

PUBLIC LAW BOARD NO. 1120

**PARTIES
TO THE
DISPUTE:**

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, COAST LINES

- and -

UNITED TRANSPORTATION UNION - ENGINEERS

**STATEMENT
OF CLAIM:**

Request for removal of twenty (20) demerits assessed
against the personal record of Engineer W. C. Comstock
as result of investigation conducted at Southern Pacific
Company in Bakersfield on December 29, 1971.

FINDINGS:

The parties herein are Carrier and Employee within the
meaning of the Railway Labor Act as amended, and this
Board has jurisdiction.

This is a sequel to this Board's Award No. 1 in which,
for reasons stated therein, a suspension of Fireman L. A. Tudor was
sustained in connection with an incident on December 16, 1971, on tracks
shared with the Southern Pacific, when six SP units coupled to four Santa
Fe units, and the ten-unit train was unable to stop at a red signal, apparently
because no air check was made to ascertain if the hoses had been connected
between the two sets of locomotives.

An investigation was conducted December 22, 1971, at
which this Claimant engineer was cited for possible violations of SP Rules
106 and 874 among others, along with Fireman Tudor. The Claimant
testified at the hearing after which Fireman Tudor was found guilty, but
there were no guilty findings were made with respect to the Claimant.

Only seven days later and still within the 15-day time
limitation from the occurrence, this Claimant was cited again but for
alleged violations other than those charged against him in the first
investigation. This time the Claimant was accused of possible violations
of rules mainly having to do with air brakes.

He was found guilty this time, and assessed 20 demerits. The demerits since have been worked off and therefore are moot, but the Organization presses this appeal on grounds that legal principles of double jeopardy and res judicata are involved in the holding of the double investigation concerning a single employee and, in its view, the dual investigation violated Claimant's rights to a fair and impartial trial under the rules.

Technically, "double jeopardy" may not be involved because the charges against Claimant in the two proceedings were different, nor is this a matter for res judicata because of lack of complete identity of issues. But the requirements of due process, particularly under the letter and spirit of the investigation procedure under the rules, do not appear to have been met.

In its Award No. 1, P. L. B. 12 held that "The holding of two investigations for the same offense (was) improper." In its Award No. 21, P. L. B. 381 similarly, "barred (a) separate second disciplinary proceeding against the Claimant by reason of the same accident * * .

In Award No. 21343 the First Division set aside a disciplinary penalty resulting from a second investigation of the same incident, saying:

"We believe that the carrier made an election as to which rule to proceed under when it first filed the charges. It could not later demand a second investigation based on the same evidence and attempt to bring in another rule, which merely rephrases the alleged first violation."

The letter and spirit of a prompt, fair and impartial investigation under the rules presupposes that the Carrier will do as thorough a job as is possible in the first instance, and that it will not merely seek another "bite at the apple," by later citing other rules violations than those alleged at first.

But the Carrier objects that it ought to be able to do this when new evidence is discovered. The courts permit reopening of cases on this ground, but with great reluctance. The new evidence usually must have sprung up entirely independently of any of the known circumstances brought to light in the hearing or trial, and often there must be an element of concealment. Almost invariably this avenue is open only to the accused and not the accuser.

Not only does piecemeal investigation smack of oppression and undue burden upon the accused, but it could import into the investigation process under railroad disputes adjustment the vice of "plea bargaining," related to the testimony given by an accused in an earlier hearing.

Accordingly, consistent with the reasoning of other public law boards and the First Division in the awards cited herein, this claim must be sustained.

AWARD: Claim sustained.



John F. Sembower
Neutral Member



B. K. Perry
(Carrier Member)



K. Levin
(Organization Member)

Dated: 3/11/74