

PUBLIC LAW BOARD NO. 1795

Award No. 12
Case No. 12

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

STATEMENT OF CLAIM:

1. That the Carrier violated the provisions of the Agreement between the Southern Pacific Transportation Company and the Brotherhood of Maintenance of Way Employees when, as a result of an untimely formal hearing, the Carrier suspended Mr. F.R. Padilla for a period of sixty (60) days, said action being arbitrary, unjust and in abuse of discretion.

2. That the Carrier now compensate Claimant F.R. Padilla for all time lost, including all overtime worked on his position during the period of his suspension and that his personal record be cleared of all charges.

STATEMENT OF FACTS: Claimant entered Carrier's service on August 30, 1962 as a Laborer and thereafter was advanced to the position of Ballast Tamper Operator. On February 11, 1976, the pertinent date in this dispute, Claimant was acting as an assigned member of extra gang No. 43 in removing cables from a tool house located at Napa Junction in California. The purpose of the assignment was to remove the cables along with various other tools and materials to Lombard, some distance away from Napa, thereby vacating the toolhouse to enable the Carrier to

demolish it through the use of a bulldozer which was also at the scene of operations. There were four men in gang No. 43, plus one additional man, the Bulldozer Operator.

It appears that on the date in question Claimant alleged that he suffered a personal injury while on duty at the job site at Napa Junction. He reported his injury, at least according to his testimony at the hearing, that same day, to various of his co-employees and to certain supervisory personnel. Two days later on February 13, 1976 Claimant filled out and signed Carrier's form entitled "Employees Report of Accident" stating in answer to the question "State how accident occurred" - "Was pulling cable out of toolhouse at Napa Junction when felt pain in my back". This is the sum and substance of Claimant's statement of injury on the date in question.

Thereafter, as appears from the record, Claimant was examined by Carrier's physician and subsequently hospitalized. Neither the report of the physician nor a copy or extract of the hospital record is part of the record evidence. Some time thereafter, in or about the month of May 1976, "After an inquiry into the matter by Carrier's Claim Department" Carrier reached a conclusion that the cause of the alleged injury as stated was possibly fraudulent. Accordingly, Carrier preferred charges against Claimant and scheduled a formal hearing into the matter for May 27, 1976, which hearing was postponed to June 1, 1976.

In any event, on the basis of the evidence adduced at the hearing Claimant was found guilty as charged and was supposedly dismissed from Carrier's service by a letter dated June 9, 1976. In point of fact, however, the discipline imposed was 60 days suspension. The specific charge lodged against Claimant was violation of Rule 801 of Carrier's Rules and Regulations of the Maintenance of Way Department which reads as follows:

"Rule 801 Employees will not be retained
in the service who are . . . dishonest
. . ."

Thereafter the usual appeal procedures were proceeded with by the principals on the property, the Organization arguing the case for Claimant and Carrier being adamant in its position as to its ruling against Claimant.

POSITION OF THE PARTIES AND OPINION

The position of the Organization is that there is no question that Claimant did suffer a work related back injury on February 11, 1976. That he reported it promptly. That he filed a proper report within two days, and thereafter was examined by Carrier physician and did enter the hospital. Thus the Organization contends that the claim should in all respects be sustained. Its further position stems from the alleged delay by Carrier in scheduling the hearing in this case. However, there is no indication of any impropriety on Carrier's part in

this respect and, additionally, the objection as to timeliness in holding the appeal was not raised at the time of the hearing. At this point it seems rather a belated issue and we see no point in its further consideration, particularly since no prejudice to Claimant's rights are indicated in the record.

The position of the Carrier, on the other hand, is that the testimony of the witnesses at the examination indicated "conclusively" that Claimant was not testifying truthfully, that he did not in fact suffer the injury he alleges he did and that he filed a false accident report. That is the gravamen of the charge in this case, - that Claimant acted dishonestly in violation of Rule 801 by filing a dishonest accident report. Both sides concede that the testimony of a least two or three of the witnesses was obviously contradictory. The testimony of Track Foreman Stevenson, however, was quite straightforward. He testified to the assignment of the men and what the work generally was to consist of. He also conceded that he knew that Claimant had sustained a back injury resulting from another accident some time in the past and therefore asserted that he assigned him to less strenuous work. (Claimant on the other hand contended that he was instructed by Mr. Stevenson to help the men out on various jobs). Mr. Stevenson stated that Claimant told him nothing about the injury he had sustained on the job until somewhat later at about three in the afternoon when they reached Lombard, their quitting point. Mr. Stevenson stated further that he did not

see Claimant handle any of the cables at any time and that he did not realize prior to being told at three in the afternoon that Claimant had sustained any injury.

