PUBLIC LAW BOARD NO. 1795

Award No. 5
Case No. 5

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

STATEMENT OF CLAIM:

1. That the Carrier violated the Agreement when as a result of an investigation December 23, 1975, it assessed A.O. Martinez' personal record with a letter of reprimand on charges not sustained by the record, said action being arbitrary, unjust and in abuse of discretion.

2. Carrier further violated the Agreement when the Division Engineer failed to comply with the provisions of Section 1 (a) of Rule 44 of the Parties' Agreement in that he failed to give reason for his denial letter of May 10, 1976. (NOTE: The latter date is in error. The letter of the Division Engineer is actually dated February 17, 1976.)

3. That the Carrier's letter of reprimand of January 19, 1976 be expunged from the Claimant's personal record and that he otherwise be cleared of all charges referred to therein.

STATEMENT OF FACTS: Claimant has been in the employ of Carrier since March 30, 1964. On December 12, 1975, Claimant was working as a track laborer with Extra Gang No. 11 at "J" yard, which is a part of Carrier's yard complex at Los Angeles. These employees were engaged in making a line change of tracks. Carrier asserts that this project had a time limit for completion in order that trains due might pass without delay, and that such timely completion would avoid blockage of other train routes in adjacent interrelated areas. In effect, therefore, that an emergency existed making it "imperative that the work be completed within the time allowed." The latter assertion is not disputed by Petitioner.

The normal lunch period of Extra Gang No. 11 was from 11:00 to 11:30 a.m. Carrier asserts that "On December 12, 1975, Claimant unilaterally went to lunch at the normal time, although no one else on his gang did so, and without any instructions from his foreman or track supervisor to do so." This, in essence, is the basis of Carrier's position in this dispute.

Accordingly, Claimant was cited for formal hearing on December 23, 1975, based on violation of Rule 801 of the Rules and Regulations, which provides in pertinent part that "Employes will not be retained in service who are . . . indifferent to duty, insubordinate . . ." Thereafter, Claimant was notified by Carrier letter of January 19, 1976, that the charge of being "indifferent to duty" had been "sustained". The letter further stated:

> "However, the violation was not of a serious nature and appropriate discipline will consist of only a letter of reprimand with copy on your personal record."

Thus, it is quite obvious that the charge of "insubordination" was not pressed by Carrier. The sole issues before us, therefore, are whether in fact Claimant was guilty of being "indifferent to duty" and whether the discipline imposed was warranted.

Basically, it is Petitioner's contention that Claimant had a right to take his lunch at the normal period; that neither Foreman Montez nor Track Supervisor Nova informed Claimant that an emergency existed and that he was not to take his lunch at the normal time; that at no time was Claimant instructed to discontinue his lunch and get back on the job; and that, accordingly, Claimant was innocent of any wrongdoing and should not have been disciplined.

Carrier asserts to the contrary, its basic position being fully set forth above.

FINDINGS: At the outset, before proceeding to the merits of this dispute, the following items merit comment.

1. Petitioner contends that Carrier violated Rule 44, Section 1(a), of the Agreement in that no reason was stated in Carrier's letter of February 17, 1976, denying the claim. However, in our view, this letter is sufficiently precise as to the basis for rejecting the claim, particularly in the light of the prior correspondence between the parties. In any event, we find no prejudice to any of Claimant's rights, since the Petitioner and Claimant were fully aware in detail of Carrier's position in this dispute.

2. Carrier's letter of February 17, 1976 states, among other things, that "no discipline was assessed," whereas its letter of January 19, 1976 specifically refers to the "letter of reprimand" as "appropriate discipline." We are of the opinion that a formal letter of reprimand entered upon an employe's permanent service record constitutes discipline. See our discussion of "discipline" and prior Awards cited in current Award No. 4.

On the merits, therefore, and based upon the record transcript of the testimony, we find that the pertinent facts of this case are not seriously in dispute.

Claimant's normal lunch period began at 11:00 a.m. and he admits taking his lunch at the normal period. He concedes that he was "aware" that none of the other members of his gang went to lunch at the normal time and that they continued to work. He denies any wrongdoing on his part, however, and maintains that he was not told by anyone that an emergency existed nor was he instructed not to take his lunch at the normal time. He asserts further that he has always performed his job faithfully and has always obeyed all orders given him, and that he did so on the day in question. As to whether he normally waited for the foreman to tell them when to go to lunch, he replied:

"other times yes, other times no."

Supervisor Nova testified to the emergency situation but admitted that on the day in question he did not apprise Claimant of the emergency nor instruct him that he would be required to work through his lunch period. He affirmed that it was not unusual for the men to go to lunch at their normal time "under normal conditions", but then he stated:

> "The foreman in any gang I have seen or been with, tell the men what time to go to eat, the men do not drop their tools at 11:00 a.m. and go to eat their lunch."

