

PUBLIC LAW BOARD NO. 1795

Award No. 6  
Case No. 6

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 February 13, 1976 it suspended Tomas Aceves from his assigned position of Ballast Tamper Operator pending investigation. It further violated the Agreement when on March 3, 1976 it suspended Claimant for a period of ninety (90) days on charges not sustained by the record, said action being arbitrary, unjust and in abuse of discretion.

2. That Carrier now compensate Claimant for all time lost, commencing February 2, 1976, including all overtime worked on his position. (NOTE: The latter date is obviously in error; the correct date is February 13, as shown above.)

STATEMENT OF FACTS: Claimant entered the service of Carrier on September 3, 1956. On February 13, 1976, Claimant reported to work and requested permission to drive his personal vehicle to the work site as he desired to quit work one hour early that day. Petitioner asserts such request was granted. Carrier replies that permission to drive to the work site was granted by Foreman Madriaga but, as to leaving one hour early, he said we will "see what happens", depending upon movement of trains, and that Claimant might not be able to leave early. An altercation then ensued and Claimant either "placed" or "threw" the keys on top of the tamper machine he was to operate. Carrier asserts Claimant stated he was going to leave and was not going to operate the machine. Petitioner replies that Claimant did not refuse to operate the machine and that he did not in fact leave the premises. These disputed factual issues will be further referred to hereafter.

In any event, Claimant was thereafter cited for formal hearing held on February 25, 1976, following which he was advised by Carrier letter of March 12 that he had been found guilty of violating Rule M810 of the Rules and Regulations and that he was suspended from service for a period of 90 days, effective March 3, 1976.

FINDINGS: In pertinent part, Rule M810 provides as follows:

"Employees must . . . remain at their post of duty and devote themselves exclusively to their duties during their tour of duty. They must not absent themselves from their employment without proper authority".

We look to the testimony at the formal hearing to resolve the contradictory factual contentions of the parties.

Foreman Madriaga testified that on the day in question Claimant was under his supervision as tamper operator; that Claimant requested permission to take his personal vehicle to the job site as he would like to leave an hour early; to which he replied:

"I said O.K. and that we would meet at the work site and see what happens".

Upon arrival at the work site, he gave the Claimant the tamper keys and explained to him "that if we had track time at 2:30, and the machine was not in the clear then, that he wouldn't be able to leave until the machine was in the clear." Claimant replied "I don't care what happens, I am going to leave at 2:30". He repeated his explanation to Claimant, but Claimant stated again "I don't care", used vulgar and offensive language, and said:

". . . if, you are not going to let me off, I'll leave right now" . . . "and some other bad words" . . . "and then he threw the keys on top of the tamper and said he was taking off and was not going to operate the machine. And, he said I don't give a damn if you like it or not and I said if you do it will be without my permission and he says he doesn't need my permission."

Mr. Madriaga then called the office and asked that Roadmaster Hall come down. That shortly thereafter extra gang Foreman Guebara arrived and took over the crew and that he (Madriaga) proceeded to operate the machine in Claimant's absence. He did not see Claimant and assumed he must have been "in the bushes . . . I imagine over by his vehicle someplace".

About an hour after he had moved the machine from MP598 to Rimlon, Mr. Hall arrived and he reported the incident to him. It appears that Claimant was still on the premises, for Mr. Madriaga did see him later on while talking to Mr. Hall; that Mr. Hall told him to have Claimant "report to the office".

On cross-examination he affirmed his prior testimony. He denied that he had "removed Claimant from service". He stated further that he had operated the machine on that day and Mr. Guebara acted as foreman.

Roadmaster Hall testified that when he arrived at Rimlon Mr. Madriaga reported to him what had occurred and related the conversation between him and Claimant, and that Claimant "threw the keys on the deck of the machine". He saw that Claimant was sitting on the machine and inquired of Mr. Madriaga, who said that "Mike Guebara put him there" and that this was contrary to his instructions. Mr. Hall then questioned Claimant and stated:

"I asked him to follow me to this office.  
John Madriaga had taken him out of service."

Mr. Hall stated further that when he asked Claimant to follow him to the office, which he did "at my request", that "this was with the understanding that he was out of service", and that this was an action in which he concurred as Roadmaster. That when he questioned Claimant, the latter related that Mr. Madriaga had at first given him permission to leave early, but then had told him there was a chance he might not get off at 2:30 and that Claimant told him he said to Mr. Madriaga "I'd just as well take the whole day off and I layed the keys on the tamper".

On cross-examination, Mr. Hall first stated that he told Mr. Madriaga to inform Claimant "that he was pulled out of service pending an investigation", but then stated that Mr. Madriaga removed Claimant from service. However, as to whether Claimant was then on the job site, he stated: "Partially correct, in my opinion his duty station was on the tamper".

