

PUBLIC LAW BOARD NO. 2206

AWARD NO. 38

CASE NO. 48

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Burlington Northern, Inc.

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The fifteen (15) day suspension of Section Foreman A. Coronado and Sectionman R. L. Tufford from October 13 to October 27, 1978, was without just and sufficient cause. (System File P-P-412C0
- (2) That Section Foreman A. Coronado and Sectionman R. L. Tufford be paid for all time lost and their records cleared.

OPINION OF BOARD:

In July 1978 Claimants were performing track repair work near Snake River, Washington. In the performance of that work they operated a gasoline-powered gear-driven motor car which weighed about 1200 pounds. After arriving at the siding at approximately 6:45 AM on July 26, 1978, Claimant Coronado moved the motor car, tested its brakes and then instructed Claimant Tufford to gas the vehicle and then secure it at the siding until Train No. 182 had passed by. In the mean time, Coronado walked some 200 yards away to talk with two welders who also were setting up to work on the same section.

According to the lineup obtained earlier by Coronado, Train No. 182 was due at Snake River at 7:05 AM, but Coronado determined from telephone conversations with the Yard Telegrapher that the train was running late. At about

7:45 AM Tufford took the motor car onto the main line to the nearest convenient gasoline pump, fueled the car and then took the car past the fouling point to a position about 120 feet from the main line where he parked it. According to his testimony, Tufford left the motor car parked in gear, set the handbrake and draped a small chain across the track to "chuck" the wheel. He then left the motor car unattended and went to the bunk house, out of sight of the motor car, where he picked up his lunch before returning to the motor car.

At approximately 8:30 AM Train No. 182 came past the siding at a speed of approximately 40 miles per hour (although the area was restricted to 35 miles per hour). As the train went past the siding, the motor car somehow traveled eastward approximately 120 feet on an uphill grade and smashed into the rear end of the train, causing the caboose to go into an air emergency. Inspection immediately after the accident showed that the motor car was nearly demolished but it was in gear with the handbrake set. Marks on the track and wheels indicated that the motor car had slid, over the chain draped over the track, with the wheels locked and continued to slide until it struck the train.

Following the incident, Claimants Coronado and Tufford, as well as the welders who had been at the scene and the train crew, all received a Notice of Hearing reading as follows:

Attend investigation in the Assistant Superintendent's Office, Pasco, Washington at 9:00 a.m., Wednesday, July 26, 1978, for the purpose of ascertaining the facts and determining your responsibility in connection with Motor Car BN 753237 being heavily damaged when Train #182, Extra 6467 East passed the East end of the siding at Snake River, Washington, MP 256.7 about 8:35 a.m., July 18, 1978.

After the hearing, Coronado and Tufford received notices of discipline dated October 13, 1978, as follows:

Mr. A. Coronado
Section Foreman

This is to advise you an entry is being placed upon your personal record and you are being suspended from the service of Burlington Northern Inc. from October 13, 1978 to October 27, 1978 inclusive for violation of Maintenance of Way Rules 64 and 712 for failure to ensure motor car in your charge was properly secured and failure to observe and inspect passing train resulting in movement of unattended motor car on siding striking moving train at siding switch causing damage to equipment while working as foreman about 8:35 A.M., July 18, 1978, at Snake River, Washington as disclosed by investigation accorded you September 13, 1978.

Please acknowledge receipt by affixing your signature in space provided on copy of this letter.


D. G. Anderson
Trainmaster


cc: Mr. S. R. Walster
Mr. J. A. White

* * *

Mr. R. L. Tufford
Laborer

This is to advise you that an entry is being placed upon your personal record and you are being suspended from the service of Burlington Northern Inc. from October 13, 1978 to October 27, 1978 inclusive for violation of Maintenance of Way Rules 64, 74, and 712 for failure to properly secure motor car and failure to observe and inspect passing train resulting in movement of unattended motor car on siding striking moving train at siding switch causing damage to equipment while working as laborer about 8:35 A.M., July 18, 1978, at Snake River, Washington as disclosed at investigation accorded you September 13, 1978.

Please acknowledge receipt by affixing your signature in space provided on copy of this letter.


D. G. Anderson
Trainmaster

cc: Mr. S. R. Walster
Mr. J. A. White

The Organization filed the present claim alleging both procedural and substantive bases for reversing the disciplinary action. The claim was denied at all levels of handling and finally appealed to this Board.

