

PUBLIC LAW BOARD NO. 3558

PARTIES)
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
 SOUTHERN PACIFIC TRANSPORTATION COMPANY
 EASTERN LINES

AWARD

STATEMENT OF CLAIM:

"1. Carrier violated the effective Agreement when San Antonio Division Machine Operator M. E. Arredondo was unjustly suspended from service from May 19 through May 30, 1986.

2. Claimant Arredondo shall now be paid for 80 hours at his respective straight time rate of pay and his record cleared of the charge account of him being unjustly suspended from service from May 19 through May 30, 1986." (MW-86-95)

OPINION OF BOARD:

At the time of the incident involved in this matter, Claimant, a Machine Operator, had approximately seven years of service. By letter dated May 14, 1986, Claimant was suspended for ten days after his involvement in a collision wherein Claimant stopped his ballast regulator and attempted a reverse movement and allegedly failed to acknowledge radio communications in violation of Rules 508 and 964. After investigation held on June 25, 1986, and by letter dated June 30, 1986, the Carrier affirmed the disciplinary action.

On April 29, 1986, near the west switch at Strobbel, Foreman D. S. Elizondo, Jr. was experiencing tamper trouble at approximately mile post 602.40. At the time of the difficulty, a work train was arriving at Strobbel from Altuda. General Production Supervisor D. F. Kocian asked the dispatcher for an extension of tracking time until 5:30 p.m. to permit Elizondo to complete resurfacing the bad portion of a curve. At approximately 5:05 p.m., Elizondo called Kocian on the radio and told Kocian that he was

not ready to come in. Kocian instructed Elizondo to make sure the the crew did not go past mile post 602 since the work train was switching over the west switch at Strobbe.

Elizondo testified that he called Claimant, who was operating Ballast Regulator 170RD, on the radio and told him to stop at mile post 602 because of the switching work train.

Elizondo further testified that although responding to calls made earlier in the day, Claimant did not respond to this call until the third attempt made by Elizondo. Further, according to Elizondo, when Claimant did acknowledge the call, Claimant replied that he was beyond mile post 602 and was in the vicinity of mile post 601.80. According to Kocian, he heard Elizondo tell Claimant not to go past mile post 602. Further, according to Kocian, he did not hear Claimant reply to Elizondo's instruction.

Immediately following Claimant were Machine Operator J. A. Montez and Assistant Foreman J. F. Alcaraz in Tamper 238RD. Following Tamper 238RD was Tamper 237RD operated by Machine Operator E. Hernandez. Tamper 238RD was not equipped with a radio at the time of the incident due to Elizondo's earlier removal of the radio from that tamper.

According to Montez, Elizondo gave a thumbs up signal which meant that the equipment was to proceed into the clear and not to stop at any particular mile post. According to Hernandez, the only communication he received was the thumbs up signal from Elizondo and he did not hear instructions over the radio concerning where Claimant should stop. Elizondo testified that he did not recall giving the thumbs up signal, but did testify that when he gives that signal, the signal means to get in the clear. On the day of the incident, the location to get clear was the siding at Strobbe.

According to Claimant, he had no instructions to stop at mile post 602 prior to his passing that location. Claimant testified that at the time he received the instruction to stop at mile post 602, he was already at mile post 601.70 for a period of five minutes. Claimant further testified that he responded "OK" to the radio call and started heading back in the other direction consistent with the instruction given to him by Elizondo. Claimant testified

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that he knew that the other machinery was following him, but did not know if they had been instructed to stop as he was. When Claimant started back, he had no visual sight of the oncoming tamper until he moved approximately 3/4 of a pole and saw Tamper 238RD proceeding towards him. Claimant tried to shift to another gear and go in the opposite direction but was unable to get the ballast regulator out of high gear. Claimant testified that he could not give a hand signal because he was busy trying to get his ballast regulator to move in the opposite direction so as to avoid a collision.

Claimant's ballast regulator collided with Tamper 238RD operated by Montez (and not 237RD as alleged in the charge). Due to a curve (described by Montez as "blind") near the site of the collision, approximately 150 and 200 feet of visibility existed between Claimant's ballast regulator and Tamper 238RD. According to Montez and Alcaraz, Claimant's ballast regulator was moving towards their tamper and there was not enough time for their tamper to stop. Montez applied his brakes to no avail since there was grease on the rail and his tamper slid.

