

PUBLIC LAW BOARD NO. 6301

AWARD NO. 4
CASE NO. 4

**PARTIES TO
THE DISPUTE:** Brotherhood of Maintenance of Way Employes
and
Kansas City Southern Railway Company
(former SouthRail Corporation)

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained

DATE: February 8, 2001

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Welder T. J. Jones for his alleged responsibility, if any, in connection with an accident that occurred on October 1, 1997 at approximately 0645 hours, south of Macon, Mississippi, was without just and sufficient cause, based on an unproven charge and arbitrary (Carrier's File MO498 5054).
2. Welder T. J. Jones shall now be allowed the remedy prescribed in Rule 33(g)."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant's employment was terminated following his involvement in the rollover of his welder's truck on October 1, 1997. At the time of the disciplinary action, Claimant had more than eight years of service as a welder. The record does not establish any blemishes on his prior work history.

According to the evidence, Claimant drove the welder's truck northbound on Highway 45 from Meridian toward Macon, Mississippi. After driving approximately 50 miles, Claimant stopped near Scooba, Mississippi to make a telephone call just after 6:00 a.m. He resumed driving the remaining 15 to 20 miles to Macon. At approximately 9:10 a.m., Carrier officials were informed by Claimant's wife of her husband's involvement in a rollover accident.

There were no eyewitnesses to the rollover. Investigation revealed that the truck went straight off the highway about 1½ miles south of Macon at approximately 6:45 a.m. The day was

clear and the pavement on the four lane divided highway was dry. There were no skid marks or signs of braking or other corrective measures. The truck essentially proceeded through the grass approximately 250 feet and then rolled over onto its right side. Claimant's speed was estimated to have been 55 to 60 mph. The speed limit in the vicinity was 55 mph.

Although damaged by the rollover, inspection of the truck disclosed no mechanical defects. It started up and was found to be drivable. However, no electrical inspection was performed. Nor were any cracks in the frame noted although the truck was not put up on a hoist for the inspection.

When contacted at the hospital, where he was treated for a head injury and released later in the day, Claimant said he had no recollection of the accident. Indeed, according to Carrier officials, Claimant initially did not recognize them when they visited him soon after his arrival at the hospital. His last memory was of the phone call at Scooba and the resumption of his trip.

Claimant assumed an electrical problem had caused the ignition to go dead thus causing loss of power steering and power braking. He recalled having experienced a similar problem with the truck approximately one week earlier. Although Claimant said he had reported it to his supervisor, the supervisor did not recall hearing of any such electrical problem. Claimant also said he performed a start-of-day vehicle inspection before beginning his trip.

On November 14, 1997, the hearing officer issued her decision finding that "... there was substantial evidence ... to conclude that [Claimant was] in violation of Rules 1.1; 1.1.1; 1.1.2 and 1.6 ..."

The Organization has challenged the discipline on both procedural and substantive grounds. Our review of the record reveals no procedural shortcomings. Long-standing precedent in this industry has recognized that it is not *per se* improper for a single carrier official to serve both as hearing officer and decision-maker.

The substantive merits of this dispute are another matter. Neither the hearing officer's decision nor any subsequent responses by Carrier officials on the property provided a specific explanation of how or in what manner Claimant had violated the rules cited by the hearing officer.

At this point, it is important to note that the lack of a meaningful explanation of the rollover by Claimant makes this record highly unusual. Normally, employees have an obligation to faithfully answer all questions in an investigation and may not withhold pertinent information. If they refuse or fail to disclose information within their knowledge, they may be subject to

appropriate discipline for impeding the Carrier's investigation. In this case, however, it is undisputed that Claimant had a verified traumatic head injury. There is no qualified medical evidence in the record to show that his loss of memory about the rollover and the final moments leading up to it is inconsistent with this type of head injury. Consequently, Claimant cannot be faulted, under these unique circumstances, for his inability to provide a plausible explanation. Accordingly, no adverse inferences may be drawn from his testimony or lack thereof.

The role of a Public Law Board in reviewing disciplinary action is two-fold. First, we must ascertain whether substantial evidence exists to support the Carrier's conclusions regarding misconduct. Second, we must determine whether the type of misconduct involved, when taken together with the employee's prior disciplinary record and any related mitigating circumstances, justifies the magnitude of penalty imposed; in other words, we must ask does the punishment fit the crime?

