PUBLIC LAW BOARD NO. 1795

Award No. 10
Case No. 10

PARTIES TO DISPUTE: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
SOUTHERN PACIFIC TRANSPORTATION COMPANY
(Pacific Lines)

STATEMENT OF CLAIM:

1. That the Carrier violated the provisions of the Agreement when on July 11, 1975, it dismissed Truck Driver Gabriel Y. Ochoa from the service of the Southern Pacific Transportation Company on charges not sustained by the record, said action being arbitrary, unjust, excessive and in abuse of discretion.

2. Carrier further violated said Agreement when Mr. Widmann, Division Engineer, failed to give reasons for denying the claim in his letters dated October 1 and December 8, 1975, as provided for in Section 1(a) of Rule 44 of the Parties' Agreement.

3. That Carrier reinstate Claimant to his former position of Truck Driver on the Los Angeles Division with seniority, vacation and all other rights unimpaired and compensate him for wage loss suffered beginning July 11, 1975 continuing until he is reinstated.

STATEMENT OF FACTS: Claimant has been employed by Carrier since November 14, 1960. On June 2, 1975, Claimant was assigned as a Truck Driver to drive a truck from Los Angeles to Niland, California, to pick up a trailer and return with it to El Monte, a suburb of Los Angeles. En route from Niland, Claimant was involved in an accident with a passenger vehicle at Mortmar, approximately 33 miles from Niland in the direction of Los Angeles. Specifically, the truck, pulling a trailer and operated by Claimant, ran into the rear end of the passenger vehicle travelling in the same direction, propelling it some 400 feet down the highway. The collision resulted in the death of a woman passenger and injuries to the father and son in the same vehicle.

Claimant was thereupon cited for formal hearing held on June 27, 1975, in regard to said accident and, based on the evidence adduced, was found guilty of violating operating General Rules G, MM and M243, and was dismissed from service by Carrier by letter of July 11, 1975. In essence, he was found guilty of (1) responsibility for the accident in that he negligently operated his vehicle on June 2, 1975, and (2) using intoxicants while subject to duty on said date.

The claim was then progressed on the property through all stages of appeal. Carrier declined the claim in each instance, maintaining that Claimant was properly found guilty as charged and that the dismissal penalty was fully warranted in the circumstances.

Petitioner asserts to the contrary and raises several issues and questions of fact, each of which will be referred to separately hereafter.

The pertinent portions of the cited General Rules read as follows:

Rule G: (In full)

> "The use of alcoholic beverages, intoxicants or narcotics by employes subject to duty, or their possession or use while on duty, is prohibited.
>
> "Employes shall not report for duty under the influence of any drugs, medication, or other substance, including those prescribed by a doctor or dentist, that in any way adversely affects their alertness, coordination, reaction, response, nor shall such drugs, medication or other substance be used by employes while on duty."

Rule MM: (In part)

> "Employes must exercise care to avoid injury to themselves or others. They must observe condition of equipment or tools which they use in performing their duties and when found defective, will, if practicable, put them in safe condition, reporting defects to the proper authority."

Rule M-243: (In part)

> "Care must be exercised in parking and driving, either on or off the right of way to avoid damage to equipment and injury to occupants."

FINDINGS: The formal hearing was quite extensive and detailed, consisting of 71 pages of transcript, plus various attachments and exhibits, including the written report of the California Patrol Officer. All of these items are part of the record and are properly before the Board for its consideration. Petitioner asserts that "The issues here are many". We agree. These issues, separately stated and analysed, are as follows.

1. Failure to State Reason for Denial of Claim.

On this issue, Petitioner contends that Carrier letters of October 1 and December 8, 1975 failed to give reasons for denying the claim as required by Rule 44, Section 1(a) of the controlling Agreement between the principals; that, accordingly, "the claim should be allowed as presented."

We have read the two cited letters, as well as all other letters exchanged between the parties on the property. It is true that Carrier's letter of December 8 is somewhat imprecise, albeit specific mention is made that Claimant's dismissal was based on violations of Rules MM, G and M243. However, the letter of October 1 states "As discussed in conference . . .". Here, we have no doubt, considering the detail of Petitioner's claim letter of August 18, that all aspects of the matter were fully explored in conference and that Carrier's reasons for denying the claim were specifically set forth. Additionally, Carrier's letters of January 7, 1976 and February 17, 1976 are pointedly specific as to its reasons for declining the claim.

On balance, therefore, we find that Petitioner was fully apprised in detail as to Carrier's position in denying the claim and that Claimant suffered no prejudice or disadvantage. For these reasons, we are not inclined to "allow the claim as presented" on so narrow and inconclusive an issue. Accordingly, this contention of Petitioner is not sustained.

