

PUBLIC LAW BOARD NO. 1795

Award No. 7
Case No. 7

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 on February 4, 1976 they removed F.A. Romero from his assigned position of Track Foreman, and further violated said Agreement when on March 12, 1976 it suspended Claimant F.A. Romero for a period of sixty (60) days on charges not sustained by the record; said action being arbitrary, unjust and in abuse of discretion.

2. That the Carrier now compensate Claimant F.A. Romero for all time lost, including all overtime worked by his assignment, and that he be paid his meal and linen allowance for each day held off his assignment beginning February 4, 1976 to and including April 25, 1976.

STATEMENT OF FACTS: Claimant has been in the employ of Carrier for over twenty years, with seniority date of November 7, 1955. Originally a Track Laborer, Claimant was subsequently promoted to the grade of Foreman and held that position on February 4, 1976, the pertinent date of this dispute.

On the morning of the day in question, Claimant was assigned as Foreman of Extra Gang No. 38 under the supervision of Roadmaster R.V. Hernandez. At about 7:30 a.m. Mr. Hernandez arrived at the work site and directed an inquiry to Claimant in which he accused him of failure to comply with certain verbal instructions which he had relayed to Claimant through another Foreman on the preceding day. Claimant replied, according to his testimony, that the reason he had not complied was that the Roadmaster "never told me before that I was to carry out orders from a Foreman or a laborer or anybody that came". At this point words were exchanged and, as alleged by Petitioner, the Roadmaster

berated Claimant and finally stated that he was "removed from service and would be cited for an investigation". Shortly thereafter, Roadmaster Hernandez left the site. Claimant remained with his gang until Track Supervisor Mendoza arrived and advised him that he had been sent to relieve him. A short while later, Mr. Mendoza received a telephone call from the Roadmaster and informed Claimant that he had been reassigned to work with the Bantam Crane Crew at a nearby location. Claimant declined to do so in view of his "having been relieved of his duties" and returned to his headquarters.

Carrier disputes Petitioner's version of the facts and contends that Claimant was not removed from service at any time; that he was given an assignment to perform, but did not do so and left the property.

In any event, Claimant was thereafter cited for investigation, which was held on February 20, 1976, the specific charges being violation of Rule 801 (insubordination) and violation of Rule M810 (failure to remain at post of duty and being absent from employment without authority) of the Rules and Regulations. On March 12, 1976, Carrier advised Claimant by letter that he had been found guilty of violating Rule M810 and imposed discipline of 60 days suspension effective February 25, 1976.

We quote Rule M810, which in pertinent part provides as follows:

"Employees must . . . remain at their post of duty and devote themselves exclusively to their duties during their tour of duty. They must not absent themselves from their employment without proper authority".

The claim was thereafter progressed on the property through the various stages of appeal and was declined by Carrier at each stage.

FINDINGS: We stress that no mention is made in Carrier's March 12th letter of the charge that Claimant was in violation of Rule 801 and, accordingly, we conclude that the charge of "insubordination" was abandoned by Carrier. We do not concern ourselves, therefore, with the issue of insubordination. We direct ourselves first to consideration

of whether in fact Claimant was discharged or removed from service pending investigation prior to his being reassigned to work with the Bantam Crane Crew. Petitioner contends, if this be so, that Claimant could not have been guilty subsequent thereto of leaving his post of duty or absenting himself from employment without authority.

Secondly, and equally important, we address our attention also to the events that occurred subsequently, as bearing upon resolution of all aspects of this dispute from an overall point of view...

We proceed, therefore, to review the pertinent testimony adduced at the formal hearing.

Roadmaster Hernandez testified that at about 7:30 a.m. of the morning in question he arrived at the job site, accompanied by Track Supervisors Di Ioli and Avelar, and in their presence discussed with Claimant the events of the previous day and certain orders which he had transmitted and with which Claimant had not complied. Claimant's reply was obviously unsatisfactory, for Mr. Hernandez informed him that he was "going to cite him for an investigation and to get in the truck, that we were going to the office". Claimant refused to get in the truck and stated he was going to his gang, about 200 yards away. Mr. Hernandez then got in the truck and went to the gang and, in the presence of Mr. Ioli, told them, among other things, that he was citing Claimant "for an investigation and that they would be working with Track Supervisor Mendoza". He stated, also, that he told Claimant "to wait for me".