Although there were no injuries in the accident, there was approximately \$7500 in equipment damage. According to Elizondo, Alcaraz, and Claimant, if Tamper 238RD had been equipped with a radio, the accident would not have occurred. Montez testified that if he had a radio on his tamper, the likelihood of the collision occurring would have been less.

Montez received 40 demerits for his involvement in the collision. According to Elizondo, in the past, Claimant has been a reliable machine operator.

Close review of the record satisfies us that the Carrier's burden of demonstrating substantial evidence to support the disciplinary action has not been met. Clearly, a breakdown in communication occurred which we cannot find was attributable to Claimant. The situation presented is one where Elizondo instructed Claimant to stop at mile post 602 which Claimant had already gone beyond necessitating Claimant to back up while at the same time the tamper operators were under the impression (either correctly or incorrectly)

that they were to proceed into the clear as a result of a thumbs up signal thereby causing the tampers to proceed towards Claimant's oncoming ballast regulator. Montez' tamper and Claimant's ballast regulator met at a sharp curve with somewhat limited visibility. Montez' efforts to stop were hindered by the limited visibility caused by the terrain and grease on the track. Claimant, on the other hand, could not get his equipment out of gear. With the above, coupled with the fact that Montez' tamper did not have a radio at the time of the clearing instruction given to the tampers and the instruction given to Claimant to stop at a point that he already passed (which conceivably could have been detected by Montez and Alcaraz if they had a radio on Tamper 238RD), the resultant collision was inevitable. Therefore, we cannot find sufficient basis in this record to place blame on Claimant for the collision.

With respect to the specific allegation against Claimant that he did not properly acknowledge Elizondo's radio communication, we note that the charge states that Claimant failed to acknowledge "any" radio communications. Yet, Elizondo admitted that Claimant ultimately *did* acknowledge the radio call, albeit on the third attempt made by Elizondo. Thus, the charge as framed in this regard has not been substantiated. Moreover, there is insufficient evidence in this record for us to conclude that Claimant, in fact, received the first two calls and thereby did not acknowledge those calls within the meaning of Rule 508. The fact that Claimant acknowledged earlier calls during the day does not establish that he improperly failed to acknowledge the first two stopping instructions given by Elizondo.

With respect to Claimant's failure to signal as a result of his reversing movement back towards mile post 602 in alleged violation of Rule 964, under the unique circumstances of this case, we cannot ignore the futility of any act of signaling by Claimant. A radio signal by Claimant would have been futile since Montez' tamper did not have a radio and Claimant had just received an instruction that caused him to proceed in reverse towards mile post 602 (a fact known by Elizondo since Elizondo testified that when Claimant ultimately acknowledged his radio calls to stop at mile post 602, Claimant stated

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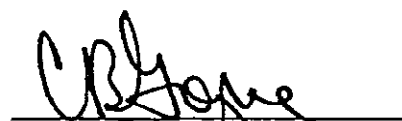
that he was already beyond mile post 602 and was in the vicinity of mile post 601.80). Further, manual signals by Claimant would have also proved futile since Montez and Alcaraz would not have seen those signals sufficiently in advance due to the terrain and the grease on the track. In addition, at the point the tamper and the ballast regulator came within sight of each other, both operators began making furious efforts to stop their respective equipment and any signaling would have taken Claimant away from his primary efforts to stop his vehicle.


We must therefore sustain the Claim. In light of the above, it is unnecessary for us to address the Organization's arguments that the charges were inaccurate and thereby fatally defective due to the reference to the wrong tamper involved in the collision and that Claimant was treated differently than Montez in the assessment of the amount of discipline.

AWARD:

Claim sustained. The suspension shall be rescinded and expunged from Claimant's record and Claimant shall be compensated for time lost.


Edwin H. Benn, Chairman
and Neutral Member


C. B. Goyne
Carrier Member


S. A. Hammons, Jr.
Organization Member

Houston, Texas
October 23, 1987