2. Hearsay Testimony.

Petitioner asserts that certain aspects of the testimony and exhibits introduced at the hearing constituted hearsay and were therefore improperly admitted into evidence. We would point, as we

have in several prior current awards, to the controlling rule that hearsay evidence is admissible "provided it is fairly admitted and properly evaluated." We intend to abide by this principle. We would point out, further, that if we find that hearsay evidence has been used unfairly against Claimant we shall exclude it from our consideration. Conversely, however, if hearsay testimony is credible on its face and is corroborated by other testimony or documentary exhibits, then it becomes a proper element before us in the resolution of this dispute.

3. The Issue of the Defective Brakes.

Petitioner assumes a broad position on this issue and asserts in its submission:

> "There is little or no doubt that, had the brakes worked properly, this accident would never have occurred."

This presupposes that the defective brakes, assuming arguendo that the evidence is so weighted, were the basic and primary cause of the accident, and that the conduct of Claimant at the time was not the primary cause of the accident. Obviously, the issue of primary responsibility is of critical importance in this dispute and we temporarily hold it in abeyance pending detailed review of all the evidence.

We turn, therefore, to the record evidence on the interrelated condition of the brakes before, during, and immediately following the accident.

Claimant testified that en route from Los Angeles to Niland he stopped at Beaumont or Banning for "a cup of coffee"; that he then proceeded to hook up the trailers; that before he left he checked the lights on the truck, the brakes and the turn signals; and that once he started out, and up to the time of the accident, his speed was about 50 miles per hour. At that speed, had the brakes been defective, Claimant would have become aware of it at least some time prior to the accident. He does not say so, however, and we can reasonably conclude that the brakes were working properly prior to the accident.

Claimant does mention a defective "handbrake" which he reported about a week prior, but the condition of the handbrake had no bearing on the cause of the accident. Here, the testimony is quite conclusive that the handbrake would have been practically useless in attempting to stop the truck and trailer at 50 miles per hour.

As to the condition of the brakes immediately prior to the accident, Claimant testified that the brakes "did not hold. They wouldn't go down. I tried. I tried three times". After the accident occurred, the Highway Patrol Officer said they were defective. At that time, Claimant stated, he tried the brakes and they went "all the way down to the floor". We are somewhat at a loss to reconcile that the brakes "wouldn't go down" prior to the accident, but went "all the way down" after the accident.

Nevertheless, Claimant's written statement reads:

> "After further interviews with the CHP Officers I was released to continue enroute to El Monte. I departed the scene at approx. 1415 hrs. with another SPCo. employee who had stopped (at) the scene. I do not know his name. I made one stop at Mecca for fuel and arrived at El Monte where I dropped the trailer at 1830 hrs and then went home. . . ."

Thus, notwithstanding the "defective brakes", Claimant was released by the Highway Patrol Officer to proceed en route with the same truck and trailer, drove for over four hours, made one stop (in which he certainly had to apply his brakes), and finally arrived at El Monte, his original destination. And all this without any mishap or untoward incident of any kind despite the "defective brakes".

Following the accident, Carrier had the truck and trailer checked thoroughly, particularly as to the condition of the brakes. Mr. M.W. Stallings, Supervisor Automotive and Work Equipment, Los Angeles, and employed by Carrier since 1939, testified that this work was performed by the California Certified Truck and Inspection Station. The report of the latter Company, which consists of some five pages, and is dated June 5, 1975, was introduced into evidence. It reveals a

thorough examination of both vehicles. The details of the examination are extensive; the report's conclusion is as follows:

> "OPINION:
>
> We found no evidence of a hydraulic or mechanical brake failure on this truck or trailer. The combination of vehicles stopped in 29% less distance than required by the California Vehicle Code, Section 26454." (Emphasis added).

Mr. Stallings testified further that absolutely no work was done on the brakes of the truck or trailer between the time of the accident and the time it was inspected by the brake specialist.

In view of the foregoing evidence, we conclude that the brakes on the truck and trailer were in effective working condition prior to and after the accident. However, we are unable to reconcile the Highway Patrol Officer's report that the "brake pedal went to floor on first application", except to point out that this was a test conducted while the vehicle was completely stationary and not in operation. The Highway Patrol Officer's report is of vital significance in the following statement:

> "STATEMENTS: Driver of V-1 Ochoa related that he was north bound . . . at approx. 50 to 55 MPH when he became sleepy and dozed at the wheel. When he woke up there was a car directly in front of him (approx. 20 feet). He applied the brake but he was unable to avoid hitting V-2. . . . Ochoa was asked when he first saw V-2, he replied, 'When I first saw the other veh. (V-2) it was about 20 feet in front of me'."