At about 8:30 a.m. he telephoned Mr. Mendoza and told him to tell Claimant to assist the Bantam Crane Crew; that "at that time" he was informed by Mr. Mendoza that Claimant stated "he was not going to the Bantam Crane because he was fired". Mr. Hernandez returned to the area about 1:00 p.m. and was informed by Mr. Mendoza that Claimant "had left the job and had refused to go to the new assignment".

On cross-examination, he denied that he had told Claimant he was fired, relieved of duty, suspended, taken out of service, "or any other words to this effect". That Claimant did ask him "if he was

PLB 1795

fired", to which he replied "No, wait here. I am going to the office to cite you for an investigation". That Mr. Di Ioli overheard this conversation, but the members of the gang did not because they "were not close enough". He was then asked at what time he had learned from Mr. Mendoza of Claimant's refusal to go to the Bantam Crane assignment. He replied:

"Approximately between 12:30 and 1:00 p.m.
It was just after lunch. I had just come
back from lunch".

He denied that he told the members of the gang "from here on in you do not have a foreman. He is fired. You do not take orders from him". He stated further:

"I did not fire Mr. Romero. He was not
replaced by Mr. Mendoza. Mr. Romero was
reassigned to other duty".

Track Supervisor Avelar testified that he stayed in the truck and did not overhear the conversation between Mr. Hernandez and Claimant. He was "positive" that Mr. Di Ioli stayed in the truck with him and that they both remained in the truck until they got to "where the gang was working", at which time they both got off the truck. At this time he heard Mr. Hernandez tell the gang "more than once" . . . "that Mr. Romero was not their foreman any more and that they have to wait there until somebody will take over the gang, to instruct them what to do". Further, that he heard Mr. Hernandez tell the men "that he was going to cite Mr. Romero for an investigation", and that when he left Claimant "was still there". Finally, that it was his impression when Mr. Hernandez was speaking to the gang "that Mr. Romero was being removed from service".

Track Supervisor Di Ioli confirmed that he had remained in the truck and did not overhear "the conversation per se" between Mr. Hernandez and Claimant. He did hear the Roadmaster tell Claimant "to get in the truck" and at this time stepped out of the truck to make room for Claimant, but that the latter refused to get in; that at this point he heard Mr. Hernandez tell Claimant that he was to be

cited for an investigation. He did not hear him tell Claimant that he was either fired, removed from service, dismissed, or any similar terminology.

He testified further that he did hear Mr. Hernandez tell the gang to "wait there at the location they were and that they would send someone down there to give them instructions as to what to do". Claimant was not present then. He also heard Mr. Hernandez tell the crew that "he was going to cite Mr. Romero for an investigation and put him on another job" and, also, that he heard him "tell the other man (Mendoza) to tell him (Claimant) to go to another job". However, on cross-examination he stated that he did not "believe that he was going to send someone to replace Mr. Romero". "I didn't know what he (Hernandez) had in mind".

Track Supervisor Mendoza testified that he received instructions by telephone from Mr. Hernandez that he was going to call Claimant for investigation and that he (Mendoza) was to instruct Claimant to work with the Crane Crew; he so advised Claimant. Claimant replied that "he was fired" and refused to work with the Crane Crew. He then said to Claimant ". . . well it is up to you, those are the instructions Mr. Hernandez told me to pass on to you". (Emphasis added) Mr. Hernandez did not tell him that Claimant "was fired or otherwise removed from service". He did not see Claimant anymore that day and, apparently, he returned to the trailer park. During this telephone conversation, Mr. Hernandez told him "to take charge of Mr. Romero's gang".

