

PUBLIC LAW BOARD NO. 1795

Award No. 11

Case No. 11

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

STATEMENT OF CLAIM:

1. That the Carrier violated the Agreement when on June 11, 1975 it disqualified Machine Operator K.P. Gooch from all equipment related classes, based on charges not sustained by the record; said action being arbitrary, unjust and in abuse of discretion.

2. Carrier further violated said Agreement when on May 23, 1975 it failed to accord Claimant a fair and impartial hearing as provided for in Rule 43, when the same officer preferred the charges and conducted the hearing.

3. Claimant now be compensated the difference between that of Track Laborer and Utility Tractor Operator (End Loader Backhoe), beginning June 11, 1975 until such time he is returned to his rightful position.

STATEMENT OF FACTS: Claimant entered Carrier's service as a laborer on April 1, 1966. During the years 1973 and 1974, Claimant established and held seniority rights in the operation of certain track work equipment. On May 23, 1975, Claimant was working his assigned position of Utility Tractor Operator (End Loader Backhoe), hereinafter referred to as "Backhoe". On the latter date, the backhoe was being operated by Claimant for cleaning of ditches parallel to railroad tracks. It became mired in a ditch and, in attempting to free the machine by manipulation of the backhoe boom, the bucket accidentally struck and injured co-employee Songer. The record does not indicate the severity of the latter's injuries, although he did require emergency hospital

treatment and, at the time of the hearing two weeks later, he was still under the care of his physician.

Thereafter, Claimant was cited for formal hearing, held on June 6, 1975, and, based on the evidence, was found guilty of violating Rule 3 of the operating Rules and Regulations. The penalty assessed by Carrier was disqualification "from all equipment related classes" effective as of June 11, 1975, plus reduction of Claimant's status to that of "laborer" with attendant reduction in his rate of pay.

Rule 3 is brief and precise; it provides as follows:

"Equipment shall not be operated in a manner to endanger life, limb or property".

Carrier maintains that the discipline here imposed was fully warranted in that Claimant violated Rule 3 by negligently and carelessly operating his machine, resulting in injury to his co-employee.

Petitioner asserts to the contrary and contends that Songer was negligent, not Claimant. Additionally, Petitioner raises various factual and procedural issues as set forth in the Statement of Claim, each of which will be discussed in detail hereafter.

Subsequent to the filing of formal claim by Petitioner, the matter was progressed on the property through the various stages of appeal as provided for in the Agreement. Carrier rejected the claim in each instance. However, the letter of Mr. E.J. Hall, Manager of Personnel, dated March 31, 1976, states that "with the hope that the disciplinary action has now served its purpose am arranging for his restriction to the position of a laborer to be vacated." As to the claim for wage loss, it was again "declined on the theory that an appropriate penalty was assessed in the first place."

Petitioner maintains nevertheless, in its formal submission to the Board, that "Claimant Gooch has not, as of this date, been placed on the position he was assigned; that being Utility Tractor Operator." Carrier conceded during the panel discussion that this was so and indicated that this item would be remedied.

FINDINGS: At the outset, Petitioner contends that Claimant was not afforded a fair and impartial hearing, as required under Rule 45 (inadvertently referred to as Rule 43) of the controlling Agreement, inasmuch as "the same officer preferred the charges and conducted the hearing". And that such procedure violated the specific language of Rule 45, which provides in pertinent part that Claimant shall be given "a fair and impartial hearing before an officer of the Company (who shall be an individual other than the one preferring charges)". . . ." (Emphasis added).

It is quite evident in the record that Mr. Fowler preferred the charges and conducted the hearing. This aspect of the matter was fully apparent to Petitioner and to Claimant at the very outset of the hearing. Nevertheless, no objection was raised at any time during the hearing on this obvious irregularity in procedure.

Our examination and analysis of the record transcript shows that the hearing itself was fairly and impartially conducted, with strict adherence to Claimant's basic rights of due process. We find, therefore, that Claimant was afforded a fair and proper hearing under the Rules on the specific charge against him; that he was vigorously represented by his Organization representative; that he was fully cognizant of the charge and had ample opportunity to testify in his own behalf, cross-examine adverse witnesses and call witnesses on his own, if so inclined.

In these circumstances, notwithstanding the one irregularity in the conduct of the Investigation, where Claimant and his authorized representative have been present throughout the hearing and have participated therein without objection, we have held that Petitioner may not be heard, after an unfavorable result, to complain of the fairness of the hearing thereafter. The onus of raising timely proper protest and objection rests upon Claimant and his representative; it cannot be shifted to Carrier.

See 2nd Div Awards 1251, 1334, 1402, and 7035; First Division Awards 11498 and 13606; and Fourth Division Award 1204.

Nor do the cases cited by Petitioner hold to the contrary. Thus, for example, in 4th Div. Award 1713 the Hearing Officer "served not only in this capacity but as a principal witness as well." Similarly in 4th Div. Award 2167, the Superintendent "preferred the charges, testified against Claimant at the hearing and finally passed judgment as to his guilt". And in 2nd Div. Award 4536, the same official was "the complaining officer, judge, witness and jury". Further, in 2nd Div. Award 4929, the same officer "preferred charges against the Claimant and then acted in the triple capacity of prosecutor, judge and jury" and throughout the hearing gave clear indication of prejudgment. (all emphasis added).

Neither of these situations is present in the case before us. Accordingly, on the basis of the authorities cited above, we must perforce reject the contention of Petitioner on this issue.

We proceed, therefore, to the merits of this dispute.