The Officer's report states further:

> "The brakes on V-1 were out of adjustment and were a contributing factor in the accident". (Emphasis added).

The Report concludes by recommending that a manslaughter charge should be filed against Claimant "in the driving of a vehicle in an unlawful manner and with gross negligence."

Based on all of the foregoing, therefore, we are unable to concur in the contention of Petitioner that "had the brakes worked properly, this accident would never have occurred." Firstly, the evidence is far from conclusive that the brakes did not work properly immediately prior to the accident. Indeed, the evidence detailed above speaks to the contrary. Secondly, and at best in any event, even if the brakes were "defective" this was only "a contributing factor in the accident". Thirdly, we are still faced with the issue of Claimant's responsibility for the accident, to which we now direct our attention.

4. The Issue of Claimant's Responsibility for the Accident.

The formal hearing held by Carrier was in all respect fairly and properly conducted, with careful adherence to Claimant's basic rights of due process. The pertinent testimony relating to the accident in which Claimant was involved, and upon which this dispute hinges, reveals the following.

Police Officer Schuemann, employed in the Special Agent Department of Carrier, testified that shortly after June 2, 1975 he was instructed to investigate the accident and did so; that he talked with Highway Patrol Officer Wells, who responded to the accident call and conducted his investigation at the scene. He was also the one who interviewed Claimant at that time.

From his investigation, Mr. Schuemann determined that a privately owned passenger vehicle was struck from behind by a Company truck operated by Claimant and was pushed forward some 400 feet as a result of the collision; that Officer Wells stated that Claimant related to him that "he had become sleepy and had dozed off, and woke up about 20 feet away from the vehicle"; that he (Mr. Schuemann) had examined the area of the accident and that there was nothing there "that would have obscured a motorist's vision of vehicles travelling ahead of him"; and that the range of vision at that point was approximately "one mile or better". That Mr. Ochoa had given him a voluntary signed statement on June 7, 1975 concerning the accident details, which statement was then offered and accepted into evidence without objection.

On cross-examination, Mr. Schuemann stated that Mr. Ochoa also said he did not see the small car until he was "just right close to it" and that the brakes on the truck "did not work right" and were found to be defective when tested by the Highway Patrol Officer and that they went down "to two inches"; that Claimant stated he had been travelling 35 to 50 miles per hour immediately prior to the accident. Further, that as a result of the accident, a woman passenger was fatally injured and a father and young boy, both passengers, also sustained injuries; and that it was his understanding from his investigation that at the time and place of the accident "the weather was clear, daylight, and the road was dry".

Mr. Ruben Gasco, Track Laborer employed by Carrier, testified that he was travelling in a Company truck driven by a Mr. Diaz and that after they left Niland they stopped for lunch together with other Carrier employes, including Claimant. That during lunch he noticed Claimant drinking beer with his lunch and that Claimant drank "more than two cans of beer". After lunch, he proceeded towards Los Angeles in his truck, following behind Claimant's truck which they kept in view "for about five or six miles, and then we couldn't see him any more". That his truck was being driven at about 45 m.p.h. and Claimant's truck was driving "between 55,60" when they lost sight of him. Shortly thereafter he saw that an accident had occurred, but they did not stop at the scene.

On cross-examination the witness stated that it was Claimant who collected the money to purchase the beer and that he was positive Claimant drank more than two cans - "I know he drank one and threw that one - and he got another one, and he was drinking that other one . . . I knew he drank another one again so he had to have more". Further, that Claimant ate "a pretty good size lunch".

As to how he judged the speed at which Claimant was travelling, the witness stated that the truck in which he was travelling was "doing about 45" and that Claimant "had to be doing over 45 in order to pass us". . . ."He had to be doing over 45 even 60 because he was going and the trailer was swerving a lot for that speed." (Emphasis added).

Further, with respect to the beer, Mr. Gasco testified that two six-packs of beer had been purchased, which were consumed by five people present at the time.

Mr. Gregorio Mesa, Truck Driver, was one of the employes who had stopped for lunch. He testified that Claimant had lunch with them and that he drank "Just one can"; that each of the others drank "just one beer". He did not see Claimant collect money to buy beer.

We would point out at this point that according to the evidence twelve cans of beer were purchased; five men were present and each one had "just one beer". This accounts for only five cans of beer, obviously. Seven cans of beer are therefore unaccounted for. The witness did not explain this phenomenon.