Mr. Garcia, one of the laborers on Claimant's crew, called as a witness for Claimant, testified that on the day in question Roadmaster Hernandez said to the crew that "as of then we no longer had a foreman". Also, that "Twice he said that Foreman Romero was no longer in service. That the Foreman was to remain until he was relieved". Claimant remained with the crew until he was relieved by Mr. Mendoza.

Mr. Acosta, another member of the crew, corroborated the testimony of Mr. Garcia, and stated:

"I heard Roadmaster Hernandez tell Romero that he was out of service".

. . . .

"He told us all that the foreman was out of service, not to work until the relief arrived". This was said "twice".

Practically the identical testimony was given by Mr. Cuellar, laborer; Mr. Brumen, laborer; and Mr. Montano, truck driver; all members of Claimant's crew and called as witnesses in his behalf.

Claimant was then called as a witness in his own behalf. Initially, he testified to the altercation with Mr. Hernandez in respect to the incident of the previous day which, in essence, relates to the issue of "insubordination". As we have stated above, that issue is no longer relevant to this dispute. In any event, it appears that Claimant's explanation did not sit well with Mr. Hernandez, for he said "I am going to fire your ass right now" and directed him to get into the truck. Claimant declined because "the truck was not safe" and started walking towards the crew. When he got there he heard Mr. Hernandez saying to the men:

"This foreman is fired and you are not to take orders from him for no reason and you are to remain here until I send somebody to take over the gang".

Claimant testified that the latter statement was "repeated again" and that Mr. Hernandez started walking toward the truck whereupon he said to Mr. Hernandez "I told him as long as you fired me, now I would like to go home". Mr. Avelar and Mr. Di Ioli were present at this point, standing "on the right side of the pickup". Mr. Hernandez replied "you stay here until I send somebody to take over. You are fired, you are out". Nevertheless, he stayed there until Mr. Mendoza "showed up". That he related to Mr. Mendoza what had transpired and the latter said "he told me to come over and take over the gang". They then discussed certain aspects of the work and Mr. Mendoza left, but returned in a little while and said that "the old man" had called up to tell him to tell Claimant "to go pick up some ties or something". He repeated that he had been "fired for no reason" and did not feel he should be assigned to other work. That if he had "come back to work he (Hernandez) would say I was disobeying his orders". As to why

he left the premises shortly thereafter, he stated "Because I was fired. He fired me twice".

Claimant then added that he had worked half his life for Carrier and was grateful because he had raised his family "with money I have earned from the company"; that he had done his best ever since he started work in 1955. "I always obey orders and I have done my work". There was further testimony that he had gone to the main office and talked to Mr. Calidonna the next day, but it appears that at this time the letter to cite him for investigation had already been typed, for he signed it then.

He denied that Mr. Hernandez had said he was going to cite Claimant "for an investigation"; that "He did not mention it at all". He testified, further, that the distance from where they were at to the place where the men were working was "six rails, 39 feet", which he could walk in about a minute or two. On cross-examination, he admitted that this distance could be at least 150 feet.

Mr. Hernandez was then recalled and basically confirmed his prior testimony. He testified further that he could recall no prior instance when Claimant had deliberately disobeyed orders of a superior "from the time he started to work to the present"; that he had never deliberately disobeyed any instructions and had always in the past devoted himself to his duties "to his capabilities". He did assert, however, that in the past Claimant had been "absent from his employment without authority". No specifics or dates were indicated. He testified further that he would not have given instructions for Claimant to perform other work if he was "out of service." That "at no time did I inform Mr. Romero that he was dismissed. I do not know how he drew this conclusion"; and that his intention that day was merely to temporarily reassign his duties "still as a foreman on the extra gang 38".

Our review of the hearing transcript and comparative analysis of the testimony of each of the witnesses indicates the presence here of sharply disputed questions of fact as between the protagonists. We are therefore separating our conclusory findings into four basic categories for purposes of emphasis and clarity.

1. WAS CLAIMANT DISMISSED OR TAKEN OUT OF SERVICE.

On this issue, as related to the initial altercation between Mr. Hernandez and Claimant, the testimony of each stands uncorroborated. Neither Mr. Avelar nor Mr. Di Ioli were in a position to overhear this conversation, for the testimony indicates that both were still in the truck at this point. Mr. Hernandez is quite positive, however, that he told Claimant that he was "going to cite him for investigation and to wait here", and that he did not tell Claimant he was "fired". Claimant is equally positive that the latter said "I am going to fire your ass right now".

