PUBLIC LAW BOARD NO. 1795

Award No. 18
Case No. 18

PARTIES TO DISPUTE: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
SOUTHERN PACIFIC TRANSPORTATION COMPANY
(Pacific Lines)

STATEMENT OF CLAIM:

1. That the Carrier violated the provisions of the Agreement between the Southern Pacific Transportation Company (Pacific Lines) and the Brotherhood of Maintenance of Way Employes when, as the result of an unfair hearing held on September 21, 1976, it suspended Mr. Marcello Y. Hernandez for a period of four weeks, said action being unreasonable, harsh, arbitrary and in abuse of discretion.

2. That Claimant now be compensated for all wage loss suffered because of the wrongful suspension and that his record be cleared of all charges.

STATEMENT OF FACTS: To avoid any confusion, it should be stated at the outset that there are two men involved in this dispute with the same last names. One is Marcello Y. Hernandez who is the Claimant, and the other is Mr. R.V. Hernandez who is the Roadmaster and directly in charge of operations in the specific area here involved.

Claimant Hernandez has been in the service of Carrier since June 23, 1953. As of February 4, 1971, Claimant

was promoted to the position of Foreman and has held that job until the present. On August 28, 1976 the Roadmaster called Claimant and instructed him to report to the old Colton Yard for the purpose of picking up and removing rail, scrap-ties and various debris from the toe path and the right-of-way. In the performance of these functions, three operators came under Claimant's supervision.

At approximately two p.m. the truck driver working under Claimaint's supervision became involved in an accident when the truck he was driving struck a concrete loading dock.

During the course of Carrier's investigation of this accident it appears that during the lunch hour (or lunch half hour in which Claimant and the truck driver participated at Olga's cafe) they each consumed one can of beer with their lunch. There is some disagreement as to whether Claimant drank two cans of beer or one; but we believe, on the basis of Claimant's record until now, and his very candid admissions at the investigation, that his statement that he recalls drinking only one can of beer is worthy of credence.

In any event, as a result of what had transpired, Claimant was advised by letter, dated September 3, 1976, to be present on Tuesday, September 14, for a formal hearing to determine the facts and place responsibility, if any, in connection with the alleged violation of Rule G of the Rules and Regulations, which we quote here verbatim:

> "Rule G. The use of alcoholic beverages, intoxicants . . . by employes subject to duty, or their possession or use while on duty, is prohibited".

The specific charge relating to Claimant was whether or not he was guilty of consumption of "alcoholic beverages" while on duty or subject to duty on August 28, 1976.

We mention this point here to dispose of a rather simple issue. The fact that Claimant was having his lunch does not mean that he was "off duty". As a matter of fact the record indicates that he was being compensated for the time. But, in any event, we consider that during the running course of responsibilities and duties performed for Carrier, the period devoted to lunch by an employe under certain circumstances is part of working time, and that certain pertinent rules, particularly those of the nature and purpose of Rule G, must be obeyed during that period as well as during all other periods of "working time".

Thereafter the investigation was adjourned and was actually held on September 21, 1976. Subsequently, by letter dated October 4, 1976, Claimant Hernandez was advised by Carrier that the evidence adduced at the hearing adequately established violation of Rule G and, as a consequence thereof, Claimant was further advised that he was being suspended without pay for a period of four weeks.

The Organization objects strenuously and raises three issues in this dispute. Firstly, it contends there was prejudgment at the hearing on the part of the Hearing Officer. We must say that we find no evidence establishing that contention to be factually accurate. Secondly, the Organization contends that the evidence was based on heresay. This issue falls by itself for one main reason. The Claimant actually conceded that he drank one can of beer during his lunch. In the face of that voluntary admission, whether it was obtained through hearsay or in any other way is completely immaterial. The issue of Claimant's guilt is not at all involved. He admits he drank one can of beer while having lunch. The other issues are also comparatively immaterial.

The major issue, of course, is the assessment of discipline and the contention of the Organization that the discipline imposed is exceedingly excessive and of such extreme nature as to negate these entire proceedings. There is an additional issue raised by the Organization and that is that the hearing itself was unfairly and improperly conducted. We do not agree and, as pointed out above, this is not the major issue before us. In point of fact, the hearing was properly held, opportunity for cross examination was sufficiently given, Claimant was afforded every opportunity to present his version of the facts; and overall we find no prejudice to Claimant as a result of any part of the way in which this hearing was conducted.

We stress the following points of testimony by Roadmaster R.V. Hernandez:

1. The point at which Claimant was interrogated was some time later and quite a distance away from the scene of the accident previously mentioned, and had no direct connection or relation thereto.

2. There is no question but that in so far as this dispute is concerned, Claimant was on duty during his lunch period.

3. The Roadmaster testified emphatically that Claimant was not intoxicated; nor that he showed any "signs" of intoxication; nor that Claimant was in any manner "under the influence of alcoholic beverages" during any of the times he had ever seen him.

4. Moreover, Roadmaster Hernandez testified further that never prior to this date had any evidence or intimation of any kind ever been brought to his attention that the Claimant had ever been seen drinking on the job or during his lunch hour; nor, to his knowledge, had Claimant ever done so.

