PUBLIC LAW BOARD NO. 1795

Award No. 3
Case No. 3

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, as a result of a formal hearing held January 6, 1976, they suspended R.A. Tena from his assigned position of Ballast Regulator Operator for a period of thirty (30) days commencing January 24, 1976 to and including February 22, 1976, said action being arbitrary, unjust and in abuse of discretion.

2. That the Carrier now compensate Claimant for all wage loss suffered during the period of January 24, 1976 to and including February 22, 1976 and Claimant's record be cleared of all charges leading to his suspension.

STATEMENT OF FACTS: Claimant entered Carrier's service on July 22, 1970. On December 1, 1975, he was working his assigned position of Ballast Regulator Operator and first moved his machine out of a spur and onto a siding, followed by Track Liner 72R, operated by co-employe Gonzalez. Claimant brought his vehicle to a stop and assisted in setting track liner buggies on the track. He then returned to his machine and moved it down grade in a westerly direction approximately 30 to 40 feet. Claimant then shifted his machine into reverse gear and backed about 70 to 80 feet in an easterly direction, striking and destroying track liner 72R, which was stopped and had not moved from its initial position on the siding.

Claimant was thereupon cited for formal hearing on January 6, 1976, and on the basis of the evidence adduced was found guilty of violating Rules 801 and M869 of the Rules and Regulations, particularly

as relating to the foregoing accident, and was suspended from service for 30 days.

The above cited Rules read as follows:

> "Rule 801: Employes will not be retained in service who are careless of the safety of themselves or others . . ."
>
> "Rule M869: Track machines must be operated at a safe speed at all times, subject to conditions, especially on grades, both while working and while running light.
>
> While traveling, machines must be separated from other machines in such a way as to avoid any undesired contact between any two machines."

Petitioner concedes, as does Claimant, that the accident did in fact occur, but maintains nevertheless:

1. That Claimant was not afforded a fair and impartial hearing in that portions of the testimony were hearsay and, further, that the hearing officer was guilty of "badgering".

2. Additionally, that Carrier failed to call as a witness Mr. Gonzalez, the operator of the other machine involved in the accident.

3. That Gonzalez was not a qualified operator and contributed to the accident.

4. Finally, that the discipline here imposed, 30 days suspension, was unreasonably severe in view of the "extenuating circumstances".

Carrier disputes each of these contentions and maintains that Claimant was properly held responsible for the accident and that the discipline imposed was fair and reasonable in the circumstances.

FINDINGS: We have carefully reviewed the correspondence on the property, the testimony adduced at the hearing, and the respective contentions of each of the principals. On the basis of the entire record before us, we reach the following conclusions:

1. Our examination of the hearing transcript indicates clearly that Claimant was afforded a fair and impartial hearing in compliance with Rule 45 of the Agreement. Claimant was given full opportunity to present his version of the facts; he was vigorously represented by Mr. Taylor, District Chairman, who was allowed full leeway in the cross-examination of witnesses; and due process was carefully observed by the hearing officer. Although certain pointed questions were asked, we are not persuaded that the hearing officer was guilty of "badgering".

2. As to the contention that "hearsay testimony" was permitted, it has been held repeatedly that hearsay testimony is admissible, provided it is fairly received and properly evaluated in the light of all the evidence. (See for example 1st Div. Awards 17158, 22294 and 3rd Div. Award 7062, among others). Additionally, the testimony of Mr. Henshaw consisted of his personal investigation report into the accident and, in basic detail, was corroborated by Claimant's testimony, which will be referred to more specifically hereafter. Accordingly, we find no basis upon which to conclude that any of Claimant's rights were prejudiced or violated in the latter respect.

3. It is quite true, as asserted by Petitioner, that Carrier failed to call Gonzalez as a witness. Nor was Carrier required to do so. We have stressed repeatedly in prior Awards that the Claimant has the option, and the burden, to call other witnesses in his behalf, whose testimony is deemed relevant to the charge. Rule 45 is amply clear on this point. Nor can Claimant shift that burden to Carrier. See Third Division Awards 13643 (Bailer), 16261 (Dugan), 17525 (Dugan), and 20867 (Norris), among others. Accordingly, Petitioner's objection on this issue is not sustained.