We would point out here that the testimony of Mr. Hernandez was somewhat contradictory. At one point he testified that when he called Mr. Mendoza at about 8:30 a.m. to reassign Claimant to the Bantam Crane Crew, that Mr. Mendoza told him "at that time" that Claimant had refused to do so "because he was fired". The testimony of Mr. Mendoza does not support this statement, for he did not transmit these instructions to Claimant until he rejoined him later at the job site after he had talked to Mr. Hernandez by telephone; that it was at this time that Claimant "refused" to perform the new assignment. Additionally, on cross-examination, Mr. Hernandez testified that it was not until about 12:30 or 1:00 o'clock "after lunch" that he first learned of said refusal by Claimant.

We stress also that during the initial altercation the issue uppermost in the mind of Mr. Hernandez, as the testimony shows, was that of Claimant's "insubordination" based on the occurrence of the preceding day. There was no issue then as to Claimant's being "absent from employment" for this related to the reassignment which occurred later on and only as an afterthought after Mr. Hernandez had returned to his office.

We look to the testimony of others, therefore, for corroboration either of Mr. Hernandez or of Claimant. Here, the testimony of Track Supervisor Avelar is of particular significance. His testimony is quite clear that it was his impression when Mr. Hernandez was speaking to the crew "that Mr. Romero was being removed from service."

Moreover, the testimony of each of the five members of the crew, which was subjected to little or no cross-examination, was equally clear that Mr. Hernandez told them twice "that Foreman Romero was no longer in service."

Additionally, Mr. Avelar testified that he heard Mr. Hernandez say to the crew "more than once" "that Mr. Romero was not their foreman any more". This is directly contrary to Mr. Hernandez's testimony on recall that Claimant had merely been reassigned temporarily to other duties but "still as a foreman on extra gang 38". (Emphasis added). Mr. Hernandez had also testified that Claimant "was not replaced by Mr. Mendoza". However, Mr. Mendoza testified specifically that Mr. Hernandez instructed him "to take over the gang until he found a man, a foreman to take the gang over". In effect, therefore, Mr. Hernandez did replace Claimant as foreman of Extra Gang No. 38.

Mr. Di Ioli's testimony, similarly, was less than corroborative of Mr. Hernandez. He testified that he did not overhear the initial altercation "per se" at all. As to whether he heard Mr. Hernandez tell the crew that Claimant was "no longer the Foreman" and that "they were not to take orders from him", Mr. Di Ioli stated: "No, I did not hear that part of the conversation". Moreover, Mr. Hernandez had testified that when he spoke to the gang, "it was in the presence of Mr. Di Ioli". Mr. Di Ioli, however, "did not hear that part of the conversation". He does not deny it, merely that he "did not hear it".

Mr. Di Ioli also testified that he heard Mr. Hernandez "tell Julian Mendoza" to tell Claimant "to go to another job". This statement is somewhat incredible and colors Mr. Di Ioli's testimony adversely, for the testimony of Mr. Hernandez, Mr. Mendoza and Claimant is quite conclusive that the reassignment instructions were not conveyed to Mr. Mendoza until later on, by telephone, after Mr. Hernandez had returned to his office.

We conclude from the foregoing that the evidence on the question of whether he was initially taken out of service preponderates in Claimant's favor. At the very least, that he was replaced by Mr. Mendoza as foreman of the gang and that he was initially taken out of service pending investigation. We have stressed the word "initially" because the latter findings relate solely to what occurred before Mr. Hernandez left the job site and returned to his office.