We mention, in passing, that Carrier has cited Case No. 10, (a case which is part of this original Docket and which was decided by this Neutral) as support for its contention that substantial discipline should be imposed in cases such as these. We do not agree that case No. 10 bears materially on any of the issues in this case.

Case No. 10, from a factual point of view, was a far cry indeed from the facts of this case. We must bear in

mind that what we have here is simply the case of a man who imbibed a can of beer during his lunch hour with no other effect; with nothing involving any damage to property, nothing involving any injury to individuals.

On the other hand, Case No. 10 involved a Carrier employe who was a truck driver who had dozed at the wheel; who, at the time of the accident which was involved in that case, was driving between 40 and 60 miles an hour; who was driving at an excessive rate of speed; and, although he had clear and unobstructed vision, caused his large truck to come into contact with a small vehicle driving directly in front of him, which accident proved to be fatal to one passenger and cause injuries to another. We should stress here that that Claimant or that former employe (since he is no longer with the Company) insisted that besides having "dozed at the wheel" he was about 30 feet away from the other vehicle when he first saw it and that he felt he was acting reasonably under the circumstances.

We need hardly point out that Case No. 10 has absolutely no relevancy whatsoever with the facts involved in the case before us.

OPINION: We repeat the following general rules relating to principles on discipline because they apply to this case as they do to Case No. 16 in which they were originally set forth.

> "Innumerable cases of the various divisions of this Board, and in the field of Industrial Relations generally, have established and

applied, in basic essence, certain specific principles in the assessment and imposition of appropriate penalties in discipline cases.

"As, for example:

(1) that the penalty should be reasonably commensurate in punishment with the nature of the violation or infraction. On the latter account, the nature of the specific individual involved as transgressor should be taken into account to judge the measure of discipline and to see to it whether this may not have an effect on avoiding repetition of individual similar offenses in the future.

(2) The discipline must in no sense whatsoever be primarily punitive in nature under any circumstances.

(3) The discipline must be designed, at least to some extent by its impact upon others, towards avoidance of similar offenses by other employes.

(4) Whenever possible, and whenever warranted, the discipline imposed should be coupled with a positive program, medical and/or professional if necessary, for inculcation of remedial attitudes and their practical application on a sound work-a-day basis, towards improvement (or possible removal) of the condition involved.

"As a general proposition, of course, discipline to have any chance of being really effective must be group inculcated regularly among those employes affected, from an educational and realistic point of view, towards establishing the purpose of the rule involved and its practical impact upon the employes, their job performance, their safety and the efficiency factors which are necessarily involved."

We would readily agree that the most important of the disciplinary principles detailed in part above, which are more or less generally applicable, do not apply to this specific dispute now before us.

Specifically, in the case before us, of those general principles cited above the first one seems most applicable to the case of this Claimant. Particularly, is this true in the face of his exemplary and outstanding record of service with Carrier. The following will emphasize the latter proposition: a) He has been in the employ of Carrier since June 23, 1953, a period of over 23 years. b) On February 4, 1971 he was promoted to Foreman and has been acting in that capacity ever since. c) His 23 years of service have been unmarred by anything in his record showing any violation of the Agreement or any infraction of the Rules and Regulations. d) He is described by Roadmaster R.V. Hernandez, his immediate supervisor, as an "above average foreman." e) In short, he is a highly exemplary employe and one deserving emulation.

In view of Claimant's record, therefore, we are not justified in concluding that the punishment inflicted by Carrier - suspension of four (4) weeks without pay - is commensurate with the violation of which Claimant was found guilty (which, incidentally, he does not dispute) - drinking one can of beer at lunch. The Organization contends that Claimant's actual disciplinary loss of wages was the sizable sum $1158.79, which is not disputed by Carrier.

We conclude that the penalty imposed is not only grossly excessive and arbitrary, but, in effect, does not comply with the standards of discipline above set forth.

We must measure this man, a first offender over a period of 24 years, as against the offense committed, and

we do not find that charging him with a "fine" of $1158.79 for drinking a can of beer at lunch is in any sense fair or proper or, what is most important, necessary in this case. We agree that some form of discipline is necessary. Claimant is a Foreman, a Supervisor of other employes, with a proud record that is looked up to by others. His punishment may very well serve as a detriment to others.

Accordingly, we are compelled in fairness and equity to reduce his period of suspension to a period of one (1) week; that he should be compensated for all wage loss suffered in excess thereof; and that in all other respects his claim should be sustained.

Actually, his imbibing one can of beer is now costing him a loss of wages amounting to approximately $300. We consider this sufficient punishment for the offense committed under the singularly unique circumstances of this case.

AWARD: AS TO PART ONE: Partially granted in accordance with foregoing findings.

AS TO PART TWO: Granted in all other respects.

Louis Norris

LOUIS NORRIS, Neutral and Chairman

S.E. Fleming

S.E. FLEMING, Organization Member

E. J. Hall 3rd.

E.J. HALL, Carrier Member

Dated: San Francisco, California
March 23, 1978