He testified further that he did not instruct Claimant to discontinue his lunch and "return to work", and that Claimant had obeyed his subsequent instructions when he was told to resume working. That he had never had any problems with Claimant as to "the way he performed his duties or anything else." He was firm in his opinion, however, that Claimant's conduct was in violation of Rule 801 as to "being indifferent to duty" and being "insubordinate". As to his basis for such opinion, he stated:

> "In my opinion, any time that any of my men take it upon themselves to absent themselves from their work site without permission from me or the foreman, they are being insubordinate to their own job".

Mr. S.R. Montez, Foreman of Extra Gang No. 11 and Claimant's immediate superior, was not quite so severe in categorizing Claimant's conduct. He too testified as to the importance of the time factor that day and that the other men of the gang did not take their normal lunch period, but that Claimant did. However, he too admitted that he did not tell Claimant that there was an emergency, nor did he tell him not to go to eat or to discontinue eating and go back to work. He stated further that he felt that if Claimant had known the situation he would have continued working. Further, that he had never had any problems with Claimant in the past; that "He is a good worker, one of the best I have, he helps with problems with hard work".

He stated, further, that it was quite normal for the men to put their tools down and go to eat at their normal time when there was no emergency. That Claimant obeyed all instructions given to him, and that in his opinion Claimant had not been insubordinate nor "indifferent to duty". In response to a specific question as to whether he considered Claimant's conduct that day as being "indifferent to duty", he stated:

> "No, this was just a mistake on this man's part."

Finally, as to whether he had told the men that the job had to be completed by a certain time, he stated:

> "I said to some of the men, but I don't know whether he (Claimant) heard me or not."

The testimony is conclusive that Claimant was not told by anyone that an emergency situation existed or that he was not to go to lunch at his normal time. Here, we would comment that there was quite obviously a lack of communication and that had either Mr. Nova or Mr. Montez made certain that all members of the gang were apprised of the situation, this dispute would never have arisen.

We would also stress at this point that Claimant has an unblemished record of conscientious duty throughout the twelve years of his service with Carrier. The record before us is devoid of any evidence to the contrary. Indeed, the testimony of both Mr. Nova and Mr. Montez specifically supports this conclusion.

We acknowledge that Claimant was aware that the rest of the gang was not going to lunch at the normal time and that, impliedly perhaps, he should have made some inquiry. However, in our view, this is overshadowed by his not being specifically apprised of the emergency and by the absence of any instructions that he was not to go to lunch at his normal time. Moreover, he started his lunch at 11:00 a.m. and was approached by Mr. Nova at 11:10, a lapse of only 10 minutes. It would have been a simple matter, considering the emergency, for

Mr. Nova to have instructed him to get back on the job. In Mr. Montez's opinion, Claimant would have complied immediately.

In these circumstances, we are not persuaded that Claimant's conduct constituted "indifference to duty". His unblemished record and the testimony of Foreman Montez speak to the contrary. We are more inclined to describe his conduct, as did Mr. Montez, as "Just a mistake". In the latter context we are impressed with the statement contained in Carrier's "Reprimand" letter to Claimant of January 19, 1976:

> "Your behavior on December 12th was only a temporary lapse and I feel sure you have learned a valuable lesson".

We consider the term "indifferent to duty" as relating generally to a rather serious offense, bordering on if not tantamount to actual neglect of responsibility. We venture to say that both Carrier and Organization would probably concur in the latter view. But Foreman Montez describes Claimant's conduct as "just a mistake" and Carrier uses the term "only a temporary lapse". We are unable to reach the finding, based simply on the testimony and pertinent facts of this dispute, that Claimant's conduct comes within the purview of being "indifferent to duty".

We are unable to conclude, therefore, that a formal letter of reprimand was warranted in this case. An oral admonition was certainly justified and, considering the past record of Claimant, would assuredly have sufficed. But the formal letter of reprimand is quite another matter, for it becomes a damaging part of Claimant's permanent service record and may well support more stringent disciplinary action in the future, should a further "offense" occur.

Accordingly, we find that Carrier's action in this dispute is not warranted when viewed in the full light of all the circumstances, and that the letter of reprimand should be expunged from Claimant's personal record.

In so holding, we do not seek to substitute our judgment for that of Carrier in evaluating the evidence or the penalty imposed.

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We do affirm, however, that in discipline cases Carrier has the burden of proof to establish by convincing evidence preponderating in its favor that Claimant is guilty as charged and that the penalty imposed is fully warranted. Such convincing evidence is lacking in this case. We find, therefore, that Carrier has not sustained its burden of proof.

AWARD: CLAIM SUSTAINED.

LOUIS NORRIS, Neutral and Chairman

S.E. FLEMING, Organization Member

E.J. HALL, Carrier Member

DATED: San Francisco, California
December 22, 1976