On redirect examination, Mr. Hall was asked twice, and replied twice, as follows:

Mr. English: "Mr. Hall, as a result of this occurrence under investigation, on February 13, was Mr. Aceves taken out of service on that date?

Mr. Hall: "Yes, pending an investigation".

The testimony of Assistant Supervisor Smoot, a witness for Carrier, is of peripheral value since, for the most part, he merely testified as to what he had overheard. In essence, his testimony confirms that of Mr. Hall. He did testify, however, as to the importance of the tamper operator and that he was "indispensable to the operations of the entire gang"; and that it was Foreman Madriaga who had been operating the machine. He did not see Claimant do so that day, but did see Claimant "standing next to the truck". He then stated further:

"I was there when Foreman Madriaga informed Tommy - Mr. Aceves - that he was going to be cited for an investigation".

As to the exact words used by Mr. Madriaga, Mr. Smoot testified:

"As I recall, he stated out of service pending an investigation".

. . . .

"Foreman Madriaga made the decision and Mr. Hall verified the decision by informing Mr. Aceves to report to the Roadmaster's office."

The testimony of Laborer Hernandez, a witness for Claimant, was limited to the question of when Mr. Hall and Mr. Smoot arrived at the scene and does not bear materially on the basic issues of this dispute. We reach the same conclusion as to part of the testimony of Foreman Guebara since he admitted having "no direct first hand knowledge" of what had transpired. However, he did ask Claimant to operate the machine (this was at Rimlon) and he said "Sure", and that Claimant then "moved the machine to the mainline". However, he confirmed that Mr. Madriaga, not Claimant, operated the machine from MP598 to Rimlon and continued to operate it for the major part of that day. He did not hear anyone tell Claimant that he "was out of service".

Claimant testified that he "did not refuse" to operate the machine; that there was some "misunderstanding" about his leaving early; that the "first time" Mr. Madriaga did not explain anything to him, but that "the second time, the foreman explained he might not be able to give him the time off and under what circumstances". He admitted that he did "place the keys on the machine" but insisted he did not refuse to operate it; that in fact he had operated the machine that day "for above five minutes at Rimlon" but had not operated the machine from MP598 to Rimlon. He asserted further that Mr. Madriaga did not tell him that if he left his post of duty it would be without his permission.

On cross-examination he repeated that Mr. Madriaga said the first time "that I could have that hour" but that the second time he said he would "probably" not be able to do so. He then said "I would have to take the whole day", to which Mr. Madriaga replied that he was being "insubordinate and he was calling the Roadmaster". He denied using any "foul language" and that he did not "leave that area at anytime".

He stated further that Mr. Hall told Mr. Madriaga to tell him "you are fired and he told me to go to the office", and that he then accompanied Mr. Hall to his office at Indio. Further, that at no time "did he leave his post of duty" and that "I had always been there". Finally, that he was "not given a fair and impartial hearing before he was dismissed".

Mr. Madriaga was then recalled and confirmed his prior testimony. He testified further that he had "never had any previous problems with Mr. Aceves, nor had he (Claimant) ever before used any foul language against him". As to the point at which Claimant "left his post of duty without permission", he stated:

"When he said if I can't leave at 2:30, I'll leave now", and that "he actually walked away".

Mr. Madriaga was then asked:

Mr. Guerrero: "Did, or rather was Mr. Aceves on the job site on SP property until such time as he was told that he was dismissed?"

Mr. Madriaga: "I imagine so."

He was then asked to read Rule 45, and did so, and was then asked:

Q. "In this regards, Mr. Madriaga, was Mr. Aceves given a fair and impartial hearing before an officer of the Company before he was dismissed on the 13th?"

A. "Yes . . . I don't know . . . he came to the office."

We have exhaustively analysed the testimony and have compared and evaluated the statements of each of the witnesses. On that basis, we reach the following factual findings:

1. Although some leading questions were asked by the Hearing Officer, there was no prejudice to any of Claimant's rights and due process was carefully observed. Claimant was afforded ample opportunity to present his version of what had occurred and to present witnesses in his own behalf; he was vigorously represented by the Local Chairman, who was at complete liberty to cross-examine all witnesses. Additionally, witnesses not testifying were excused from the hearing room. In short, Claimant was given a fair and impartial hearing as required by the Agreement.

2. We do not concur in the contention of Petitioner that the testimony of Mr. Hall and Mr. Smoot was hearsay and therefore inadmissible. Nor do we agree that Claimant was found "guilty . . . solely on the unsubstantiated evidence of a sole witness." Firstly, in current

Award No. 3 we have cited the principle that hearsay testimony is admissible "if fairly received and properly evaluated". Secondly, in the respects that both Mr. Hall and Mr. Smoot testified to statements made by Mr. Madriaga and Claimant in their presence, their testimony does not constitute hearsay. Thirdly, the testimony of the "sole witness", Mr. Madriaga, is corroborated in essential details not only by Mr. Hall and Mr. Smoot, but also by Mr. Guebara and, most important, by the conduct and testimony of Claimant. Conversely, the testimony of Claimant stands uncorroborated, except in minor detail.

