

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 assess Claimant Butrymowicz a suspension of 240 days after investigation January 15, 1991 was unjust.

2. That the Carrier now expunge the 240 day suspension from Claimant's record, reimbursing him for all wage loss and expenses incurred as a result of attending the investigation January 15, 1991, 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 December 3, 1990, Carrier's Regional Manager wrote the claimant and the crew of Work Train W-CA011-26, in pertinent part, as follows:

"You are hereby notified to attend formal investigation in the Assistant Superintendent's Office, Needles, California at 10:00 a.m., Friday, December 14, 1990, to determine the facts and place responsibility, if any, concerning your alleged failure in connection with improper operation of air dump car ATSF 186267 causing contents of car to dump onto track side Mile Post 621.4, subsequently derailing cars of train Q-DABA1-23 operating on the north track November 26, 1990.

Alleged failure to determine proper position of locking device on car ATSF 186267 on the part of Conductor J. L. Lafever, while employed as conductor of

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of work train W-CA011-26.

Alleged failure of B&B Foreman J. M. Butrymowicz to perform proper inspection to air dump cars while being handled by crew of work train W-CA011-26, November 26, 1990,

Involving possible violation of rules A, B, 106, 108, 109(A) and 607 of General Code of Operating Rules Second Edition, effective October 29, 1989: supplement to 607 as contained in special instructions no. 4 page 216 of System Timetable No. 1, effective October 29, 1989, on the part of the crew of W-CA011-26 and Operating Circular No. 406 of General Orders and Operating Circulars, effective January 1, 1990, on the part of Conductor J. L. Lafever.

Involving possible violation of Rules 4(C) and 1211 of Rules and Instructions for Maintenance of Way and Structures Form 1015 Std., effective October 29, 1989, and Bulletin No. 12.1 of the Chief Engineers Instructions Book, Form 1015CEI Std., effective November 1, 1989, on the part of Mr. Butrymowicz.

J. T. Campbell, General Supervisor Train Handling, and D. M. Gosney, Supervisor Structures, will attend as carrier witnesses.

You may arrange for representation in line with the provisions of agreement or schedule governing your working conditions, and you may likewise arrange for the attendance of any desired witnesses."

The investigation was postponed until January 15, 1991, following which Carrier found the claimant (B&B Foreman J. M. Butrymowicz) responsible for violation of the rule and instructions cited in the notice of investigation and suspended him from service for 240 days as a result thereof.

Claimant's representative protested the investigation on the premise that the notice was vague and indefinite, Carrier had obtained statements from the Carrier-witnesses (enabling the conducting officer to know in advance the answers to most of the questions asked of the Carrier-witnesses) and Assistant Superintendent Mansheim asked a leading question of Carrier-witness Gosney.

The Board finds that the notice of investigation was sufficiently specific to enable the claimant and his representative to prepare a defense against the charges; it is not improper for a carrier to obtain statements from

witnesses as a part of its preliminary investigation and, although both the Carrier and Employee representatives were guilty of asking leading questions of the witnesses, the leading questions asked were not so pervasive or serious as to constitute a fatal flaw in the investigation.

The investigation involved in this case was quite lengthy (well over 100 pages) and the testimony was somewhat convoluted and contradictory. Other evidence introduced at the investigation consists of pictures, showing instructions printed on the side of the air dump car in question; a copy of instructions issued subsequent to the date of the derailment and a copy of a newspaper article of December 14, 1990, indicating that Carrier officials had concluded that "*** vandals apparently had played with levers that control discharge of loads from cars on a work train sitting idle over the Thanksgiving weekend. When the train crew started work Monday morning, one of the cars that had been tampered with dumped its load of rocks onto the north tracks and 'as luck would have it' a train was passing by ***." Nevertheless, the testimony and other evidence of record is sufficient for the Board to find as follows:

Claimant's contentions were based on the premise that he had not received and/or been instructed on Bulletin No. 12.1 of the Chief Engineers Instructions Book, and he was not sufficiently experienced in handling air dump cars to be considered as the "one qualified man" who handles the dumping of air dump cars, as alluded to in Bulletin No. 12.1. The testimony of Carrier-witness Gosney, however, was adequate to establish that even if the claimant had not received and/or been instructed on Bulletin No. 12.1 as of the date of the incident, he had substantial experience in handling air dump cars, plus instructions similar to those provided in Bulletin No. 12.1, and he should have known to inspect the dump levers carefully before permitting the air dump system to be charged. He did not do so, in view of which he was properly found to have been responsible, at least to some degree, for the derailment in question.

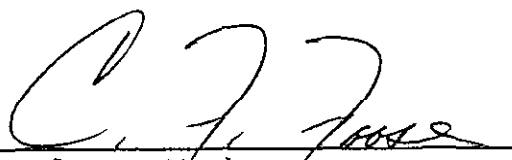
Notwithstanding the Board's conclusions as set forth above, in deference to the claimant's relatively long service and good discipline record, the Board finds that the suspension of 240 days will be reduced to a suspension of 90 days.

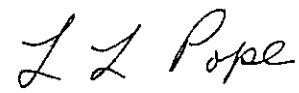
AWARD: Claim sustained in part in accordance with the last paragraph of the findings above.

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ORDER: Carrier is directed to comply with the Award within
thirty (30) days from the date shown thereon.


G. Michael Garmon, Chairman


Employee Member


Carrier Member

Dated at Chicago, IL:

March 28, 1991