PUBLIC LAW BOARD NO. 1795

Award No. 4
Case No. 4

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

STATEMENT OF CLAIM:

1. That the Carrier violated the Agreement when on October 28, 1975 they disciplined Vacation Relief Operator, R.T. Vega, by removing Claimant from his position of Operator on a Speed Swing, thus demoting him to position of Laborer without having accorded him a fair and impartial hearing; said action being arbitrary, unjust and in abuse of discretion.

2. That the Carrier further violated the Agreement when G.L. Murdock, Division Engineer, failed to give reason for denying claim in his letter dated January 5, 1976, as provided for in Section 1(a) of Rule 44.

3. That the Carrier now compensate Claimant the difference between that of Laborer and the higher rated position of Crane Operator beginning October 8, 1975, and each day subsequent thereto until such time the regular Operator returned from vacation.

STATEMENT OF FACTS: Claimant entered Carrier's service on October 7, 1964 as a track laborer. On May 9, 1975, he qualified as a Speed Swing Operator. On October 28, 1975, the pertinent date of this dispute, Claimant was filling a vacation relief assignment of Crane Operator. This machine is equipped with a front end loader and was being used at the time to move dirt and gravel from the track and adjacent areas. Claimant stopped his machine near the tracks and was awaiting further instructions from the Foreman. However, three crew members were still working on the track. It appears that due to the close proximity to the track of Claimant's machine (as asserted by

Carrier) or due to the crew's presence on the track (as contended by Petitioner) Extra Train 4315-West rolled by and was caused to make an emergency stop. It appears further that, based on a telegram received from the Engineer of Train 4315 on October 28, Roadmaster Mercado appeared on the scene, accused Claimant of "fouling the main track" and, as alleged by Petitioner, immediately relieved him of his position of Speed Swing Operator and demoted him to Track Laborer.

In the correspondence on the property Carrier concedes that Claimant "still maintains a seniority date of May 9, 1975 as a Speed Swing Operator". (See Mr. Murdock's letter of January 5, 1976). This being so, the only issue before the Board is whether any compensation is due Claimant as demanded in the Statement of Claim.

Petitioner asserts that Carrier (1) violated Rule 45 of the Agreement when it "disciplined" Claimant by demoting him to Laborer without first according him a formal hearing; and (2) violated Rule 44 by denying the claim without stating a specific reason.

Carrier responds that it did not violate the agreement since Claimant "was not disciplined" but merely "replaced" by a more senior employe.

FINDINGS: There are two issues which require resolution before we proceed to the merits of this dispute.

Firstly, Carrier asserts in its submission to the Board, and this for the first time since it is not referred to in the correspondence on the property, that "Claimant had been instructed by his foreman to remove his machine from the track area" and that he "returned to the track area contrary to the foreman's instructions". Such assertion constitutes "new matter" not previously raised and, as such, is not now properly before the Board and must be excluded from consideration.

The principle as to the exclusion of "new matter" raised for the first time at this stage of the appellate process has been consistently and uniformly upheld in a long line of prior Awards.

See 2nd Division Awards 2374, 3551, 4011, 4249, 4926 and 7023. See also Rules of Procedure, Circular No. 1, National Railroad Adjustment Board, adopted 10/10/34, and additionally, 3rd Division Awards, 18656, 19101, 20064, 20121, 20255, and 20468, among many others.

Secondly, as to Petitioner's contention that no reason was stated by Carrier in denying the claim, we find that in the full context of Mr. Murdock's letter of January 5, 1976, sufficient reason was given. This is particularly so in the light of Carrier's consistent adherence to its position that Claimant was not "disciplined" but merely "replaced". In any event, we consider it better practice to decide this dispute, not on this narrow issue, but on the much broader grounds detailed below.

On the merits, therefore, we recognize that in particular situations of immediate peril Carrier has the authority and the responsibility of making on the spot decisions. Such situations, for example, would include those relating to the immediate safety of passengers, employes or property. In so acting, however, Carrier assumes certain risks: (1) making a proper determination that an immediate safety factor is involved, (2) ensuring that responsibility therefor is properly lodged against particular personnel, and (3) taking the necessary remedial action with reasonable certainty that it is justified under the prevailing circumstances.

Applying these considerations in the context of this dispute, the question before us is whether, assuming the presence of the safety factor, did Carrier act properly in removing Claimant from his position of Operator and reassigning him to the position of Laborer.

Carrier asserts that such action did not constitute "discipline" We cannot agree. The term "discipline", as defined in prior Awards and as applied generally in all manner of industrial labor relations, ranges from outright dismissal or suspension to demotion from job classification, reduction in rate of pay or loss of specific benefits. In fact, it has been held that the placing of a letter of admonition and warning in the personal service record of an employe constitutes discipline.

See, for example, discussion of "discipline" and Awards analysed in 2nd Div. Award 7024.

In the instant dispute, the record indicates that Claimant was in fact immediately demoted to a lower rated position with consequent reduction in rate of pay. In our view, this constituted imposition of discipline.

Thus, we are faced with the issue of whether Carrier was justified in imposing immediate discipline. Here, the telegram and statement of Engineer Cox are of crucial factual importance. The telegram states that "your crews at Cordelia working with crane were almost hit". It makes no reference to the position of Claimant's machine. The full statement of the Engineer makes reference to "a speed swing with very close clearance to the right of the track, but it appeared to be in the clear". It then refers to the three crew members "working between the rails with their backs towards us" and that, in spite of the warning whistles sounded by Train 4315, the crew was exceedingly slow in clearing the rails; one crewman in particular "only cleared the track by about three cars".

In summary, therefore, there is nothing in the telegram or in the statement of Engineer Cox which imputes any fault or dereliction of safety responsibility to Claimant. Nor is there any corroboration in either document of the Roadmaster's charge that Claimant's vehicle "fouled the main track".

No formal hearing was held in this case. Thus, we do not have before us for proper evaluation any transcript of testimony of witnesses upon which to resolve the factual issues here involved. We are of the opinion that in the factual circumstances of this dispute, a formal hearing was essential to determine responsibility and to fix the disciplinary penalty, if any. Additionally, that based upon the information available to Roadmaster Gentry at the time of this occurrence, there was insufficient justification for the imposition of immediate discipline against Claimant.

We deem it important to stress that our discussion of "discipline" here is limited to the peculiar facts of this dispute. This Award is not intended as precedent for the concept that discipline, as such, may be imposed by Carrier without the formal hearing required under Rule 45.

On this record, therefore, and based upon the foregoing considerations, we are compelled to the conclusion that the imposition of discipline in this case without affording Claimant a fair and impartial hearing was clearly in violation of Rule 45 of the Agreement.

Accordingly, we have no alternative but to sustain the claim that Claimant be compensated for the pay differential between Laborer and Crane Operator for the period from October 8, 1975 until the return from vacation of the regular Operator. Such payment to be made within 30 days of receipt by Carrier of this Award.

AWARD: CLAIM SUSTAINED.

LOUIS NORRIS, Neutral and Chairman

S.E. FLEMING, Organization Member

E.J. HALL, Carrier Member

DATED: San Francisco, California
December 20, 1976