pacific Transportation Company." (TR 8)

SOPTC's position was incorrect.

This is a Discipline case and SOPTC, the moving party, had the burden of proving by "Substantial Evidence" that Below was guilty of the offense for which he had been disciplined. Below had no obligation to prove himself innocent, SOPTC had the obligation to prove that he was guilty.

Basic to the concept of a "Fair and Impartial Hearing" is the right of the "accused" to confront his "accusor" and to test the credibility of the "accusor" in the crucible of cross-examination. SOPTC denied Below that inherent right.

A Company police report, "per se", is not "evidence", it is the report of a SOPTC employee, no more than that. If Glaspey reported accurately to SOPTC, Holt's complaint (charge) was that Below had threatened to disrupt Holt's operation unless Holt submitted to Below's request for a payment(s). (TR 6) This would have constituted an offense involving "Moral Turpitude", demanding the "accusor" be put to his proof, which would require at a minimum, submitting to cross-examination by Below and BMW at the "Hearing", preferably under oath.

It is now appropriate for this PLB to determine whether SOPTC met the mandate of Rule 45 with respect to making a "Specific Charge" against Below.

Webster's New Universal Unabridged Dictionary defines the word "Specific" as meaning; limiting and limited, tending to specify or

particularize, definite, precise.

J.K. Young notified Below by letter dated December 4, 1985 that:

"...Evidence adduced at formal hearing held November 14, 1985 established responsibility in your expectation of receiving gratuities from Tie Contractor near Culp - California - which constitutes violation of Rule 801 - Employees will not be retained in the service ...who conduct themselves in a manner which would subject the railroad to criticism."
(underlining by Arbitrator)

Webster defines "Expectation" as to look forward to the probable or occurrence, appearance, to consider likely, or certain. To consider reasonable, or due. To consider obligatory.

Patently SOPTC's charge was not "Specific." A "Specific Charge" would have alleged a clearly defined offense which had occurred at a specific location on a stated date.

Now to the question, was there "Substantial Evidence" adduced at the Hearing conducted November 14, 1985?

Absent the testimony of the "accusor" (Holt) there was no direct evidence adduced, except on behalf of Below. R.E. Tirri (TR 10-11) testified, without contradiction by SOPTC, "Mike" approached Tirri asking for the Tie Handler Operator. "Mike" identified himself as the son-in-law of Holt. Tirri introduced "Mike" to Below. Tirri heard "Mike" ask Below if he could work out a deal - Tirri heard Below reply "I don't know what you are talking about." Tirri heard "Mike" say to Below, "On previous occasions I have paid up to \$20 a week to previous employees."

Z.H. Robinson (TR 12-15), testified without contradiction by

SOPTC, he was with Below and Tirri "and a tall, blone-haired gentleman who identified himself as 'Mike , Holt's son-in-law." "Mike" told the SOPTC employees he had a "problem" - his crew was stacking and binding ties, they were miles behind the Railroad Crew and would never catch up, could Below help by stacking the ties, he offered Below a "Unit of Ties a Day if he would do so." Below acknowledged that "Mike's" proposal seemed lucrative but he would have to see how it went. "Mike" distributed some business cards to the SOPTC crew. (Exhibit B)

On cross-examination by Mahon, Robinson related an incident in which he was offered \$100 by a Tie Contractor for helping him. Robinson testified he refused the gratuity.

Also on cross-examination Robinson testified that; on various occasions he had been directed to place ties:

On either side of the track

Disregard where they go just get them out of the way

Stack them conveniently for the Contractors

"I have been told to put them just about everywhere they can go along the track, neatly, or scattered."

On cross-examination Mahon asked Below whether he was "aware that the Southern Pacific in its contract with Highland Reforestation, Inc., is supposed to assist in placing of ties and/or removal of ties from the Southern Pacific property and assist in any way possible to help the contractor...." (TR 18) Below replied that he was unaware of any obligation to assist "Highland". (TR 18) (underlining by Arbitrator)

Finally, even if, "arguendo", Below's "Voluntary Statement" to two (2) SOPTC Police Officers could be construed as tacit acknowledgement that; he hoped to establish a mutually beneficial relationship with "Highland", there is no evidence in the record that such a relationship was ever established. Further, nothing in the record refutes Below's categorical denials that;

- 1) He never received "anything" from "Highland"
- 2) He never demanded anything from "Highland"
- 3) He never threatened "Highland" (Holt).

One cannot conclude without asking two (2) rhetorical questions:

If SOPTC was obligated to assist "Highland" "in any way possible," why was this fact not communicated to the SOPTC employees involved in this situation.

If SOPTC was obligated to assist "Highland" "in any way possible," what services could "Mike" or "Reed" have been seeking that they were not entitled to receive pursuant to the "Highland" contract with SOPTC.
(TR 18)

Rhetorical questions make for interesting speculation. However, this PLB is not privileged to indulge in speculation. We are a creature of the parties' agreement and are required to predicate our decisions on the provisions of their agreement, and, the evidence adduced in the record.

FINDING:

This Board FINDS AND HOLDS:

- 1) The provisions of Rule 45 of the parties' agreement were not complied with by SOPTC.
- 2) "Substantial Evidence" sufficient to prove SOPTC's charge against Below was not adduced at the "Hearing" on November 14, 1985.

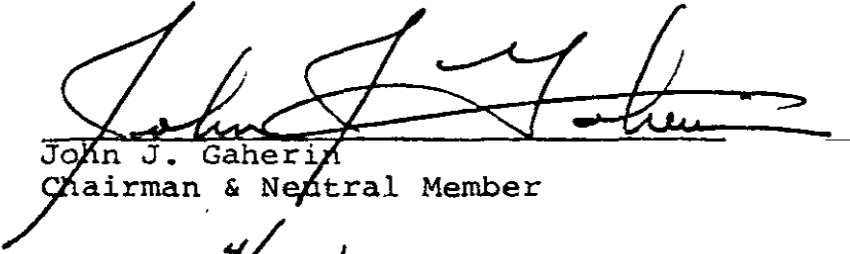
AWARD:

Below's appeal is sustained for the reasons set forth in the opinion.

The reference to the suspension imposed upon Below shall, forthwith, be expunged from his Disciplinary Record.

Below shall, forthwith, be reimbursed for all wage loss and benefit credits as the result of having been improperly suspended.

IT IS SO ORDERED:



John J. Gaheir
Chairman & Neutral Member

4/30/86

