

PUBLIC LAW BOARD NO. 1198

PARTIES) SOUTHERN PACIFIC TRANSPORTATION COMPANY (T&L LINES)  
          )  
TO        )  
          )  
DISPUTE) UNITED TRANSPORTATION UNION (S)

STATEMENT OF CLAIM: Claim for all time lost by Switchman H. W. Muller, New Orleans Terminal, June 17, 1973 until such time as claimant is reinstated with unimpaired seniority, vacation and all other rights; also claim is made for reimbursement for all monies paid to Travelers Insurance Company by claimant for the purpose of maintaining Health & Welfare coverage under Group Policy GA-23000.

FINDINGS: This Public Law Board No. 1198 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 charged with:

"Being indifferent to duty, vicious and for wilful disregard affecting the interest of the Company when you removed the back plate of Handie Talkie radios issued to you, Avondale, Louisiana, and placing foreign matter in the radios thereby making them inoperative and beyond repair and for being insubordinate on June 16, 1973 to Terminal Superintendent when you left his office after being instructed by him to remain which may be in violation of Rules 801 and 804 of Rules and Regulations of the Transportation Department."

Evidence of record indicates that the officer who prepared the wording of this charge was the officer who made the decision that claimant was guilty. The Organization contends that the Carrier's charge constituted a presumption of guilt.

With this contention, the Board must agree, for the Carrier charged the claimant with being indifferent to duty and then stated "when" he had removed the back plate of the Handie Talkie radios issued to him. In other words, the officer who worded the charge and made the decision assumed or presumed that the claimant had removed the back plate. The charge should have stated that he was being indifferent to duty by removing the back plate, or that he was charged with removing the back plate, and that such constituted being indifferent to duty.

In other words the claimant should be charged with the act or acts which constitute a violation of the Operating Rules. This is a question of fact which must be resolved by proof. Whether or not such act or acts does constitute a violation requires an interpretation of the rules of the Carrier. In this instance the fact which the company set out to prove, i.e., that the claimant had destroyed the radios, was presumed to have been fact in the charge itself.

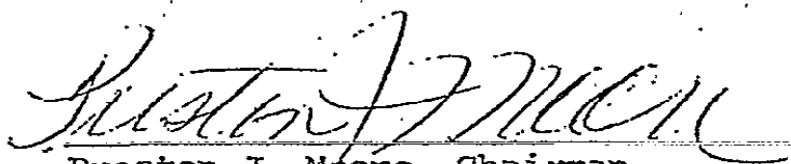
The Board has examined all of the evidence of record and finds that there was sufficient evidence for the Carrier to make a reasonable and just finding that the claimant had destroyed the radios. However many awards of the First Division and Public Law Boards have held that the claimant is entitled to a fair and just trial. These Boards have held that prejudgment is a violation of the Agreement between the Union and the Company.

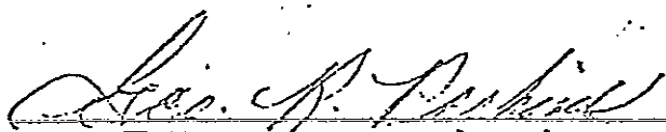
Under these circumstances the Board is obligated to find that the claimant is entitled to be reinstated with seniority and all other rights unimpaired and pay for time lost. It is therefore the finding of this Board that claimant be reinstated with seniority and all other rights unimpaired and pay for time lost.

The Board notes that the Carrier contends that the outside earnings of the claimant should be deducted from this award. In the absence of a rule which authorizes the deduction of outside earnings or a practice on the property of deduction of outside earnings, the Board finds that the deduction of outside earnings is not justified.

AWARD: Claim sustained 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

  
J. P. Perkins, Organization Member

  
R. Cunningham, Carrier Member

AWARD NO. 8, CASE NO. 8 (SU-1774), PUBLIC LAW BOARD NO. 1198

Pursuant to direction of the National Mediation Board,  
Public Law Board No. 1198 has been reopened for clarification  
of its Award No. 8 as to the meaning of the term "time lost".

BACKGROUND:

Award No. 8 is attached as the next two pages of this  
submission:

NATIONAL MEDIATION  
BOARD  
DEC 9 8 46 AM '76  
NATIONAL RAILROAD  
ADJUSTMENT BOARD

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INTERPRETATION

AWARD NO. 8

PUBLIC LAW BOARD 1198

NATIONAL MEDIATION  
BOARD

DEC 9 8 45 AM '76

NATIONAL RAILROAD  
ADJUSTMENT BOARD

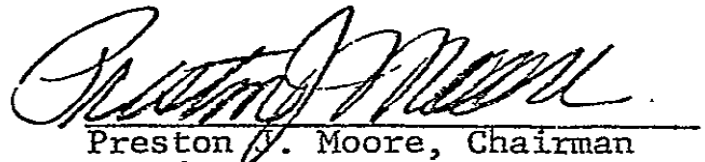
The parties have submitted extensive briefs regarding the intent of the clause "pay for time lost" and the practice on the property regarding such interpretation.

After careful consideration and study of all the evidence submitted by both parties, it is the opinion of the Board that there is no established practice on the property in regard to interpretation of "pay for time lost."

Therefore, it is incumbent on the referee to set forth what was meant by that term. At the time the award was rendered, it was the intent of the referee to pay in accordance with the practice on the property. In the absence of finding of such practice, the referee must now determine the meaning of that phrase.

It is the finding of the Board that the claimant is entitled to the earnings of the employee immediately junior to him who worked regularly. The Board is not taking the median between the next senior and the next junior employee for the reason that the claimant would not have been able to work the assignment of the next senior employee. The next junior employee would most likely have performed the service the claimant would have been entitled to perform. The award sustained the pay for time lost and this includes the time that the claimant would have performed service. This includes overtime, but does not include air hose pay, meal periods and other arbitraries.

Therefore, it is the finding of the Board that the claimant is entitled to the earnings of the next junior man exclusive of air pay, meal periods and arbitraries.

  
Preston V. Moore, Chairman

October 5, 1976