Claimant was then called as a witness in his own behalf. He conceded that he was familiar with the cited General Rules and that he had been involved in the accident of June 2, 1975, above alluded to; that he had collided with the rear portion of a private vehicle (a Japanese make, 4 wheel drive) travelling in the same direction. He admitted to having some beer during lunch - "just one bottle, a small bottle"; that he did not buy the beer and did not know who did. He denied "knowing" that two 6-packs were purchased. He denied, as testified by Mr. Gasco, that he was "absolutely under the influence", nor could he account for the reason such a statement would be made.

He denied that he had been driving at 55 or 60 M.P.H. prior to the accident and asserted that he was going "about 50 M.P.H."; that he passed other trucks between Niland and Mortmar; that at the time of the accident he had applied the brakes but they "did not hold"; and that at the time he made the statement to the Highway Patrol Officer he was "in shock". He denied that he was "sleeping in the truck" or that he "had dozed off at anytime", as stated in the report of the Highway Patrol Officer. He insisted he had said "dazed", not "dozed". He admitted seeing the car ahead of him, but maintained that "I had enough time to slow down or stop, but the brakes would not hold". He maintained that he had exercised proper care "to avoid injury" to himself or others.

He was somewhat inconsistent as to the time it had taken him to travel the 33 miles from the lunch site to the scene of the accident. He had stated that this had taken about an hour and a half, but the evidence indicates that he departed the lunch site at about 12:00 and that the accident occurred at about 12:30, a time lapse of about one half hour. The reasonable inference is obvious that he had to be travelling in excess of 50 M.P.H. in order to drive 33 miles in a half hour.

He stated further that at the time of the accident the other car was about 35 feet in front of him; that it was a clear day with good visibility ahead of him and that he could see about a half mile or better. The following colloquy then took place:

> Q. "If you were rapidly overtaking the car, and you know that you could not pass around it because a Semi-truck was coming, why is it that you did not try to slow down sooner rather than wait until you were 35 feet away from the car?
>
> A. "Because I thought my brakes were working.
>
> Q. "But why did you wait until you were 35 feet behind the car?
>
> A. "If you think you got brakes, you are not going to stop a half mile behind, Am I right?
>
> Q. "No, you're wrong. I don't believe a person should drive 35 feet behind a car.
>
> A. "I said, '35 feet or more'."

There was then some testimony about Claimant's being called out on assignment immediately after completing a prior assignment. However, as to this particular assignment, Claimant admitted that he went on duty at six a.m., which was on a Monday morning after he had been off duty all weekend.

Mr. Schuemann was then recalled and confirmed that Claimant had left the lunch site at about 12:00 Noon and that the accident had occurred at 12:30 p.m., according to the report of the Highway Patrol Officer.

Mr. Gasco was also recalled and he confirmed his prior testimony as to the amount of beer Claimant had consumed during lunch.

Further, that while they were travelling behind Claimant, he knew the exact speed at which his (Gasco's) truck was travelling "by looking at the speedometer" and that he judged Claimant's speed by comparing "our speed with his"; that they "were doing 45" and Claimant "had to have been going faster in order to get that far away from us".

The foregoing, in essence, constitutes the testimony on the basic issue of Claimant's primary responsibility for the accident. Additionally, Petitioner's written submission directs our attention to the statement "that Claimant Ochoa had been exonerated from all charges in connection with the accident except 'following too close' for which he was fined $65.00 by the courts".

We stress here that we have no way of ascertaining the nature of the evidence presented in the Court proceeding or the basis of the Court's findings. Suffice it to say that the measure of guilt required in such a Court proceeding, is markedly different from that required in this disciplinary proceeding. In that context, we cite the following established and controlling principle:

> "In discipline cases the burden of proof rests squarely upon Carrier to demonstrate by substantial probative evidence preponderating in its favor that Claimant is guilty of the offense charged."

See 2nd Div. Awards 6580, 6620, 6741 and 7035; 1st Div. Award 20471; and 3rd Div. Awards 14120, 20245, 20471, 20252 and 20770, among a host of others.

Applying the latter principle to the testimony and documentary exhibits present in the record before us, we conclude that Carrier has satisfactorily sustained its burden of proof. We stress further that analytical comparison and evaluation of the testimony of Carrier witnesses and the various exhibits in evidence shows substantial corroboration as to the critical issues of this dispute. Claimant's testimony, on the other hand, stands uncorroborated.

