

PUBLIC LAW BOARD NO. 1795

Award No. 19

Case No. 19

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

STATEMENT OF CLAIM:

1. That the Carrier violated the Agreement when on September 29, 1976 they removed Extra Gang Foreman J.M. Peais from his assigned position of Foreman and removed his name from the Foreman's Seniority Roster, said action being arbitrary, unduly harsh and in abuse of discretion.

2. Carrier further violated said Agreement when Mr. J.W. Ferguson, Division Engineer, failed to give reasons for denying the claim in his letter of denial dated November 19, 1976 as provided for in Section 1 (a) of Rule 44 of the Parties' Agreement.

3. That the Carrier now reinstate Claimant's Track Foreman's seniority rights and that he be compensated the difference in wage loss suffered beginning September 29, 1976, continuing until his Foreman's seniority is restored.

STATEMENT OF FACTS: This case relates to the proper use of "allocated time" in connection with track work, and possible track obstructions and safety factors affected thereby. The pertinent details and appropriate comment will appear as the case is analysed below.

Claimant has been in the service of Carrier since February 20, 1976. As of January 1, 1970 he was qualified as

a Track Foreman and held that position on the date of the incidents detailed hereafter, and which were the basis of the charges lodged against him by Carrier. On August 25, 1976 Claimant was the Foreman of Extra Gang No. 40, Division Steel Rail Laying Gang. During the tour of duty here involved this Gang was working between the West switch of the station at Fields, Oregon, and the East switch of the station of Frazier. Specifically, the gang was laying rail between the east switch of the siding at Frazier and 100 feet into Tunnel No. 14, approximately a distance of 1000 feet in an easterly direction towards the station at Fields. The latter is the precise nature of the work being performed on that date. The distance between Fields and Frazier is about  $3\frac{1}{2}$  miles.

In order to obtain the proper "time allocation" for the performance of the work assignment, it was necessary for Claimant to call in to Dispatcher Hisey. This he did and, according to the dispatcher, was given "clock time" between the west end of Frazier and the west end of Fields for the period from 9:13 a.m. until 3:30 p.m. on August 25, 1976.

This is confirmed by the notation made on the dispatcher's sheet of the call-in.

Claimant contends nevertheless that when he called in he said "East" not "West" in respect to both end points.

It is somewhat contradictory for Claimant to say he called in "East" and Hisey to have written "West". Nevertheless the original area of work actually intended by the

assignment and so understood by all concerned is quite clear and concise and is stated specifically in the submission of Carrier. We repeat:

"Specifically, the gang was laying rail between the East switch of the siding at Frazier and 100 feet into Tunnel No. 14 approximately a distance of 1000 feet in an easterly direction towards the station of Fields."

It is important to note that trains are not allowed into the limits of work during the times specified.

In any event, as a result of certain actions taken in the performance of the assignment, by Claimant and by members of his gang who were under his direct supervision, Claimant was cited for Formal Hearing on the basis of Carrier's charge that Claimant had violated that portion of Rule 202-B of the Rules of the Maintenance of Way and Structures reading:

". . . Before obstructing track or in any way rendering track impassable between stations, foreman will obtain work limits and clock time limit between opposing absolute signals from train dispatcher which must not be exceeded."

". . . Foreman must notify train dispatcher when dual control switch has been returned to motor position."

On the basis of the evidence adduced at the hearing held on September 14 and 15, 1976, Claimant was found guilty of having violated Rule 202-B and was disqualified as Extra Gang Track Foreman by Carrier letter of September 29, 1976.

Appeal procedures were initiated by the Organization on the property, which were rejected by Carrier in each case, and the matter is now properly before this Board.

POSITIONS OF THE PARTIES: The Organization raises various contentions each of which will be referred to below and discussed separately.

1. The Organization contends firstly that Claimant was improperly removed from his assigned position as Foreman and that his name was improperly removed from the Foreman's Seniority Roster. That such action by Carrier was arbitrary, unduly harsh and not supported by the testimony adduced at the investigation. This item will be referred to hereafter in greater detail.

2. The Organization contends further that Carrier failed to give reasons for denying the claim in its letter of November 19, 1976, as provided in Rule 44 Section 1(A) of the Agreement. We consider however that this letter by its very language and clear intent was a proper rejection. The Organization and Claimant knew completely the provisions of Rule 202(B) and knew the specific violations with which Claimant was being charged. We conclude therefore that Carrier's letter of November 19 was not only proper, but that there was no disadvantage to Claimant nor any deprivation of his rights of due process insofar as the denial of the claim was concerned.

3. The Organization urges further that Carrier acted improperly in that Division Engineer Ferguson's letter of September 29, 1976 is<sup>9</sup> allegedly based on the evidence adduced at that portion of the hearing which was held on September 14, 1976; and that in so doing he completely disregarded the

testimony of September 15, 1976. This, it is contended by the Organization, violated Rule 45-(C) of the Agreement which states in part "Decisions as to whether or not employee is at fault shall be based upon evidence adduced at the hearing".

We do not consider this objection well taken. Regardless of the date used by Mr. Ferguson in his letter, we believe it refers to the hearing in full including the testimony of September 14 and September 15, September 14 being merely the first day of the hearing. In any event it is quite obvious from Carrier's position and, in fact, the position of the Organization, that this case is based on the entire testimony taken at the formal hearing and not just that of one day.

