AWARD NO. 25

Case No. 25

PUBLIC LAW BOARD NO. 4823

PARTIES) THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
TO) versus
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

"1. That the Carrier's decision to suspend Claimant Moreno from service for twenty (20) days after investigation September 21, 1990 was unjust.

2. That the Carrier now lift the twenty (20) day suspension from the Claimant's record, reimbursing him for all wage loss and expenses incurred as a result of attending the investigation September 21, 1990, because a review of the investigation transcript reveals that substantial evidence was not introduced that indicates Claimant is guilty of violation of rules he was charged with in the Notice of Investigation."

FINDINGS:

This Public Law Board No. 4823 finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

On September 11, 1990, Carrier's Regional Manager wrote the claimant, in pertinent part, as follows:

> "You are hereby notified to attend formal investigation at the Second Floor Conference Room Regional Office Building, 4515 Kansas Avenue, 10:00 AM, September 21, 1990 concerning your alleged responsibility in regard to the damage sustained to burro crane ATSF 1780 that turned over while under your operation in Kansas City on August 27, 1990, so as to determine the facts and establish responsibility, if any, involving possible violation of Rules A, B, 1100, and 4516 of the Safety and General Rules for all Employees 1989 and Rule 1041, Rules and Instructions for Maintenance of Way and Structures, 1989."

Following the investigation, the Carrier found Claimant Moreno responsible for violation of the rules cited above.

For his responsibility in connection therewith, he was suspended from service without pay for twenty (20) days.

The rules cited in the notice of investigation read as follows:

"Rule A: Safety is of the first importance in the discharge of duty. Obedience to the rules is essential to safety and to remaining in service. The service demands faithful, intelligent and courteous discharge of duty.

Rule B: Employees whose duties are prescribed by these rules must have a copy available for reference while on duty. Employees whose duties are affected by the timetable must have a current copy immediately available for reference while on duty. Employees must be familiar with and obey all rules and instructions and must attend required classes. If in doubt as to the meaning of any rule or instruction, employees must apply to their supervisor for an explanation. Rules may be issued, canceled or modified by general order, timetable or special instruction.

Rule 1100: Safe Course: In case of doubt or uncertainty, the safe course must be taken.

Rule 4516: Lifting: Do not overload hoisting equipment. When starting to lift an unusually heavy load test brakes when load is a few inches from the floor or ground. Operators should be familiar with rated capacities at each specified radius. If doubt exists as to the radius, weight of the object or lifting capacity no attempt should be made to lift it. When a crane is working on super elevated track or any track which is out of cross level, extra consideration should be given to the machine's stability. If there is doubt as to the effects of the low rail on the crane's operating characteristics, a supervisor should be consulted for the safe operating procedure. Always consult a supervisor if a track is out of cross level more than one inch. Vertical lifts shall be made wherever possible to prevent dragging or swinging. When necessary to lift at an angle, determine that all employees are safely positioned and make lift slowly until lift is vertical. Operators must avoid dropping or jerking loads. Lifting mounted wheels with magnet is prohibited.

Rule 1041: Responsibility Of Roadway Machine Operators: They will be held responsible for the safety, care, maintenance and performance of the

"machines to which they are assigned. Immediate report will be made to the proper authority and followed up with a wire report when machine is out of service or not performing properly. If a safety device is not operating properly the operator will take every precaution for safety. If the machine cannot be operated safely, it will be removed from service and a wire report will be sent to the Supervisor of Work Equipment and Assistant Superintendent Maintenance. They will be governed by instructions of work equipment maintainers and roadway mechanics regarding the maintenance and operation of machines. Upon taking over a machine and again upon completing assignment, they will render to the appropriate Maintenance of Way Officer and Work Equipment Supervisor, under whom they may be working, a report of the condition of the machine. This report will list small tools, operator instruction book, parts book and repair parts on hand. Copies of all reports shall be made to the Assistant Superintendent Maintenance and Supervisor of Work Equipment. Roadway machine operators must have the proper tools necessary for maintenance and servicing the machine. On machines so equipped, machine operator will record each day in the machine log book the maintenance and/or repairs they perform on the machines they are assigned to operate."

Germane to the Board's findings in the instant dispute is the following testimony of Roadmaster Schibbelhut (a Carrier witness):

(Pages 4 and 5 of transcript)

"Q: Based on your knowledge and your experience working with and around cranes over the years, what would you say could have caused this crane to have turned over?