The testimony of J. Ybarra, Laborer, was not quite so consistent. He testified that he never saw Claimant handle the cables. He further stated that he did not know Claimant had injured his back until Claimant notified the track supervisor later on. On cross-examination Ybarra testified he was "outside the building" handling the cables and could not see who was feeding the cables through the hole, obviously from the inside. Mr. Ybarra testified further that although he was outside the building he was not pulling any cable "just receiving". He stated further: "You can't see very well when you are pulling; you might pull somebody with it". He referred to "they" were feeding the cable, but then stated that Pete Rohas was the only one doing the feeding. As for Claimant, "He wasn't outside so he must have been inside". He did not at any time see Claimant handle the cable "from where my position was". But he did admit on cross-examination that from his position he could not see Claimant at all and that "he could not say whether Claimant was handling the cable or not."

Mr. Rohas, also one of the Laborers, testified that he assisted in the moving of the cables that were inside. He did not "remember" whether he saw Claimant handle any of the cables at any time. He did not specifically deny that this was so, just that he did not remember. He testified further that the first he knew Claimant had been injured was when they rode back to Lombard at quitting time when he "had heard it from some of the

other guys". On cross-examination, Rohas testified "I don't see him - too many guys - too many noise" "I don't remember him lifting the cable".

Robert Ybarra the operator of the bulldozer was the most positive of all the witnesses. He was working with extra gang 43 on February 11 and was in the process of removing the materials from the tool house, including the cable. He testified quite definitely that he saw Claimant handle the cables from "outside" the building. Claimant did not tell him of his injury until he gave him "a lift home" from work. Ybarra drove Claimant home in his car and stated that Claimant was not in a condition to do so. On cross-examination his testimony was basically unshaken. He testified that the cables were being handled by hand from inside to outside through a hole in the building. He did not see who was inside. He did not agree precisely with the testimony of the other witnesses as to the fact that specific individuals handled the cables on the inside and specific individuals handled the cables on the outside. He did testify quite definitely that the foreman had ordered the Claimant to help the boys and that he did so.

Claimant testified that he was working with the rest of the gang to remove the cables from the toolhouse; some were special heavy caliber cable. He testified quite definitely that he was working on the outside and did not remember if anyone was inside because he did not look. He first noticed discomfort in his back

"when this loop - it shook my body and my back hurt" that this occurred while he was pulling the cable. He told this to Rohas and Ybarra immediately, stating "Yes I didn't make too much effort, (obviously "fuss"), but I remember I tell him my back hurt". He testified further that he told the Foreman while at Napa Junction and told the Track Supervisor at Lombard. These statements to both supervisors were made that very same day. He testified further to the fact that he had completed and filed the Statement of Accident Report two days later, which he identified and also acknowledged his signature. Cross-examination did not shake his testimony to any material extent.

From an overall point of view, both sides concede that the testimony of two or three of the witnesses is, to put it mildly, somewhat contradictory. Thus, at various times Claimant is placed "inside the shack" or "outside the shack"; at other times he is "helping out" and at still other times he is "standing still". At times he is "pulling the cable" and at other times he is "feeding it to others". Quite positive however is the testimony of bulldozer operator Robert Ybarra who, as previously stated, was stationed outside the premises, was not directly involved in the work details on the chains and was fully in a position to see what was going on in good detail.

Notwithstanding the conflicting testimony certain affirmative facts do emerge:

1. The record does indicate that Claimant suffered from a prior back injury.

2. The record indicates that Claimant allegedly suffered some form of work related injury on the date in question.

3. The fact is also clear that he reported the accident to some employees in the morning and to others at Lombard when they arrived in the afternoon.

4. Two days later he filed a written report of the accident which on the face of it appears to be credible.

5. It is equally clear and of considerable significance that Claimant was admitted to the Hospital, in connection with which the following colloquy took place during the course of the formal hearing:

"Mr. Arrosio: Under whose direction was he admitted to the hospital in San Francisco.

"Mr. Flores: I couldn't say for sure but the admission had to be arranged by our medical officer.

"Mr. Arrosio (continuing): Who are the medical officers you stated who are our medical officers.

"Mr. Flores: Dr. Meyers

"Mr. Arrosio: That is all I have at this time."