2. THE EFFECT OF THE REASSIGNMENT.

The testimony is clear and convincing that after Mr. Hernandez returned to his office, something occurred which changed the situation. Precisely what, is not clear in the record, but Mr. Hernandez does state "I returned to my office and contacted my superiors in Los Angeles". In any event, shortly thereafter he telephoned Mr. Mendoza and gave him instructions as to reassigning Claimant to work with the Bantam Crane Crew. Mr. Mendoza promptly conveyed these instructions to Claimant in unequivocal fashion, but Claimant refused to comply. At this precise time, and prior thereto, Claimant was still at the job site, acting on the specific prior instructions from Roadmaster Hernandez "to remain".

We find that irrespective of what had occurred prior thereto, the effect of the reassignment was to counteract and negate any prior actions of Mr. Hernandez in removing Claimant from service. Claimant's obligation and responsibility at this point was to perform the duties of the reassignment. Clearly, at this point, Claimant's reassignment would not have occurred had there been any thought then that Claimant was "out of service", either pending investigation or permanently.

We are not persuaded by Claimant's statement, referring to Mr. Hernandez, "That if I had come back to work, he would say I was disobeying his orders". We are not convinced of the "logic" of Claimant's position that he would be "obeying orders" by insisting that he was "fired" and refusing to comply. Nor do we concur in Petitioner's contention that Claimant would be "admitting guilt" by accepting the reassignment. On the contrary, Claimant would be acting in complete good faith and supporting his record as a conscientious employe had he

proceeded to work with the Bantam Crane Crew as instructed.

In short, the situation had changed, and, whether rightly or wrongly in Claimant's opinion, a valid order of reassignment had been conveyed to him, issued by his admitted superior in authority. Under the well established principle of "comply and grieve later", his sole option was to comply now and, if he deemed it warranted, file a proper grievance thereafter. His reasons for opting not to comply, as we have indicated above, are not persuasive.

3. THE PERTINENCY OF RULE M810.

The provisions of Rule M810, as quoted above, are clear and concise and were admittedly known to Claimant. Accordingly, in view of the foregoing findings, we conclude that once Claimant was specifically instructed by Foreman Mendoza that he had been reassigned by Roadmaster Hernandez, his refusal to perform the duties of the reassignment and his leaving the property were in violation of Rule M810. In short, that he did not thereafter remain at his post of duty and devote himself exclusively to his duties during his "tour of duty", and that he did in fact "absent himself from employment without proper authority". On this issue, and particularly in the light of the subsequent events, we find that the evidence preponderates in favor of Carrier and that it sustained its burden of proof.

4. THE PENALTY.

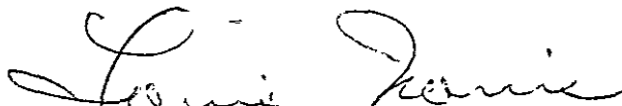
The disciplinary penalty imposed by Carrier was sixty days suspension effective February 25, 1976, based solely on the charge of violation of Rule M810. We find, however, that fault in this dispute is attributable to both sides; to Roadmaster Hernandez for acting precipitately in the matter at the outset, and to Claimant for refusing to comply with the reassignment. Additionally, there are substantial mitigating factors militating in favor of Claimant, plus the fact that the record is devoid of any evidence of prior disciplinary infraction during Claimant's twenty year period of service with Carrier.

In these circumstances, and based on an overall view of the merits of this dispute, we conclude that the penalty of sixty days

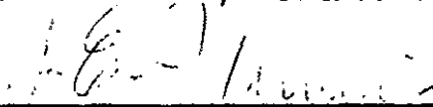
suspension is unduly harsh and unreasonable. We would, therefore, reduce the penalty to thirty days suspension and we so find.

Accordingly, we will sustain the claim in the limited respect above indicated. Carrier shall reimburse Claimant for any straight time wage loss in excess of thirty days, commencing February 25, 1976, such payment to be made within thirty days of receipt by Carrier of this Award.

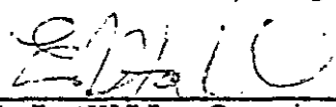
AWARD: Claim sustained in part in accordance with foregoing findings.



LOUIS NORRIS, Neutral and Chairman



S.E. FLEMING, Organization Member



E.J. HALL, Carrier Member

DATED: San Francisco, California
January 10, 1977