PUBLIC LAW BOARD NO. 1838

Award No. 81

Case No. 81
Carrier File MW-PO-81-52

Parties to Dispute: Brotherhood of Maintenance of Way Employes and Norfolk and Western Railway Company

Statement of Claim: Employes R. L. Prince and Albert Ferguson were discharged on September 15, 1981, at 11:15 a.m. account of allegedly refusing to operate unsafe crane. After formal investigation held on October 19, 1981, the discharge was reduced to 60 day suspension. Employes request Mr. Prince and Mr. Ferguson be reinstated and paid for all time lost.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 1, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

On September 15, 1981, Claimants Ferguson and Prince were assigned as operator and helper on Truck Crane No. 19012 at Martiki, Kentucky. On said date Claimants, under the supervision of Assistant Roadmaster Varney, were instructed to move the truck-crane from Martiki to Williamson, W. V., a distance of approximately twenty-five (25) miles.

Claimants allege that the machine was not safe, asked for and were granted permission to contact their union representative, and returned to their supervisor and again, while not directly stating that they were refusing the assignment, stated that they would not operate the crane because it was not in a safe condition, discussing the particulars

thereof with Mr. Varney. As a result of their response Claimants were instructed that they were dismissed from Carrier's service.

Pursuant to a request under Rule 33 of their schedule, Claimants requested, and were given, a hearing that was held on October 19, 1981. As a result thereof Claimants were assessed sixty (60) days actual suspension. From that suspension they appeal.

There is no dispute in the facts. Claimants, while not actually articulating a refusal, made it patently clear that they were not going to undertake the movement of the crane in question, alleging a long and substantial list of safety defects, including, but not limited to, no windshields or side windows, no door handles that properly secured the doors in place, no head lights, no brake lights, defective accelerator, a tendency for the gear level to pop out of gear, to mention a few.

Carrier, for its part, had made a cursory inspection of the unit, determined that it could be moved over the highway with safety. To insure a safe passage Carrier had made arrangements for a "pilot" truck to proceed in advance of the truck-crane, and a follow-up unit to protect the rear-end of the crane. As further proof of the safe ability of the unit in question to traverse the distance intended,Carrier points to the uneventful trip that was subsequently made by other Employes after Claimants' refusal to participate in the move. Carrier argues that an employee cannot be permitted to refuse to perform work which is part of the normal duties of his class or craft. Carrier asserts that an employee's refusal to obey instructions of his supervisor is a serious matter and that it would be impossible for Carrier or any other company to maintain a sound and efficient operation if every employee,

or any employee, is permitted to decide for himself what work of his class or craft he will perform or when he will perform it.

Carrier avers that Claimants were charged with their refusal to perform the work assigned to them by their Supervisors, the record readily demonstrates that Claimants were given direct instructions to move truck-crane No. 19012 from Martiki, Kentucky to Williamson, W. Va., a distance of approximately twenty-five (25) miles, and that they refused to do so based upon their own determination that the machine would not safely make the trip, as well as the advice given to them by their union representative. Carrier asserts that it took every precaution to insure the safe movement of the truck-crane to minimize any risk to the public or to Claimants.

Organization, on behalf of Claimants, candidly admits Claimants refusal to carry out their instructions. However, they assert, by way of defense on behalf of Claimants, that for Claimants to have complied with their instructions would have put them in contravention of state laws, in violation of the company's own rules, and caused the employees to create a known hazard to the public, as well as jeopardize their own safety. In support of that position Organization points to the uncontroverted testimony in the transcript which demonstrates that truck-crane No. 19012 had:

> No headlights; no taillights; no windshield wipers; no door glasses; no mirrors; no makers; no flares; no fire extinguishers; no parking lights; no turn signals; no brake lights; a sticking throttle, and no state permit to travel on the highway."

Additionally, they emphasize Carrier witnesses testimony that the truck-crane had previously been scheduled to move from the location involved in the instant claim to Ohio, but Carrier deferred the move

because the truck-crane was not suitable to move over the highway. They underscore the witness of a Carrier mechanic to the effect that he had inspected the truck-crane several weeks before this incident to determine what were necessary repairs, that the mechanic had ordered the replacement parts, but as of the date of the incident, which resulted in Claimant's suspension for sixty (60) days, none of the parts had been sent to, or placed on the truck-crane.

Organization argues that Claimants were required to comply with all of Carrier's rules and regulations and safety requirements. Amongst those safety requirements Organization points to those reflected in Form MM-158 which in pertinent part reads:

> "Vehicles must always be operated at a reasonable and safe rate of speed with due regard for existing speed regulations, traffic, weather, road, vehicles and other existing conditions. Vehicles will not be operated in a careless or wreckless manner. Drivers will be responsible for familiarizing themselves with traffic ordinances of the area in which they travel. The driver shall be solely responsible for all fines imposed and/or time lost when convicted of any traffic violation."

According to Supervisor Varney's own testimony, while the Carrier may have agreed to responsible for any and all fines, in the event of a traffic citation, there was no way that the Carrier could reimburse a man for points assessed against his license or the loss of his license, if any. Supervisor Varney acknowledged that Carrier was not complying with all of the requirements of Form MM-158.

The weather conditions at the time the Claimants reported for duty and were given the within assignment were a light misting rain. Form MM-158 required, in pertinent part, that:

> "Headlights must be turned on when the driver is unable to see a person or object 500 feet ahead of his vehicle. Also they must be used when visibility is restricted due to rain, fog, and so forth."

Claimants testimony was never seriously contradicted throughout the hearing. Claimants were familiar with the machine, both having operated it at various times in the preceding weeks, the condition of the machine, although mechanically operable, failed to meet any of the minimal requirements that are universal in virtually every state - windshields, windshield wipers, headlights, brake lights, doors that securely close, etc.

Carrier, for reasons of its own, elected to move the vehicle from where it was to another point over public highways, albeit, lightly travelled ones. Claimants were faced with a conundrum not of their own making: to comply they would have violated state laws risking assessments of points, or possible loss of license; failing to comply with Carrier's instructions, they risked discipline or dismissal.

Carrier placed Claimants in an unreasonable and unconscionable position. We wholly agree and support Carrier in its contentions that workers cannot be permitted to pick and choose amongst the various duties of their respective assignments. However, such was not the case here. Carrier knew the condition of the vehicle, knew it was not in compliance with minimum state safety laws for vehicles passing over public highways. Even though Carrier may have took extra pains to minimize the risks of injury or accident, nonetheless, to have disciplined Claimants for failing to knowingly violate a state law was unreasonable at the very least.

Therefore, we must conclude based upon the facts set forth in this record that the Claim will be sustained.

AWARD: Claim sustained.

ORDER: Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.

Bryce Hall, Employee Member

J. A. Abbatello, Jr., Carrier Member

A. Thomas Van Wart, Chairman
and Neutral Member

Issued at Salem, New Jersey, March 26, 1984.