

PUBLIC LAW BOARD NO. 3836

In the Matter of the Arbitration Between

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES

-and-

SOUTHERN PACIFIC TRANSPORTATION
COMPANY (WESTERN LINES)

Case No. 3: Appeal of Track Laborer A.A. Nasser from
discipline by suspension for ten (10)
working days.

PREFACE

Public Law Board No. 3836 was established pursuant to the provisions of the Railway Labor Act, as amended by Public Law 84-456 and, that certain Agreement entered into by and between the parties at San Francisco, California, April 11, 1985. The jurisdiction of PLB 3836 is confined to appeals involving disciplinary actions of six (6) months or less. In deciding whether the discipline assessed should be upheld, modified or set aside, the Board must decide:

1. whether there was compliance with the provisions of Rule 45 of the parties' collectively bargained agreement;
2. whether substantial evidence was adduced at the investigation(s) to prove the charge(s) made;
3. whether the discipline assessed was "excessive."

The Board's Awards shall contain only the Neutral Chairman's signature and copies of the Awards shall be furnished to each party.

BACKGROUND

On April 11, 1985, at approximately 7:10 A.M., Nasser sustained an "acute back sprain" (TR-9) while assisting in the positioning of a "liner buggy." He was examined by a physician who prescribed "some medication." Nasser performed no further work on April 11, and did not report for work on April 12.

On April 15 he requested further medical attention which was provided.

Nasser reported to District MW Manager Gutierrez on April "16 or 17" and proffered a "return to duty" authorization issued by one Bala C. Marar, M.D. (TR-10) Marar authorized Nasser to return to work, restricted to "Light duty - no pushing - pulling - lifting or carrying above 30 lbs until April 29, 1985." (Arbitrator's underlining) However, Nasser was not permitted to return to work "... because he was pulled out of service on April 12...." (TR-10)

By "charge letter" dated April 12, 1985 Regional MW Manager Hernandez instructed Nasser to attend a hearing April 19, 1985 "in conjunction (sic) with your carelessness and un-attentiveness (sic) while assisting in lifting and placing - front buggy liner - on April 11, 1985... which may be in violation of portions of Rule M - and 801...." (TR-1)

Regional Engineer J.T. Hall conducted the April 19 hearing, and by letter dated April 29, Hall advised Nasser as follows:

"After reviewing all testimony from the transcript of hearing held April 19,

1985, am convinced that it clearly established your carelessness and unattentiveness while assisting in lifting and placing on the rail, front buggy for track liner in vicinity of MP 77.2 at Davis, California, on April 11, 1985 at approximately 7:10 AM, which is in violation of portions of Rules M and 801 of the Rules and Regulations for the Maintenance of Way and Structures which reads as follows:

Rule M, which reads in part:

'Carelessness by employees will not be condoned and they must exercise care to avoid injury to themselves or others...'

Rule 801, which reads in part:

'Employees will not be retained in the service who are careless of the safety of themselves or others...'

'Any act of...negligence effecting the interest of the Company is sufficient cause for dismissal...'

For the reasons stated above, you are suspended from the service of the Southern Pacific Transportation Company for ten (10) working days which will expire on April 30, 1985, and you may return to work on Wednesday, May 1, 1985...." (Arbitrator's underlining)

Only Nasser and Liner Operator Hector Acevedo were present at the scene when the incident which gave rise to the issue at Bar occurred.

Nasser testified on his own behalf.

Acevedo testified with the assistance of District MW Manager P.C. Gutierrez who acted as interpreter for Acevedo. (TR-14)

Summarized, Acevedo testified:

1) That; Nasser and he routinely, each day, lifted the

track liner buggy and placed it upon the track. (TR-14)

2) That; Nasser did not complain about his back "...until after we put it on top of the track...." (TR-14) (Arbitrator's underlining)

3) That; when lifting the buggy he was on one side and Nasser on the other side. (TR-15) (Arbitrator's underlining)

4) That; he only saw Nasser "bend over and did not see him use his legs to pick up...." (TR-15) ^{1/}

On Cross Examination by Division Chairman Llamas, Acevedo

1) Described the "shoulder" as having been at a "slope" with "loose gravel." (TR-16) (Arbitrator's underlining)

2) Llamas: "...How can you see him when he lift his side of the buggy...the way he bend over...?"

Acevedo: "...He was lifting one end and I was lifting the other end...face to face...." (TR-16) (Arbitrator's underlining)

Acevedo was recalled by Hall following Nasser's testimony. The following colloquy took place:

Hall: "...I have one more question...or two really. When lifting the buggy to put it on the rail - were

^{1/} Hall requested Acevedo to demonstrate how he observed Nasser "pick up the liner buggy." Hall described Acevedo's demonstration as follows:

"...Mr. Acevedo bent over from the waist with very little bend to his legs...with his back parallel to the ground ...which is an improper way of lifting." (TR-15) (Arbitrator's underlining)

you going backward up the shoulder to the track?"

Acevedo: "No."

Hall: "Were you going sideways."

Acevedo: "Sideways." (TR-22)

(Arbitrator's underlining)

Summarized, Nasser testified:

1) He performed the prescribed or recommended back exercises (see Employer Ex. B) before commencing work on April 11.

(TR-17)

2) That; he had previously lifted "this line buggy before." (TR-17)

3) That; in the immediate area where he was working "There was a lot of loose gravel and a high shoulder." (TR-17)

4) Asked if he could see there was loose gravel and why they didn't "...move it up toward the side of the rail where you [Nasser] could get on top of the ties on level footing and put the buggy on top of the rail...", Nasser responded, "There was no other way to move it. We had to lift it from the ground in order to get it on the rail." (TR-18) (Arbitrator's underlining)

5) That; his back first started bothering him when he was carrying the buggy - "...the loose gravel kind of moved and I jerked a little bit. It was not when I lifted the buggy...it was when I was moving toward the track the loose gravel moved."