A: There are several possibilities, one being mechanical. If it was being let down and it caught or slipped, that might pull it over. Elevation on the the tracks might do it. However, I checked the elevation there and we were within an eighth of an inch either way in that area; so it couldn't have have been elevation. It was possible that when he took it out of a car, it could have caught on the edge and swung forward; that might tip it over. Also, it's possible to tip one over if you had the boom too low or where it wouldn't handle the load or had too heavy a load on it. Also, if a person swung it fast, centrifugal force might tip it over.

Q: I suppose if the load was too heavy, it would

"certainly be a problem; is that correct?
A: Yes, also on the note, the first panel he unloaded was an eight foot panel, which is a little bit lighter than the second, which was a nine foot panel.

Q: The panel that he was handling when the crane turned over was a nine foot tie panel?
A: It was a heavier panel.

Q: Did you have other nine foot track panels unloaded previously?
A: We've probably unloaded approximately 270 or 300 of them during the Fastrack project. It's not overloading it, unloading nine foot panels.

Q: To your knowledge was there any mechanical problem that could have come into play?
A: No, not that I was informed of. Mr. Greenhill gave a statement that there was no mechanical problems that he knew of when he turned over."

(Page 6 of transcript)

"Q: You said he has unloaded 270 to 300 nine foot panels?
A: Yes.

Q: The crane is not overloaded in handling nine foot panels?
A: No, we've loaded over the past years and in the last, all the years I know about we've unloaded them with the burro crane forties. We can't with thirties but forties is what we use.

Q: Mr. Mareno is the one that unloaded all these that you're talking about with this particular crane?
A: Yes, he did."

The Claimant testified, in pertinent part, as follows:

(Page 16 of transcript)

"Q: Mr. Mareno, you've heard the reading of the notice of investigation and the rules cited; you've also heard the testimony given here. Would you tell us in your own words, what knowledge you have of the incident under investigation?
A: On August 27 I was instructed by Mr. Schibbelhut to, with Walter Mathis, unload track panels at AY Tower. I also had a car of ballast with me to

"unload out there. They also wanted me to unload two track panels right in front of AY Tower so I went ahead and got ready to unload my panels, like I normally do it. We had one panel unloaded then went to unload the second panel, just the same way like I did all the other ones. I picked up the panel to clear the car so I can start swinging out of the car, when I start my swing motion to the north of the track everything was fine. When I almost cleared the car, part of the panel, which was the rail part, hit slightly the crane, on the bottom part of the crane. It caused it to swing slowly and at that time there was nobody who could stop it from swinging so as soon as it was almost even, the way I had the crane angled, apparently it put more weight on the panel, which started to raise the track wheels on the crane on the south side, which made my crane go down. So immediately I started to release my pedal for the load to come down. I wanted to gradually lower it down and this happened real fast, before I knew the panel was already on the ground and my boom kept going down also. When that happened I knew I didn't have any control over the burro crane any more and I knew I was going down so I just tried to protect myself from getting hurt because I knew I couldn't hold the crane anymore and that's just about the way it happened."

(Page 17 of transcript)

"Q: When you picked the panel up and cleared the side of the car you said that the panel swung and the corner, one of the rails came into contact with the with the lower part of the burro crane, is that right?

A: The lower point of the crane, however high I had it to clear the car when I started swinging the east side of the panel hit part of the boom and that's what caused it to swing, slightly hit it. It doesn't take very much for the panel to swing. Sometimes even, without hitting anything it could swing around.

Q: By swing, you mean it started to rotate, to turn.

A: Yes."

(Page 18 of transcript)

"Q: How do you explain this one panel, this incident? How do you explain the crane turning over?

A: It happened so quick that there is no explanation

"to it. If I could have done something to prevent it, I would have. It was just, it happened so quick.

Q: Of course, after it had gone past the point of no return it was beyond the point of no return and nothing you could do would bring it back. The question is what took it to that point of no return? How do you explain the fact that this track panel, when it was no different from some 270 to 300 other track panels that you had unloaded, turned your crane over?
A: When it rotated at the angle that it did and that's what caused it; otherwise, I would have have just been able to go ahead and bring it down.

Q: To simply rotate the load doesn't lighten it, if it's being swung where the centrifugal force gets involved then it would certainly affect your load.
A: If I'm swinging....

Q: I just want to make sure we're getting our terms together, the same here.
A: Yes sir.