4. Finally, the Organization refers us to a statement made by District Chairman Golden at the termination of the formal hearing. He posed the question that "whoever makes the decision on this hearing that they take into consideration the evidence concerning who, in fact, was running this gang on this particular day, whether, in fact, it was Mr. Peais or Mr. Aldana."

The contention with respect to Aldana is not one that we can go into in detail. The sole claim before us is that of the Claimant and we have no other task but to examine that claim, review the entire record, and decide it one way or another. We might say that we acknowledge that the record

indicates some activities on the part of Mr. Aldana in connection with the performance of this job assignment. However, the record is quite clear that Claimant was Foreman of the job; that he gave the orders to the men, that they obeyed him; and that stated very simply he was the man in charge and must therefore accept responsibility for proper performance of the job assignment.

With respect to the Organization's position under item "1" above, this is basically the discipline imposed upon Claimant by Carrier. Carrier contends however that in the performance of the job assignment here involved Claimant committed certain acts which were clearly in violation of Rule 202-B and that the evidence adduced at the formal hearing amply sustains this conclusion. Carrier contends further, therefore, that the discipline imposed was fully warranted.

FINDINGS AND CONCLUSION: At the outset it is important to note that the allocation of clock time is obstructive in nature. This is the "time" that was specifically allocated to Claimant and his gang, and it authorized him to so move his equipment and men so as to obstruct the track affected by the performance of the job during the regular course of the work assignment. The allocation of clock time is intended for the protection of the men and equipment as work is performed on the track. It is quite obvious from the record that violation of clock time limits places the men and equipment, and potentially others, in positions of jeopardy.

Based essentially on the testimony of Dispatcher Hisey, which is basically undisputed and was not shaken on cross examination, as corroborated by the testimony of other witnesses, including that of Claimant and of Track Supervisor Aldana, we reach the following findings.

It appears quite obvious from the entire record that Claimant, as well as the members of the crew under his supervision, operated quite loosely in the operation of the switching equipment during the course of the work performed on August 25, 1976, particularly in respect to movement of track equipment resulting in obstructing the siding at Fields. Additionally, in these instances, and others, he failed to notify the dispatcher of his changes of movement as required by the rules, thus potentially endangering equipment and men.

It appears further that some time before the completion of the work on that day, Claimant as Foreman decided to use the siding at Fields for the purpose of lodging the track repair equipment which the gang was using on the job. Claimant failed to notify the Dispatcher of this decision so as to ensure that the siding at Fields was available for such use.

Additionally, on the basis of the record testimony, it should have become obvious to Claimant that he could not possibly complete this "lodging" operation by 3:30 p.m., the termination of his "clock time" limits. Nevertheless, he did not notify the Dispatcher that he would require additional time.

Both situations were potentially dangerous and Claimant must be held responsible therefor.

Moreover, this required the dispatcher to take certain necessary steps, on his own, to protect not only the men and equipment under Claimant's control, but also the passengers and equipment of two trains being scheduled for movement in the same area, namely the siding at Fields. These steps by the dispatcher were necessary to avoid potential damage and danger of serious accident had the dispatcher not taken control of the situation, as he did.

The fact that no accident occurred is attributable to two reasons: (1) Claimant's luck of timing even though he obstructed the track improperly, and more important (2) prompt and expedient actions taken by the dispatcher in taking over control as detailed above.

On the basis of the entire record therefore we find that Claimant was properly found guilty of violating Rule 202-B in respect to the following matters.

His failure to protect his men and equipment. His improper use of dual control switches without notifying the dispatcher. Failure to advise dispatcher at each change of movement. His responsibility for the risk of accident with respect to the other two trains. The fact that he cleared his equipment and, in doing so, improperly used the spur at Fields without obtaining authorization or permission from dispatcher Hisey is most emphatically in violation of Rule 202-B.



The two trains, which the dispatcher took under his control, were scheduled for a meet at this precise location and this, of course, involved the danger of accident which dispatcher Hisey avoided. Finally, it is quite obvious from the testimony that Claimant and his work gang exceeded the time limits allocated to them. As stated previously, it was impossible to complete the lodging of the equipment in the siding at Fields by 3:30 p.m., which was the expiration of his allocated time. Claimant was fully aware of this and his failure to notify the dispatcher in advance was indeed a serious matter.

Accordingly, we hold and find that Claimant was properly found guilty by Carrier and that the discipline imposed was fair and proper under the circumstances.

Nevertheless, we are inclined to urge leniency in the discretion and judgment of Carrier. Principally for the reason that Mr. Aldana seems to have created some confusion in the matter by taking over various aspects of the work assignment and by making derogatory comments to other members of the gang, and this in turn would tend to diminish the degree of Claimant's guilt. We therefore leave to Carrier's discretion whether or not Claimant should be placed on probation as Foreman for a period of time and then restored to his prior title and work assignment with all rights unimpaired.

For the purpose of this decision, however, the claim is denied in toto, particularly in view of the two similar prior violations which are referred to in the record.

AWARD: CLAIM DENIED.

Louis Norris  
LOUIS NORRIS, Neutral and Chairman

S.E. Fleming  
S.E. FLEMING, Organization Member

E. J. Hall  
E.J. HALL, Carrier Member

DATED: San Francisco, California  
May 18, 1978