I put the buggy down and that is when I felt the pain." (TR-18, 19,20) (Arbitrator's underlining)

6) As to the manner in which he was walking Nasser responded to Hall's inquiry as follows:

Hall: "...If you were walking forward toward the track does this mean Mr. Acevedo was walking backwards up the same slope?"

Nasser: "Yes Sir."

DISCUSSION:

To dispose of this appeal I must determine:

First, whether Rule 45 of the parties' collectively bargained agreement has been complied with.

Rule 45 mandates "employees...shall not be disciplined without first being given a fair and impartial hearing before an officer of the Company (who shall be other than the one preferring the charge)."

Although Regional Engineer J.T. Hall did not sign the Nasser "charge letter" (his subordinate, Regional MW Manager Hernandez performed that ministerial function), Regional Engineer Hall controlled every other facet of the matter at Bar.

Regional Engineer Hall conducted the Hearing in which role, Hall aggressively prosecuted Nasser.

Regional Engineer Hall evaluated the "testimony from the

transcript."

Regional Engineer Hall found Nasser guilty as "charged."

Regional Engineer Hall pronounced the sentence - a suspension for ten (10) working days without pay.

This PLB lacks the authority, and this Arbitrator has no desire, to instruct these parties concerning the conduct of their contractual relationships. Suffice it to say, however, that, in the judgment of this Arbitrator, it is contrary to the concept of fairness and impartiality for one Employer Representative to act as the "De Facto" Accuser, the Prosecutor when conducting the "Hearing", the Evaluator of the evidence adduced at the "Hearing", and Dispenser of the punishment to be imposed upon the accused employee.

This situation is made particularly pertinent when one considers the closeness of the employer-employee relationship between Hall and Nasser.

Second, did the Employer adduce "substantial evidence" that Nasser was injured due to his "carelessness and inattentiveness."

This is a disciplinary matter, and, therefore, the obligation to prove by "substantial evidence" that Nasser was "careless and inattentive" rests with the Employer. Said differently, the Employer must prove by "substantial evidence" that Nasser was "careless and inattentive" - Nasser did not have to prove he was not "careless and inattentive."

Nasser categorically denied he had been "careless or inattentive." Nasser avered without contradiction that:

"I was walking towards the track and when I carried the buggy the loose gravel kind of moved and I jerked a little bit.

It was not when I lifted the buggy - it was when I was moving toward the tracks the loose gravel moved.

I put the buggy down and that is when I felt pain." (TR-18)

Nothing in the record refutes this statement. In fact, Acevedo testified:

"It wasn't until after we put it on top of the track that he [Nasser] complained about his back." (TR-14)

Turning now to Acevedo's testimony:

Whenever it is necessary to employ the services of an Interpreter in a disciplinary proceeding there are potential problems. The meaning of words and phrases frequently change due to inflection - or dialects. Thus, it is incumbent upon an Arbitrator to be extremely cautious in evaluating the testimony of any witness presented through an Interpreter, and particularly, as here, when one is dealing with the unsworn testimony of an adverse witness. However, since the Union did not interpose any objection to Gutierrez's role, I have accepted his interpretation of Acevedo's testimony as having been accurate. Nevertheless, Acevedo's testimony must, at best, be considered as having been ambivalent.

At TR-15 Acevedo testified that, when lifting the buggy

he was on one side and Nasser on the other. At TR-16 Acevedo testified Nasser was lifting one end and I was lifting the other end "face to face." However, at TR-22 Acevedo testified he was walking "sideways," which probably means he was on one side and Nasser on the other as he testified at TR-15.

In any event, the Union (or Nasser) did not impeach Acevedo's testimony, including how he saw Nasser positioned when lifting the buggy. (See Footnote 1)

However, in my view, how Nasser was positioned when lifting is not, "Per Se" determinative of this matter.

Nasser testified that he had lifted "this liner buggy before." (TR-17) Thus, he was familiar with the process, and cannot reasonably be expected to have positioned himself so as to unnecessarily jeopardize his safety when lifting. Further, Nasser consistently averred, without contradiction, by "substantial evidence" offered by the Employer that, he injured himself when:

"I was moving toward the track the loose gravel moved."

I put the buggy down and that is when I felt the pain." (TR-18,19,20)

Nasser's contention is fully corroborated by Acevedo's testimony that, Nasser did not complain when lifting but, only after carrying the buggy through the loose ballast and placing it upon the track. (TR-14)

Based solely on this record the Employer failed to

establish through "substantial evidence" that Nasser was guilty of the charge levied against him. Accordingly, I will find for the Appellant.

AWARD

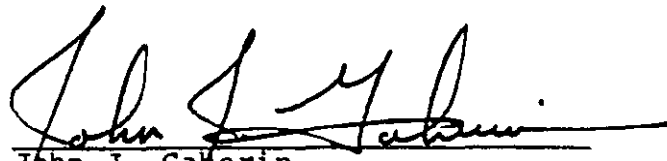
The Appeal of Track Laborer A.A. Nasser from discipline by suspension for a period of ten (10) working days is sustained.

ORDER

The Southern Pacific Transportation Company shall compensate Track Laborer A.A. Nasser, within fifteen (15) working days of the receipt of this ORDER, for all wage loss suffered as a result of having been improperly suspended.

All charges shall be removed from Track Laborer A.A. Nasser's record.

It Is So Ordered: This 2nd Day of October, 1985 -
Centerville, Barnstable County, Commonwealth of
Massachusetts.


John J. Galerin
Neutral Chairman