(Page 19 of transcript)

Q: Are you referring to the swing or are you referring to the rotation?
A: The swinging motion and rotation are the same things. That may cause it but, to me, the angle that it was at the time that it came down that's the only thing different that could happen, that did happen from a lot of other panels.

Q: Well, let me ask you this question. If you had been boomed higher do you feel that the crane would still have turned over?
A: I would have to do it that way and see. That would be the only way I could tell.

Q: When you boom higher you have more lifting capacity with the crane; is that correct?
A: That's the way they operate, yes."

Also important in the Board's consideration of the facts and circumstances surrounding the case is Roadmaster Schibbelhut's testimony on Pages 14 and 15 of the transcript; i.e.:

"Q: Mr. Schibbelhut, you went through a list of situations, a list of things that could possibly

"have caused the crane to turn over. Based on your knowledge and your experience and as a result of your investigation into this incident have you arrived at any conclusions as to what happened? What was the cause?

A: Not having been there but from just what I've heard and what I've been told, it sounds like maybe that when he swung it out, since it was heavier than the other panel, it might have been a little overloaded and maybe it got going too fast and it just carried it over. That would be a combination of both too heavy a load and maybe moving too fast and it carried it over.

Q: By too heavy, you mean that the track panel was too heavy for the load limits of the crane or that...

A: No, we've unloaded a lot of them like that and there shouldn't have been no problem but maybe it was, since the first panel was a lighter panel perhaps the second one, he wasn't ready for the nine foot, heavier panel.

Q: By being ready, what would he have done to have been ready for this panel?

A: Well to test on the panel, you get it up and you start to lift a little and it starts to bounce on you, you raise it a little higher so that your boom is higher to carry a heavier load.

Q: You reposition your boom to compensate for the load that you're raising?

A: Correct.

Q: Which is a normal procedure?

A: Yes.

Q: There were eight foot tie track panels and nine foot tie track panels and I assume that during a routine day you would come in contact with an eight footer, then an eight footer, then a nine footer. Is that safe to assume?

A: It would depend on what project you were on. On the Fastrack we dealt with all number one nines, on the auto facility we had some eights and some nines.

Q: So, in your opinion, should the operator be aware of the potential for a heavier load at any point in time and, as such, position the boom to stay well within the safety perimeters of making that lift?

A: Correct. He'd have to put it a little bit different for nines than eight because it weighs

"more.

Q: Would you say that is a prime responsibility of the machine operators to be knowledgeable as to the position that the boom should be in to handle the load and to handle the load safely?
A: He'd have to watch what he's unloading; correct."

While not at issue in the instant dispute, manifest in Mr. Schiele's conduct of the investigation is a propensity to ask leading questions, make statements and ask the witnesses for conclusions. This is not the way to conduct a fair and impartial investigation. Accordingly, in so far as future investigations are concerned, the Carrier would be well advised to take whatever steps are necessary to correct this deficiency.

The evidence of record is purely circumstantial; there was no testimony or other evidence which can be pointed to as clearly and/or unrefutably establishing the claimant's responsibility for the accident. (Claimant Moreno's testimony is tantamount to a denial that he was operating the burro crane differently, to any significant degree, than the manner he usually operated said machine while performing similar functions. Likewise, the testimony of Section Foreman Mathis, the only other eyewitness to testify, tends to corraborate Claimant Moreno's testimony.) However, this is not a court of law and circumstantial evidence is sometimes sufficient to lead a reasonable person to an unequivocal conclusion as to the employee's responsibility, which is all that is required under this forum.

After carefully considering all of the testimony, the Board finds that the claimant was properly found responsible for violation of the rules cited in the notice of investigation. Under the facts and circumstances of record, there is no rational basis for explaining the accident other than said accident was due to the manner in which the claimant was operating the machine. (There was no defect in the machine, no defect in the track and no other defect or other circumstance which can be considered to have caused or even contributed to the accident in a significant way. While Claimant Moreno attempted to implicate that the machine and/or the usual manner of operating the machine was unsafe, and this caused or contributed to the accident, his attempt is belied by unrefuted testimony to the effect that the claimant had recently unloaded 270 to 300 similar track panels in the same mannner, without encountering a problem.) The Board finds, likewise, that the assessment of a twenty (20) day suspension for the claimant's responsibility in connection therewith was an appropriate measure of discipline.

AWARD: Claim denied.

G. Michael Garmon, Chairman

Employee Member

Carrier Member

Dated at Chicago, IL:
November 30, 1982