We are somewhat troubled by the fact that there are several aspects of factual evidence which are completely lacking as exhibits. In fact, there are only two exhibits attached to the transcript of the testimony. Exhibit A, the report of accident filed by grievant, and exhibit B, being the letter of June 9, 1976 from Mr. Murdock to Claimant suspending him from service. In our opinion several of these missing exhibits might well have served to shed considerable light on the entire case. For instance, the following may serve as examples:

1. Carrier's written presentation states "Upon learning in the month of May 1976 after an inquiry into the matter by Carrier's Claim Department that the cause of the alleged injury as stated was possible fraudulent". It would have been of considerable relevance had Carrier indicated the results of its inquiry and had at least submitted some testimony indicating what facts there were that indicated to it at that time that Claimant might possibly have filed a fraudulent accident report.

2. As previously stated there was no dispute that Claimant did suffer a prior back injury.

3. There is no dispute, and this is most significant, that Claimant did assumedly suffer a back injury on the date in question. Nevertheless, the transcript evidence itself does not at all relate to the major issue of whether or not he had in fact suffered a back injury, but emphasizes the various contradictory points to which we have alluded above, but which pertain solely to the work factors.

4. It is not disputed that Claimant did enter the hospital on certification of Carrier's physician.

5. Moreover, there is no doubt that Claimant filed an accident report two days later which was quite normal and regular under the circumstances.

The conclusion we are reaching rather inevitably is that there is insufficient factual evidence to support Carrier's contention as to the charge here involved. This Board would have been well served to have before it (1) a copy of the hospital

record showing Claimant's condition at that time, (2) a copy of the medical report of the physician showing grievant's medical condition at the time of the examination, with particular emphasis of the probable nature of the injury, if any, and the reasonable cause thereof, and (3) some evidence as to the basis upon which Carrier's inquiry of May, 1976, reached the conclusions it did.

In the final analysis, therefore, we are faced with a situation wherein on the face of it Claimant's version of the facts is credible on those points which are most relevant to this case:

1. That he allegedly suffered a work related injury on February 11, 1976 which he reported to various employees on the same day.
2. That he completed and submitted an accident report some two days later stating the nature of his work related injury.
3. That he was subsequently hospitalized, and
4. That he was assumedly examined by Carrier's physician for, as testified to by Mr. Flores, he was certified to entry into the hospital only as a result of the certifying report of the physician.

Thus, notwithstanding Carrier's stress on those aspects of the testimony which tend, in some degree, to discredit Claimant, we do not consider these points to be of critical relevance to the major issue before us. We state these points in the negative for emphasis:

(1) There is no evidence that Claimant did not sustain a work related injury on February 11, 1976.

(2) There is no evidence that he did not report the work related injury and that he did not subsequently file a formal accident report.

(3) There is no evidence that he did not previously suffer a back injury in connection with another accident.

(4) And, affirmatively, there is evidence that he was hospitalized and that he was examined and certified for hospital entry by Carrier's physician.

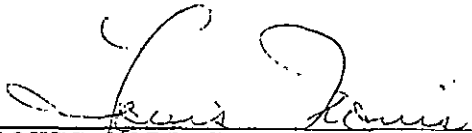
(5) Neither the report of the Carrier as to its inquiry of May 1976, nor the physical report of the examination by the physician, nor the hospital record itself as to the condition of Claimant upon admission, are part of this record. These reports, as we previously stated, would no doubt have been of considerable significance in placing this entire matter in proper perspective.

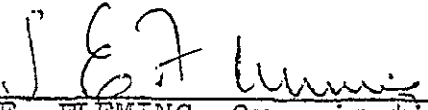
The charge against Claimant is the filing of a fraudulent report of an accident concerning a work related injury. More specifically, Claimant is accused of "dishonesty" in violation of Rule 801 of Carrier's Rules and Regulations. In the latter context it has been quite definitely established beyond peradventure that in discipline cases the burden rests squarely upon Carrier to establish by convincing probative evidence the guilt of the accused on a specific charge lodged against him - and this by a clear preponderance of the evidence.


In view of all of the foregoing, therefore, we are unable to conclude that Carrier has sustained its burden of proof on the particular charge lodged against Claimant in this case.

Accordingly we have no alternative but to sustain the claim.

AWARD: CLAIM SUSTAINED.


 LOUIS NORRIS, Neutral and Chairman


 S.E. FLEMING, Organization Member


 E.J. HALL, Carrier Member

DATED: San Francisco, California
 January 26, 1978