

**PUBLIC LAW BOARD NO. 3558**

<b>PARTIES</b>	)	<b>BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES</b>
<b>TO</b>	)	
<b>DISPUTE</b>	)	<b>SOUTHERN PACIFIC TRANSPORTATION COMPANY</b>
		<b>EASTERN LINES</b>

**AWARD**

**STATEMENT OF CLAIM:**

"1. Carrier violated the effective Agreement when Assistant Track Foreman D. W. Scott was unjustly demoted to the position of track laborer.

2. Claimant Scott shall now be reinstated to his former position of Assistant Track Foreman with his record cleared of alleged violation of Carrier Rules A, 607 (1) and (2) and Rule 1051 in addition to the difference in rate of pay between an assistant track foreman and a track laborer commencing October 3, 1986, and to run concurrently until Mr. Scott is restored to the position of Assistant Track Foreman." (MW-86-138)

**OPINION OF BOARD:**

At the time of the incident giving rise to the claim, Claimant held the position of assistant track foreman. Claimant has been employed by the Carrier since September 1978. As a result of charges dated September 19, 1986, investigation held September 25, 1986, and by letter dated October 1, 1986, Claimant was disqualified as an assistant foreman and demoted to track laborer because of events leading to the overturning of a crane.

On September 15, 1986, the regular foreman on system gang 35 was not present and Claimant was in charge of replacing a road crossing at 23rd street in downtown Bryan, Texas. The work required the use of a crane. At approximately 8:45 a.m., in the process of removing a track panel consisting of two rails and twenty ties, the crane (which is rated for a seven and one-half ton load capacity and which could handle the load involved herein), which was operated by machine operator D. K. Taylor, turned over and sustained damage of between \$6,000 and \$8,000. Taylor testified that the crane turned over after he

picked up the panel and was moving down the track to set the panel down while keeping the boom of the crane low in order to avoid overhead power lines. As a result, the panel was about twenty four inches off the ground. During this process, Taylor was receiving instructions and signals from Claimant. Taylor testified that he and not Claimant was responsible for turning over the crane because he had the boom too loaded to handle the load of the panel on the side of the crane.

Claimant testified that he was given instructions by his supervisor as to where the panel was to be placed. Claimant further testified that he was merely following the instructions of his supervisor but could have moved the panel in another manner and in a safer fashion as follows:

[Q] You stated earlier that the panel could have been moved in another manner and been done in a safe condition. Would you explain to me how this could have been done?

[A] Panel could have been moved by the crane picking it up, setting it on the rail and let the front end loader come down and push it off.

[Q] Did you not have authority to have this done?

[A] The front end loader was broke down.

[Q] How long was it after that the front end loader had been fixed that morning?

[A] I would say about 12:30 or 1.

[Q] Could the backhoe that you had there on the job site done the same thing?

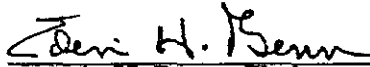
[A] Maybe. Maybe it could.

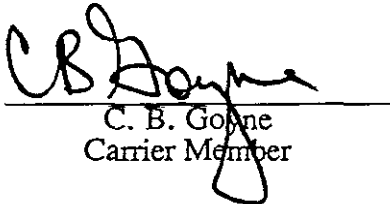
The question presented concerns the Carrier's determination that Claimant did not have the requisite fitness and ability for the assistant track foreman's position. Clearly, as the assigned foreman on September 15, 1986, Claimant had responsibility for the safe operation of the crane under his supervision at a time that he was giving instructions to the crane operator. Inasmuch as the crane turned over while under Claimant's direct supervision, we find the Carrier's determination is supported by the record and we cannot say that the Carrier's determination was either arbitrary or capricious, especially where Claimant acknowledged that there were safer ways of performing the work.

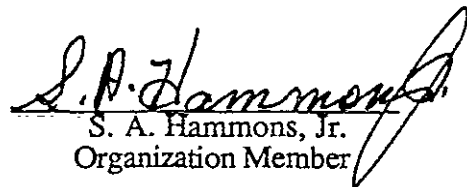
However, we do feel that extenuating circumstances exist so as to preclude a permanent disqualification from the assistant track foreman's position. Specifically, Claimant was under quite direct instructions from his supervisor concerning the placement of the panel; the overhead power lines proved to be an obstacle; the machine operator acknowledged responsibility for the incident and alternative methods of moving the panel through use of the front end loader or backhoe may have delayed the process in that the front end loader was not operating at the time of move and the backhoe was scheduled to perform other work in relation to completing the installation of the crossing. Considering those mitigating circumstances and further considering that the record does not demonstrate that Claimant had similar problems in the past and balancing those factors against the responsibility that a foreman has concerning the safety of his crew, we believe that in this case, Claimant's seniority as an assistant track foreman should be restored but he should not receive compensation for the time that he was disqualified from that position.

**AWARD:**

Claim sustained in accord with findings. Claimant's seniority as an assistant track foreman shall be restored but without compensation for time lost.

  
Edwin H. Benn, Chairman  
and Neutral Member

  
C. B. Gojane  
Carrier Member

  
S. A. Hammons, Jr.  
Organization Member

Houston, Texas  
August 31, 1988