3. We acknowledge that there is sharp dispute as to the initial conversation between Claimant and Mr. Madriaga, and, also, that there are minor discrepancies as to certain time factors and exactly where Claimant was at particular times that day. Stripped of all irrelevancies, however, and based on an overall view of the testimony, the following facts are conclusively established:

a) Regardless of whether it was said the "first time" or the "second time", Foreman Madriaga did tell Claimant that he might not be able to allow him to leave early that day. And when Claimant replied that he was going to leave anyway and that he intended "to leave now", Foreman Madriaga did tell Claimant that this would be without his permission. Certainly, there was nothing Mr. Madriaga said that would, expressly or impliedly, give Claimant the impression that he had "permission to leave". In any event, and this is the crucial issue before us, there was nothing said or done by Mr. Madriaga that could conceivably be construed as giving Claimant permission to leave his post of duty and not operate the tamper machine.

b) The question of whether Claimant "placed" or "threw" the keys on the machine is of relative unimportance. The fact is that when he divorced himself from possession of the keys and walked away, he removed himself from his "post of duty" and was not devoting himself to his duties. Additionally, his statements and his conduct during and immediately following the altercation with Foreman Madriaga, are conclusive that at that time he had no intention of performing the duties of his job assignment that day. These findings are not offset

or contraverted by the fact that Claimant remained on the premises (as distinguished from his post of duty), or the fact that he operated the machine for some five minutes later on at the request of Foreman Guebara. The further fact is that Foreman Madriaga did operate the machine from MP598 to Rimlon, as well as for the major balance of that day. Claimant's "five minutes"; therefore, fades into insignificance.

4. We find further that, notwithstanding some variance in the testimony, Claimant was in fact taken out of service pending investigation. Foreman Madriaga denies that he made such statement to Claimant, although Mr. Smoot is quite firm in his testimony that he was there when Mr. Madriaga informed Claimant "that he was going to be cited for an investigation", and that the exact words used were "out of service pending an investigation". Mr. Hall is equally firm in his testimony that "as a result of this occurrence Mr. Aceves was taken out of service on that date, pending an investigation". Moreover, the final paragraph of Rule 45, subdivision (a), of the Agreement specifically authorizes Carrier "where circumstances indicate" to suspend an employee "pending an investigation". We find that such "circumstances" were present on the morning here involved, when viewed in the full light of Claimant's conduct on that day and his statements to Foreman Madriaga.

5. We are not persuaded, as contended by Petitioner, that Claimant was "dismissed" on the date in question. The evidence on this point is far from conclusive or convincing. The testimony shows that Claimant remained on the premises, operated the tamper machine for five minutes and performed other minor tasks and finally accompanied Mr. Hall to his office. Such conduct, particularly when viewed in the full context of all the evidence, belies the assertion that he was "dismissed".

We have no quarrel with the established principle cited by Petitioner that in discipline cases the burden of proof rests with Carrier, and that this burden can be satisfied only by the production of substantial evidence of probative value. We find, however, based on the record testimony and the foregoing findings, that Carrier has



sustained such burden of proof and that it has produced the required "substantial evidence of probative value". In short, that Claimant was properly found guilty of violating Rule M810.

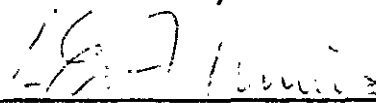
This brings us to the final contention of Petitioner that the penalty here imposed, ninety days suspension, was "arbitrary, unjust and in abuse of discretion". We are impressed at this point with the fact that Claimant has been in Carrier's service for some 20 years and that the record before us is devoid of any evidence of any prior disciplinary infraction during this entire twenty year period. Additionally, that Foreman Madriaga testified that he had "never had any previous problems with Mr. Aceves, nor had he ever before used any foul language against him".

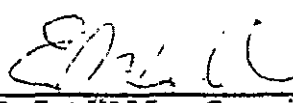
We are compelled to the conclusion, therefore, that the penalty of ninety days suspension with consequent loss of pay is unduly harsh and unreasonable in the circumstances of this dispute. We would consider that a sixty days suspension is adequate discipline when measured against the offense committed and the extenuating circumstances present in this record.

Accordingly, we will sustain the claim in the limited respect above indicated. Carrier shall reimburse Claimant for any straight time loss of earnings in excess of sixty (60) days, commencing March 3, 1976, such payment to be made within thirty (30) days of receipt by Carrier of this Award.

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

  
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LOUIS NORRIS, Neutral and Chairman

  
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S.E. FLEMING, Organization Member

  
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E.J. HALL, Carrier Member

DATED: San Francisco, California  
January 6, 1977