These critical issues, brought into sharp focus by the evidence, conclusively lead to the following factual findings:

a) At the time and place of the accident the weather was clear, it was daylight and the road was dry. It was a clear day, with good visibility and Claimant could see about a half mile or better, ahead of him.

b) Immediately prior to the accident Claimant was operating his vehicle at a speed of no less than 50 M.P.H. and more probably at a speed closer to 60 M.P.H. Mr. Gasco's testimony is unshaken on this point. Moreover, Claimant's statement to the Highway Patrol Officer at the scene of the accident is that he was travelling "at approx. 50 to 55 MPH".

c) There is no doubt that Claimant was "travelling too close", of which offense he was found guilty and fined in the Court proceeding. His testimony is that he was about 35 feet from the vehicle in front of him. His statement to the Highway Patrol Officer, which is more likely to represent the truth, is that "when I first saw the other vehicle it was about 20 feet in front of me". In either case, whether it was 35 feet or 20 feet, Claimant was travelling dangerously too close under the circumstances then prevailing.

d) The only logical explanation for the reason he was travelling so close is the fact, as he stated to the Highway Patrol Officer, that "he became sleepy and dozed at the wheel". We are not convinced as to the truth of Claimant's testimony that he said "dazed" not "dozed". This was an obvious afterthought. Nor can we impute to the Officer at the scene the inability to differentiate between the words "dozed" and "dazed". Moreover, the full statement is that Claimant "<u>became sleepy</u> and dozed at the wheel" (Emphasis added). The word "dazed" has no pertinency in this context.

We find, therefore, that based on the evidence Carrier was warranted in determining that Claimant was primarily responsible for the accident. In essence, that he was operating his vehicle at too

great a speed under the circumstances; that he was "following too close" to the vehicle in front of him; that he knew or should have known that at this speed (50 to 60 M.P.H.) and at this distance (20 feet, or even 35 feet) he could not possibly have stopped in sufficient time to avoid collision with the other vehicle. In short, that Claimant was operating his vehicle "with gross negligence". Accordingly, we find that Claimant was properly found guilty of violating General Rules MM and M-243, as charged.

As a matter of long standing policy, amply supported by past precedent, and particularly under the facts and circumstances of this case, this Board will not substitute its judgment for that of Carrier in evaluating the evidence. This is particularly true where substantial probative evidence is presented in the record supporting the charges against Claimant. We so find in this dispute.

See precedents cited above, as well as 3rd Div. Awards 6387, 19487, 17914, 15574 and 20770, among others.

We underscore the two points that Claimant "became sleepy and dozed at the wheel" (as indicated in his statement to the Highway Patrol Officer) and that he had "indulged in intoxicants during the course of his tour of duty", as stressed by Carrier. These factors, conceivably interrelated, were or may have been contributing causes of the accident. In any event, from an overall view of the evidence, Carrier was warranted in so finding as a matter of reasonable factual inference.

5. THE USE OF INTOXICANTS

On the basis of the record evidence, there is little doubt that Claimant drank some beer during lunch on the day in question, while he was still in transit and in the course of his tour of duty. Mr. Gasco states that Claimant had more than two beers and appeared to be "under the influence". Additionally, this witness testified credibly, showed no animosity towards Claimant, and no evidence is presented to indicate any motive for his testifying falsely. Claimant's testimony on this issue is obviously self-serving and basically uncorroborated.

In essence, Claimant conceded that he did have some beer during lunch, but "just one bottle, a small bottle". However, the testimony of Mr. Gasco and Mr. Mesa does not mention bottles at all, much less a "small" bottle. They each refer to "cans" of beer. Mr. Gasco states that two 6-packs were purchased; i.e., 12 cans of beer. Both Mr. Gasco and Mr. Mesa confirm that five men were present. Nevertheless, Mr. Mesa insists that they each drank "just one beer". We find such testimony unconvincing. We are more inclined to accept Mr. Gasco's testimony that the twelve cans of beer were consumed by the five men present, and that Claimant did in fact consume "more than two cans".

Carrier was therefore justified in accepting the testimony of Mr. Gasco. Moreover, in view of the controlling principles cited above, we find neither factual basis nor authority upon which to substitute our judgment for that of Carrier in evaluating the evidence on this issue.

Accordingly, we find that Claimant was properly found guilty of violating General Rule G, as charged.

6. THE PENALTY

Finally, whereas the penalty of dismissal is severe, there is substantial evidence in the record to support the imposition of the discipline of dismissal based on Claimant's gross negligence, the severity and attendant consequences of the accident, and his violations of the cited Rules. The action of Carrier in this case, therefore, cannot be deemed arbitrary, capricious, unreasonable, or an abuse of discretion.

Accordingly, based on the entire record and the controlling principles cited above, we have no alternative but to deny the claim.

AWARD: CLAIM DENIED.

LOUIS NORRIS, Neutral and Chairman

S.E. FLEMING, Organization Member

E.J. HALL, Carrier Member

DATED: San Francisco,
California
January 19, 1977