

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

dispute
in 20 11/11/95

**Award No. 32983
Docket No. MW-33798
98-3-97-3-116**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company
((Eastern Lines)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline assessed B&B Foremen Pete Salas [twenty (20) day suspension] and L. A. Montes [thirty (30) day suspension] for their alleged failure of making the bridge, THE 777.49 Fort Hancock, Texas impassable for train movement while making repairs and for failure to obtain track authority while making the repairs on Thursday, November 30, 1995 was without just and sufficient cause and based on unproven charges (System File MW-96-30/MW D96-14 SPE).**
- (2) B&B Foremen Pete Salas and L. A. Montes shall now be compensated "... for all lost time commencing on December 7, 1995 including all overtime if worked by their assigned gang, per diem for all lost time or trailer pay for each day including weekend, for all lost time to be used as qualifying days for vacation purposes and to remove from their personal record charge letter dated December 7, 1995, Certified Mail-Return Receipt Requested, P-478-312-333 and P-478-312-334, and all other rights entitled to them account the Carrier has failed to comply with Article 14 of our current agreement."**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Assigned to a crew responsible for making repairs to a bulkhead on bridge 777.49 at Fort Hancock, Texas, Foreman Montes and his crew on November 29, 1995, commenced work by excavating sandy soil with a backhoe to a depth of approximately eight feet at a distance of 12 to 15 feet from the track and bulkhead. The bridge was slow ordered to 40 miles per hour while this work was underway. Upon completion, Montes asked B&B Supervisor D. O'Neal to assign Foreman Salas to assist with the installation of stringers on November 30. Salas and his gang joined Montes' crew the following day. Because Salas had nine years of service as a Foreman at the time and Montes had been a Foreman for only seven months, Salas was placed in charge of the work of replacing stringers in the bulkhead.

On November 30, Claimants positioned the first stringer, measuring eight inches wide, 17 inches high and 30 inches long, at the bottom of the head wall after digging out material to slide the new stringer into position beneath the existing structure. The record indicates the excavation work lasted from 20 minutes to 90 minutes, and that sand was seeping from the opening being made during the installation of the second stringer. Neither Claimant requested track time while new stringers were being installed, although it was clear that the material supporting the bridge was loose. The bridge was slow ordered to ten miles per hour while stringers were being replaced.

At approximately 10:00 A.M., a train crossed the bridge and material began to slough off beneath it. Not wanting to slow approaching trains, neither Claimant requested track time. Approximately 30 minutes later, a second train crossed, causing

a major shift of sand and loose material and creating a large hole beneath the tracks. All train traffic was halted pending completion of repairs. Claimants completed their assignment around 3:30 P.M. that day, and were removed from service.

On December 21, 1995, following an Investigation, Claimants were found to have violated Carrier's Safety Rules 72.0.1.4 and 71.2.12.8. Salas was suspended for 20 days, Montes for 30 days and O'Neal for five days.

The Organization maintains that Carrier failed to support the charges leveled against the Claimants. It further argues that these disciplinary actions suffer from several procedural defects, including Montes' late receipt of the Carrier's decision and Carrier's failure to furnish a copy of the transcript in a timely manner. Carrier rejects the procedural defenses as baseless and asserts that Claimants' negligence in declining to seek track time while engaging in work that obviously weakened the bridge structure caused a dangerous situation in direct violation of its Rules.

The Rules relied upon by Carrier read in pertinent part as follows:

"Rule 72.0.1.4. Within CTC Territory when main track or controlled siding is obstructed or impassable or in any way is to be made unsafe for passage of trains or engines, or when main track or controlled siding is occupied by roadway machines, track and time limits will be secured from Train Dispatcher to afford protection against trains and engines without flag protection as required by Rule 5.4.

Rule 71.2.12.8 They must not permit trains to proceed over any bridge, trestle or other structure in course of construction, renewal or repair while any part of the old or new structures is weakened by the loosening or removal of any of its parts which render it unsafe at restricted speed. Sufficient stringers, girds, braces and bolts must be in place to provide proper strength in a structure."

The Organization's procedural arguments are rejected. The record indicates that Carrier's decision was rendered eight days after the Investigation and within the time limits set forth in Article 14 of the Agreement. Although courtesy and convention might suggest otherwise, Article 14 does not dictate that the disciplinary decision be furnished to the Organization representative. Copy of the transcript taken at the Investigation on

December 13, 1995 was received by the Organization and Claimants on January 9, 1996. The Rule establishes no time limits on Carrier for providing such documents to the employee and his representative. Article 14, Section 6 requires only that the "transcript . . . will be furnished the employee and his representative after they have verified and signed same."

A careful examination of the record discloses that despite the unquestioned authority of both Claimants to have sought track time before beginning the work at issue, neither believed that their activities would compromise the safety of the bridge. Supervisor O'Neal testified at the Hearing that in his opinion the men had done excessive digging close to the bridge without proper track and time authority. One of Claimants' crew members, summoned in his defense, also testified that he believed track and time authority was necessary for the work. Claimants' activities clearly made the bridge unsafe, and ultimately impassable. Their failure to request track time was a serious lapse of judgment and undeniably breached Carrier's Rules.

There is substantial record evidence here to support discipline, although the Board is not persuaded that there are compelling reasons for assessing a significantly more severe penalty to Claimant Montes than to Claimant Salas. The grounds for that disparity advanced to the Organization in claim handling on the property were that by reason of his work the previous day, Montes had better knowledge of the type of fill material in the area, and thus was in a superior position to recognize the hazards in proceeding without track time.

Claimant Montes had been a B&B Foreman for only seven months on the date of the incident giving rise to his suspension. Montes was working directly under Claimant Salas who had been placed in charged of replacing stringers in the bridge bulkhead. It was Salas who first observed a large amount of sand sloughing away from the bulkhead after the second train passed. It was Salas who testified that he determined to forego track time "because I didn't want to obstruct the passage of trains over that bridge," opting instead to restrict speed to ten miles per hour until the next four trains had passed. It was Salas who then realized his mistake and got on the radio around 10:30 A.M. to halt traffic after the second train caused a slough from the top of the bridge on the south side at the west end. Salas acknowledged that he had observed the digging from the previous day, and he conceded that he was aware that the work in the area had been done in sand. He further acknowledged he knew there had been a washout in the same area earlier in the year.

Montes, in contrast, spent the morning of November 30 on his backhoe, relying on Salas to deal with the crew as well as the track time issue as the senior Foreman in charge. "I don't plan to get track and time," Montes testified, "because, you know, you need more experience than me to talk." The testimony in fact reveals that Montes at no time went underneath the bridge to work until after the collapse.

Under the circumstances, and fully recognizing that Carrier has very substantial latitude in this area, to assess Montes a disciplinary suspension 50 percent greater than that assigned to Salas - to whom he was accountable - and six times that assigned to O'Neal - to whom both were accountable - strikes the Board as so unreasonably harsh in context as to be arbitrary.

The Board finds that Carrier's determination to discipline Claimants is supported by record evidence, but that the record does not substantiate that Claimant Montes was more culpable than Claimant Salas for the events giving rise to their suspensions. Montes' record shall be revised to reduce his disciplinary suspension from 30 days to 20 days, and he shall be made whole for time and benefits lost as a result of this Award.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 23rd day of December 1998.