At the outset, we concur with the Organization that Carrier violated the notice and due process requirements of Rule 40 by finding Claimants guilty and assessing discipline for alleged violations of Rule 712 for "failure to observe and inspect passing train". The hearing notice cannot reasonably be construed to specify any such charge, but rather connotes to any reasonable person an allegation of negligence as proximate causation of the damage to the motor car. On that point, we find persuasive the reasoning of Award 3-14778, as follows:

We are aware that a hearing within the contemplation of Rule 69(a) is not attended by the technicalities of a criminal proceeding or even a civil proceeding in a court of record. We make the comparison only to illustrate the common understanding of due process. No man can defend himself against a charge to him unknown. Certainly, it is not due process to shovel anything and everything into a record and leave to the uninhibited hearing officer finding what misconduct he feels the employe has committed. Issue must be joined before hearing.

The record in this case demonstrates the ill of lack of due process. Here the Claimants were found guilty of not complying with instructions in Chief Engineer's Circular No. 81. They were not charged with such malfeasance. Even during the hearing they were not advised that they were being so charged which would have afforded them opportunity to move for the protection of their rights. Consequently, they were denied the indispensable due process right to prepare and present their defense to such a charge. From our study of the transcript of the hearing and the notice giving rise to it we are persuaded that Claimants were not on notice, real or constructive, that they were being tried for violation of Circular No. 81. We, therefore, will sustain paragraphs (a) and (c) of the Claim." (Underscoring added)

Accordingly, to the extent that the fifteen (15) day suspensions were premised in part upon an invalid finding of a violation of Rule 712, they must be reduced.

In addition to the rejected finding of culpability on Rule 712, Carrier also based the fifteen (15) day suspensions upon findings that Claimants had failed to comply with Rules 64 and 74, as follows:

"64. Track cars or on-track equipment shall not be operated while a train is passing on an adjacent main track. Equipment shall be stopped, secured against moving and all persons shall be clear of tracks.

74. Track cars or on-track equipment must not be left standing unattended on main track or siding if line-up indicates trains are in the vicinity. When not in use such equipment must be clear of passing trains, secured to prevent movement and when not in sight, must be locked. Trains may be run through a controlled siding without warning."

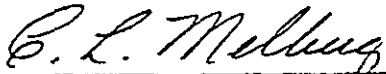
We are of the opinion that the Notice of Hearing supra fairly comprehended a charge of negligence in the securing of the motor car, thus bringing Carrier's Rules 64 and 74 properly within the ambit of the proceedings. Moreover, with respect to Tufford, the evidence does support a conclusion that he failed to do everything required by Rule 74 to secure the vehicle while it was out of his sight. In that connection, the hearing transcript clearly establishes by

his own admission that he failed to "lock" the motor car in the required manner while it was out of his sight. (See transcript Q and A #499-504.) The record establishes that Rule 74 requires, and Claimant knew, that "locking" meant running the chain through the wheels under the track and securing the chain. Instead, Tufford merely draped the chain across the track as a chuck against the wheels. From the evidence of record we must find that Carrier was not arbitrary or unreasonable in concluding that Claimant had not properly locked the vehicle before leaving it and that this negligence was a contributing factor in causing the accident. We shall not set aside the discipline of Claimant Tufford but, to the extent it was premised upon an invalid finding of a Rule 712 violation, it must be reduced. In the circumstances, we deem a ten-day suspension appropriate for the proven violations of Rule 74 and we shall so order.

With respect to Claimant Coronado, we are not persuaded that he was culpable for the failure of his subordinate to comply with the locking requirements of Rule 74. So far as the record shows, Coronado instructed Tufford, an experienced and presumably capable motor car operator, to fuel the motor car and secure it on the siding. Tufford's negligence in leaving the vehicle unattended and unlocked while he went to the bunk house cannot fairly be imputed to the relief Foreman who was otherwise occupied on Carrier's business. In our judgment, Carrier was arbitrary and unreasonable in holding Coronado equally culpable for the dereliction of Tufford. Accordingly, the fifteen (15) day suspension of Coronado is set aside because of the invalid Carrier finding that he violated Rule 712 and the failure of proof to show that he violated Rules 64 and/or 74.

AWARD


Claim sustained in part and denied in part as indicated in the Opinion. The penalty of a fifteen (15) day actual suspension against Claimant Tufford shall be reduced to a ten-day actual suspension. The penalty of a fifteen (15) day actual suspension against Claimant Coronado is reversed. Carrier shall compensate Claimants and adjust the personnel records in accordance with this Award and Opinion within thirty (30) days of issuance.



C. L. Melberg, Carrier Member



F. H. Funk, Employee Member
Dissenting To Tufford Discipline


Dana E. Eischen, Chairman

Date: 9/24/81