Moreover, at the outset of the Investigation, the Hearing Officer specifically inquired whether Claimant desired "any witnesses other than those present", to which the reply was made "Yes, Luis Cornejo, Extra Gang Foreman". Mr. Cornejo was in fact called as a witness.

4. We find that the testimony presented at the hearing fully substantiates Carrier's determination that Claimant was negligent in the operation of his vehicle and that he was in violation of the cited Rules. Particularly is this evident in Claimant's testimony. He admitted that he was familiar with the provisions of Rules 801 and M869. Specifically, he testified as follows:

> "Mr. Tena, how far was your machine, the 93RW Ballast Regulator, positioned from the next liner buggy when you returned to your machine after setting the liner buggies on the track?
>
> Approximately one rail length.
>
> You estimated that your regulator rolled downgrade 30 to 40 feet after lifting the wings, shifting from neutral to reverse position and starting back upgrade towards the liner, is that correct?
>
> That is correct.
>
> Then you estimated you traveled in reverse position upgrade approximately 70 or 80 feet before striking the liner equipment?
>
> That's correct.
>
> Mr. Tena, while traveling this estimated 70 or 80 feet, did you not observe that the 72R Track Liner had not moved and was positioned just as you had left it a few minutes earlier?
>
> That's correct.
>
> Mr. Tena, why did you not observe this?
>
> Because by the time I raised the plow, raised my wing, traveled it westward, I thought the liner would be moving.
>
> Mr. Tena, did you look towards the liner to see if it was moving?
>
> No, I didn't.
>
> Mr. Tena, at no time while traveling this estimated 70 or 80 feet, did you look to see if the way was clear?
>
> No, I didn't.
>
> Mr. Tena, what were the weather conditions at the time of the accident?
>
> It was clear.

You had good visibility?

Yes, I did.

Was there any obstruction or visibility problem that could have prevented you from having a good view of the 72R Track Liner positioned on the track?

No."

Claimant then made reference to the fact that Gonzalez was a relatively inexperienced operator and that "if it had been another operator, qualified operator, this would not have happened."

However, his testimony on this issue does not absolve him:

"Mr. Tena, are you trying to tell me that when the track liner is operated by the normal operator that you make a habit of backing in reverse 70 or 80 feet without looking and checking to see if the way is clear?

No, I don't.

No, you don't what?

I don't make that a habit. I usually do look and at this particular time I didn't look back because I thought he was moving."

In concluding his testimony, he stated:

"You don't feel that the fact that you didn't look to observe whether or not the liner had moved was the cause of the accident?

I should've looked, but I didn't; but if the liner would have been moving the accident could have been preventable."
(All emphasis added).

In view of the foregoing testimony of Claimant, therefore, it becomes increasingly evident that the responsibility for the accident rests with Claimant. He moved his vehicle in reverse 70 to 80 feet before striking the track liner, which had remained completely stationary. At no time during this movement did he look to see whether the track liner had moved to ensure that the way was clear. He "thought" the liner had moved, admitted that he "should have looked" but he did not do so. Additionally, we are not persuaded that any

fault can be imputed to Gonzalez. The record testimony speaks to the contrary.

5. Finally, in the circumstances of this dispute, we find no basis upon which to conclude that the discipline of 30 days suspension here imposed was unwarranted or that it was unduly severe or unreasonable.

The principle is well established that where there is substantial probative record evidence preponderating in Carrier's favor, supporting the charges and the discipline imposed, this Board will not disturb the action taken. Particularly is this true where the record supports the finding that Carrier has not acted arbitrarily, unreasonably or without due process. We so find in this case.

See Third Division Awards 3149 (Carter), 10791 (Ray), 14700 (Rohman), 15574 (Ives), 16602 (Devine), 19433 (Blackwell), 19874 (Roadley), and 20867 (Norris), among many others.

In view of the foregoing findings, therefore, particularly Claimant's own admissions at the investigation, we are compelled 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
December 20, 1976