

PUBLIC LAW BOARD NO. 4338

PARTIES) UNION PACIFIC RAILROAD COMPANY
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM: Claim that the discipline of 45 days suspension imposed on California Division Track Foreman S. A. Sowa for alleged violation of Rules A, B, J, L, 1510, 1511, 607(1), 607(2), 609, 4000, 4001, 4152, 4153 and 4160 was arbitrary, capricious and unwarranted. That the claimant's record shall be cleared of the discipline and he shall be paid for all time lost.

FINDINGS: This Public Law Board No. 4338 finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

In this dispute the claimant was notified to attend an investigation on September 3, 1986 to determine his responsibility in the charges that at approximately 10:00 a.m. on August 6, 1986 while backing section boom truck 1915-62554 onto railroad right of way near First Street and East End Avenue, Pomona, California, he allegedly struck a traffic light, knocking it over, which caused approximately \$1,200 of damage to City property, which was a possible violation of General Rules A, B, I, L and Rules 1510, 1511 of the Maintenance of Way Rules effective April 28, 1985 and Rules 607(1), 607(2), 609, 4000, 4001, 4152, 4153 and 4160 of Safety, Radio and General Rules for All Employees, revised April 28, 1985.

The investigation was held on September 9, 1986, and pursuant thereto the claimant was assessed 45 days suspension. Claimant had been offered a 30 day calendar suspension by letter dated August 12, 1986 but had refused.

At the commencement of the investigation the claimant's representative requested that the company witnesses be separated. The hearing officer denied this request. Claimant's representative was apparently requesting that the witnesses be sequestered, and normally this request would be granted.

This is generally a requirement if the witnesses are testifying as to the same occurrence where hearing other testimony might refresh or influence their own testimony. The Board will review all the testimony of record and then determine if the denial of this request is prejudicial.

Roadmaster K. W. Hargraves testified that he received a report of the accident on August 6, 1986 and his Assistant, R. A. Woods, investigated the incident.

The evidence indicates that the claimant section foreman was driving the boom truck which struck a traffic signal pole and knocked it over while the truck was being backed onto the railroad right of way from the street.

The Board realizes that an investigation is not a court, but the hearing officer should direct witnesses to answer questions when asked. Questions, if possible, should be answered "yes" or "no" and then the witness, if he deems it necessary, may explain his answer.

It is noted on Page 10 of the Transcript that K. W. Hargraves did not directly answer the question by the claimant's representative, and the hearing officer overruled an objection made by the claimant's representative. One can assume that the answer may have been an indication of the witnesses' opinion, but such an assumption should not be necessary. This is not a serious error, but the hearing officer should recognize this fact.

The Board is also concerned that the hearing officer denied Witness K. W. Hargraves the right to answer a question regarding past incidents where employees of the railroad have been involved. The claimant's representative explained to the hearing officer that he was aware of similar cases involving employees who were issued demerits. In other words, the claimant's representative was attempting to establish disparate treatment of employees.

This is a permissible defense. It is an affirmative defense and one which must be proven by the one making such an allegation. The witness should have been allowed to answer the question. Nevertheless the burden of proof is upon the Union in this case. Again the Board wishes to stress that there is no attempt to place court rules or any such on the parties, but the Union should be allowed to present proof that there was disparate treatment in assessing discipline.

Mr. Hargraves further testified that he believed a 30 day suspension offered to the claimant was fair. The evidence further establishes that the claimant did not have a back-up man outside the truck. The claimant stated he was in a rush to get the truck out of traffic.

The Board has reviewed all the testimony of record, including that of the claimant, as well as the exhibits submitted. The refusal to sequester witnesses herein is not prejudicial in this case since the testimony of any one witness herein would not affect the testimony of another witness.


Also it is noted that the Union did not present proof to establish that other employees with similar discipline records had committed a similar offense and had been assessed lesser amount of discipline. For those reasons there is no basis for setting the discipline aside.

However, the officer who conducted the investigation, K. W. Har-
graves, testified that he believed a 30 day suspension was
reasonable. The evidence indicates that perhaps the hearing
officer determined that since the claimant refused to accept a
30 day suspension, he would assess him 45 days for such refusal.

Under the agreement between the parties, the claimant has the
right to an investigation and a hearing. Simply because he re-
fused to accept the discipline offered, the Carrier is not then
justified in assessing more discipline than is reasonable. For
the foregoing reason the discipline assessed will be reduced
from a 45 day suspension to a 30 day suspension.

AWARD: Claim disposed of as per above.

ORDER: The Carrier is directed to comply with this award within
thirty days from the date of this award.


Preston J. Moore, Chairman


Union Member


Carrier Member

Dated: November 10, 1987