Witness P.J. Songer testified that he and Frank Lovio were working with Claimant on the day in question; that they were watching him from about 30 to 40 feet away as he tried to extricate his machine from the ditch in which it had become mired; that he became "frantic and revved his throttle beyond normal throttle working area" and appeared "to be getting out of hand". That at this time "I started to walk towards the backhoe. Mr. Gooch was fully in view and I was fully in view of Mr. Gooch. When I got between the dump cart and the backhoe, the bucket swang very fast, smashing me between the backhoe and the dump cart, for no apparent reason."

He testified further that he had received emergency treatment at the hospital and was still under the doctor's care. On cross-examination, his testimony remained unshaken.

Mr. Lovio corroborated the testimony of Mr. Songer, and stated further that at the time the latter was hit, "the front part of the boom swung over and hit him, hitting him with the bucket" and that this was "an abrupt change in the direction of the backhoe boom".

Claimant confirmed that he was involved in the accident which resulted in personal injuries to Mr. Songer; that his backhoe became stuck and that while trying to correct the situation his backhoe bucket struck Mr. Songer. He stated he did not strike him deliberately; that he "did not see him". However, he admitted that while he was completing the swing of the backhoe attachment he "then saw Pat Songer walk between the backhoe and the dump cart. When I saw him I stopped my swing and the slack action hit Pat and knocked him into the dump cart."

Obviously, at this point, Claimant did not see Songer before he started the swing of the backhoe attachment.

Claimant then denied that Songer and Lovio "were in the immediate area", although it is quite obvious that they were. He testified further that there was a certain amount of uncontrollable slack action in stopping the movement of the boom - "four to eight inches it varies". That he did not "expect" Songer to come walking by the bucket; that he did open the throttle more than usual and that he "was disgusted" at the time.

Claimant then testified to some impairment of vision caused by the obstruction of the backhoe bucket and that this could "conceal a man's body". However, as to whether this would have "concealed a man in the immediate area", he stated "No, just partially".

Based on the testimony we reach the following factual conclusions:

1. Both Songer and Lovio were fully within Claimant's range of vision. Both testified that they and Claimant were "fully in view" of each other. Claimant conceded that despite the asserted visual obstruction, the "concealment" was "just partially".

2. Claimant was obviously upset by his inability to free his machine; Songer uses the word "frantic", Claimant admits he was "disgusted".

3. The testimony is quite clear on the fact that Claimant revved his throttle beyond normal usage and that he then made "an abrupt change in the direction of the backhoe boom", causing it to strike and injure Songer.

4. Further, that although Claimant states he stopped his swing when he saw Songer, the fact is that he did not prior thereto check the positions of Songer and Lovio to ensure that they were not within immediate range of the motion of the backhoe boom.

We find from the foregoing, therefore, that Claimant was negligent in the operation of his machine, particularly in making an abrupt change in the direction of the backhoe boom without exercising proper and timely care to ensure that no one was in the direct line of its action sweep. In so finding, we do not overlook Petitioner's contention that Songer may have contributed to the accident in walking forward when he did. However, this does not absolve Claimant. The backhoe was in his sole control and the primary responsibility was his to ensure that it was operated in a careful and prudent manner so as not "to endanger life, limb or property". The record indicates that he failed to do so.

In these circumstances, Carrier was warranted in finding Claimant guilty of violating Rule 3 as charged and in assessing appropriate discipline.

This Board has held in innumerable prior Awards that it will not substitute its judgment for that of Carrier in evaluating the evidence, provided substantial probative evidence is presented in the record supporting the charge against Claimant and the disciplinary penalty imposed. The cases in support of this principle are legion and need hardly be cited here.

We conclude, therefore, that such substantial probative evidence is present in this case and that Carrier sustained its burden of proof.

The measure of discipline initially assessed against Claimant was permanent disqualification from all equipment related classes, demotion to the position of "laborer" and attendant loss of wage differential, effective as of June 11, 1975.

In the factual context of this dispute, we would have ruled that such permanent disqualification and demotion was unduly harsh and unreasonable, particularly since there is no evidence in the record of any prior disciplinary infraction by Claimant. It appears that Carrier reached a similar conclusion for, as the record indicates, as of March 31, 1976 Carrier vacated Claimant's job restrictions. Nevertheless, as of the date of the panel discussion by the Board, Claimant had not as yet been restored to his former position of Utility Tractor Operator.

We therefore rule as follows:

a) Petitioner's claim for wage loss for the period from June 11, 1975 to March 31, 1976, based on the rate differential between Utility Tractor Operator and Laborer, is not sustained for the reasons set forth above.

b) Petitioner's claim for such wage loss is sustained for the period from March 31, 1976 until such time as Claimant is reassigned by seniority roster and rate of pay to his former position of Utility Tractor Operator.

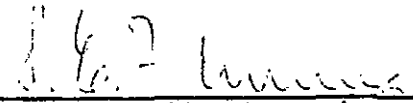
c) In the event that such reassignment has in fact occurred, the date of such reassignment shall terminate Carrier's obligation for any further differential wage loss hereunder.

d) The payment of such wage loss, if any, in accordance with the foregoing, shall be made by Carrier within thirty (30) days of its receipt of this Award.

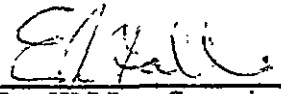
AWARD: Claim sustained in part in accordance with foregoing findings.



LOUIS NORRIS, Neutral and Chairman



S.E. FLEMING, Organization Member



E.J. HALL, Carrier Member

DATED: San Francisco, California
January 21, 1977