It is well settled that the occurrence of an accident, by itself, does not constitute proof of misconduct or rule violation. To support its disciplinary decisions, carriers must provide specific explanations describing how or in what manner an employee's actions constitute misconduct or a rule violation. See, for example, Third Division Awards 32760, 32787, 32888, 31912, and 31993. In addition to providing a specific causal theory of misconduct, there must also be substantial evidence to support the theory.

After careful review of the instant record, we must find the Carrier's disciplinary action to be seriously deficient. First, Carrier did not explain how or in what manner the rules were violated. To illustrate this problem, it is helpful to recite the content of Rule 1.6.

Rule 1.6 - Conduct. Employees must not be careless of the safety of themselves or others. Negligence, insubordinate, dishonest, immoral, quarrelsome, discourteous or disloyal, desertion from duty, making false reports or statements, concealing facts concerning matters under investigation and serious violations of the law are prohibited.

Did Carrier conclude that Claimant violated Rule 1.6 by falling asleep at the wheel? When asked if he had, Claimant replied in the negative. Or did Carrier determine that Claimant violated Rule 1.6 by losing control of the truck due to excessive speed? If it did, Carrier did not say so. Or did Carrier conclude that Claimant violated Rule 1.6 by negligently failing to detect a truck defect that caused or contributed to the rollover? Or did Carrier perhaps find that Claimant had falsely claimed he inspected the truck before beginning the trip? Or did it find him

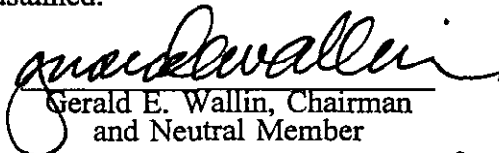
guilty of concealing facts concerning matters under investigation? Did it believe Claimant violated Rule 1.6 by attempting suicide? Did Carrier determine that Claimant was trying to sustain a work-related injury? Or was Claimant distracted by something that caused him to take his eyes off the road at the wrong time? Or did some physiological reason, beyond his control, cause Claimant to momentarily lose consciousness? On this record, there is no proper evidence to rule out this possibility.

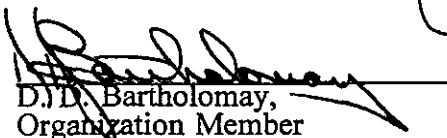
The record in this dispute does not provide answers to any of the foregoing questions, and they are but a few of the possible theories that might have played a role.

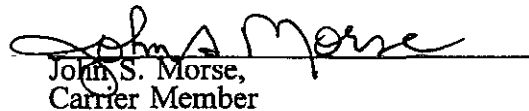
The lack of a misconduct theory poses two dilemmas for us. First, we have no definite scenario against which to test the substantiality of the evidence. Second, we have no proper basis for evaluating the connection between the kind of misconduct involved and the magnitude of the disciplinary penalty. If, for example, Claimant was speeding, there is a high degree of intent involved. Intentional misconduct ordinarily justifies a greater disciplinary penalty. On the other hand, if Claimant fell asleep at the wheel, the element of intent is likely not a factor. It might be argued that such inadvertent behavior is less culpable and calls for lesser discipline. If physiological factors were involved, Claimant may have no culpability at all, in which case no discipline might be warranted.

We find the failure or reluctance to advance a misconduct theory to be fatal to Carrier's disciplinary action in this matter. Its absence suggests a lack of confidence in Carrier's own evaluation of the evidence or an inability to explain the event. It is well settled that the Carrier bears the sole burden of proof to establish not only the nature of alleged misconduct but also the reasonableness of the disciplinary penalty. On this record, we are compelled to find that Carrier has not satisfied this burden. Accordingly, we must sustain the Claim. In so doing, we note that Rule 33(g) allows Carrier to set off against any lost time compensation owed to Claimant the amount of earnings received in other employment.

AWARD: The Claim is sustained.


Gerald E. Wallin, Chairman
and Neutral Member


D.J.D. Bartholomay,
Organization Member


John S. Morse,
Carrier Member