

PUBLIC LAW BOARD NO. 148
DOCKET NO. 5 - AWARD NO. 5

GENE T. RITTER

OPINION OF THE BOARD:

Effective Monday, September 14, 1970, Claimant, Guadalupe Martinez, was demoted from Track Foreman to Track Laborer as a result of a formal hearing conducted under the provisions of Article 11 of the Agreement between the Galveston Wharves and the Brotherhood of Maintenance of Way Employees. The Claimant was found guilty of indifference in the performance of his duties arising out of three specific charges, to-wit:

1. That the track gang under Claimant's supervision required 11 days to complete a crossing at an intersection, which constituted an unreasonable length of time.
2. That Claimant was not available to call at his residence from 12:30 until 4:30 A. M., August 20, 1970, and failed to leave specific instructions as to where he could be located.
3. That on August 20, 1970, at approximately 10:45 A. M., Claimant allowed his track gang to be blocked off from their work for approximately 40 minutes by an engine crew making up a transfer.

The facts disclose that Claimant, at the time of the formal hearing, had been an employe of the Carrier in the Track Department for a period of some 25 years and that he has acted as Track Foreman for a period in excess of 5 years.

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In respect to specific charge No. 1, that Claimant's track gang had taken an unreasonable length of time in completing a crossing, this Board finds that Carrier failed to establish what a reasonable length of time would have been and gives this Board no yardstick with which to determine whether or not the 11 days consumed in this project was unreasonable. It was admitted by both parties that the track gang experienced difficulty with machinery. Although Carrier complained of the fact that Claimant could not persuade his men to work overtime, there is no probative evidence divulged indicating that this was the fault of Claimant. It was established that Carrier's supervisor suggested that the men change off the ball busting machine, but it was never established that any specific order was given Claimant to this effect. It is this Board's opinion that the above named charge No. 1 was not substantiated by evidence.

This Board can find no rule contained in the Agreement requiring Claimant to be available on a 24 hour basis. In fact, the evidence shows that Claimant was in his home on the night in question, but that Carrier was unable to arouse this Claimant, possibly because of some medication being taken by Claimant at this time. Carrier submitted a list of prior violations where Claimant was not available for emergency work; however, these prior violations can only be considered in exercising punishment,

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but may not be considered or used to prove Carrier's charge in the instant case. Having failed to prove this charge in the instant case, these previous calls will not be considered.

Carrier found Claimant guilty of being indifferent to duties by allowing his crew to be blocked off by a transfer of cars for 40 minutes. The evidence shows that Carrier had ordered Claimant to work his crew in the repair of a derailment at the time that the transfer of cars interfered with this work. The spiking work on the South side of the transfer of cars had nothing to do with the derailment. In the event Claimant had worked his crew on the spiking detail, which is maintenance of way work, it would have been to his credit, but it can not work against him when he waited for the transfer of trains to move from the position on which he was ordered to repair. This Board finds that Claimant and his crew did nothing contrary to the orders given him by Carrier, and, therefore, finds that Charge No. 3 is without merit.

It was intimated during the argument before this Board that Claimant is not physically able to perform the duties of Track Foreman and that this discipline proceeding was one way of removing him. This Board calls Carrier's attention to Article 26 of the Agreement which enables Carrier to require employees to take a physical examination not more frequent than once each year unless it is apparent that employee's health or physical condition is such that an examination is necessary. Under this Article, a physical

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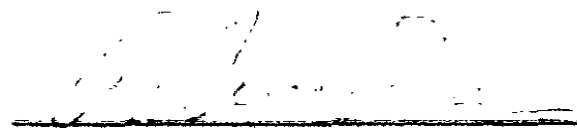
examination of Claimant could be required and if Claimant is found disqualified because of physical impairment, Carrier could take appropriate action in accordance with the physical findings.

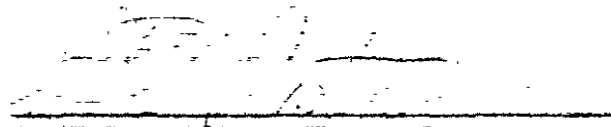
This Board finds that the evidence adduced does not sustain any of the charges, and in accordance with Award No. 4876 (Kelliher), it is the finding of this Board that the action of Carrier was arbitrary and capricious. Therefore, this claim will be sustained.

AWARD: Claim sustained. Claimant shall be restored to his position as Foreman and reimbursed in the amount of the difference between Track Laborer's wage and Track Foreman's wage.

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O. L. SELIG, Carrier Member


A. J. CUNNINGHAM, Organization Member


GENE T. POTTER Neutral