

PUBLIC LAW BOARD NO. 1997

Parties: Brotherhood of Maintenance of Way Employees  
and  
Union Pacific Railroad Company

Statement of Claim: "1. That the Carrier violated its Agreement with the Brotherhood of Maintenance of Way Employees, and particularly Rule 48 thereof, when on October 1, 1976 they dismissed Extra Gang Laborer Frederick L. Kuester for alleged violation of Maintenance of Way and Signal Rules 700 and 701, said dismissal being unjust, unreasonable and in abuse of discretion.

2. That F. L. Kuester be reinstated to his former position with seniority, and all other rights unimpaired and additionally be compensated for loss of earnings commencing October 1, 1976 account the Carrier's improper action."

Discussion: The Claimant had a seniority date of September 18, 1975. He was furloughed in October 1975 and recalled in July 1976.

The operative facts are that on October 1, 1976, at approximately 2:00 P.M. the Claimant was working as a Laborer in Gang 4905. His foreman was Mr. Kelley Valdez. Mr. Valdez instructed the Claimant to pull spikes from cross ties preparatory to laying a switch. The Claimant contended that as he was pulling up spikes an on-rail Speed Swing Crane pulled up close and then backed into him and struck the claw bar which he was using to pull up the spikes. The Claimant alleged that Foreman Valdez then came over to him and asked

him if he could not work the claw bar faster he should leave. The Claimant added that the Foreman grabbed his claw bar, threw it on the ground, and told him to get out, which the Claimant did.

Foreman Valdez's version of the events is that he lined up the Claimant and other members of the Gang to pull up the spikes. The Speed Swing Crane was moved to a point where all the spikes could be removed. Foreman Valdez further testified he stood about 40 feet away at the switch point and observed the Claimant standing with his claw bar. He stated he motioned to him to start pulling spikes, but the Claimant responded with an obscenity asking whether he wanted him to get under the crane, which the Foreman stated was about 20 to 50 feet away. When the Claimant refused to work, the Foreman told him to leave. The Claimant threw down his claw bar and left. The Foreman testified that he only had two hours to get the switch installed.

On October 4, 1976, after the Claimant had conferred with his union representatives, he returned to the property and insisted he be given a written statement of the reasons for his discharge. The Claimant contended that the Foreman made uncomplimentary and vulgar remarks about union representatives, but nevertheless on October 6, 1976, he received a letter that he had been discharged for violating Rules 700 and 701 which enjoins, among other things, employees from being insubordinate or using vulgar language.

On October 8, 1976, the Assistant General Chairman requested a hearing in accordance with Schedule Rule 48(a). On October 11, 1976, the Division Engineer scheduled a hearing for

October 18, 1976, but by letter dated October 14, 1976, to the Assistant General Chairman, requested a postponement of the hearing until October 30, 1976.

When the October 30, 1976, hearing convened, neither the Roadmaster nor Foreman Valdez were present. The Hearing Officer stated that he would have to conduct the hearing and weigh the Claimant's testimony against what he had been told by the supervisors since a postponement had not been agreed to. The Organization stated the Hearing Officer's statement was not accurate because the only postponement requested was the one to postpone the hearing from October 11 to October 30, to which the Organization had agreed. At the conclusion of the October 30th hearing, the Hearing Officer proposed, over the objections of the Assistant General Chairman, to reschedule another hearing to take testimony from the operator of the crane as to whether the crane had backed into the Claimant.

The rescheduled hearing convened on November 12, 1976, at which time both Mr. Valdez, Roadmaster Maxwell and Crane Operator Montes were present. The Claimant did not appear, although his union representatives attended, under protest, contending that the November 12, 1976 hearing was improper since the October 30th hearing was the hearing provided for by the Contract.

At the November 12, 1976 hearing, testimony was given by the Crane Operator and the two supervisors. The Crane Operator denied that he had touched the Claimant with his machine.

On December 10, 1976, the Division Engineer wrote the Claimant that he was discharged from the Company since the hearings

of October 30 and November 12, 1976 substantiated the charges that he had violated Rules 700 and 701 by being insubordinate.

Among other matters, the Union protested that the December 10, 1976 letter, postmarked December 16, 1976, breached Rule 48(a) which required the Carrier to state its decision within 20 days after the completion of the hearing.

#### Carrier's Position

The Carrier denied that it had committed any material prejudicial errors in its handling of the instant case. The Carrier notified the Claimant on October 6, 1976, of his removal from service and a hearing was ultimately scheduled for October 30, 1976. At this hearing, it became apparent that it was necessary to obtain the testimony of the Crane Operator and so the hearing was recessed to obtain this testimony. The Carrier added that the failure to notify the Claimant within 20 days was not a material error because it in no way prejudiced the Claimant's rights.

On the merits, the Carrier contended that there was sufficient probative evidence to support its discharge of the Claimant. While there are differing versions of what transpired on the afternoon of October 1, 1976, the Carrier is privileged to accept one version of the events over another, provided that there is sufficient probative evidence to support and uphold the version it has chosen to accept. It is the function of the Carrier, and not this Board, to weigh all the conflicts in the testimony and other evidence and to resolve these conflicts.

The Carrier contended that there was sufficient probative evidence to show that the Claimant refused to follow his Foreman's instructions to pull spikes and questioned the Foreman as to why there was any hurry in getting the work done. The evidence showed that the Claimant refused to comply with proper orders of duly constituted supervision. When the Foreman noted the Claimant had not started to pull spikes as directed, he told him to leave work. At which time the Claimant threw down his claw bar and went home.

The record shows that the Claimant was insubordinate and used vulgar language toward his supervisor, and moreover he had not been touched or hurt in any way by the crane. The Carrier stated the witness produced by the Claimant at the hearing was evasive and purported not to hear any profanity or argumentative statement by the Claimant. The Carrier noted that the Claimant did not produce a fellow employee "named" "Whitey" who purportedly stood next to the Claimant and would have heard and seen everything that transpired between the Claimant and the Foreman and the Crane Operator. The Carrier added that Foreman Valdez's testimony was clear and unequivocal that the Claimant had refused to pull spikes and questioned him as to the reason for ~~hurry~~ing to do the work.

The Carrier denied that it had committed any procedural errors or contract violations which had materially prejudiced the Claimant's right to a fair and impartial hearing.

#### Union's Position

The Union contended that there was no basis in the events of October 1, 1976, to discharge the Claimant. The Claimant

was pulling spikes when the crane backed into him and struck the claw bar with which he was working. The Claimant sought to get out of the way of the crane. The Foreman then came over and grabbed the claw bar from the Claimant and told him to leave. The Union added that there was nothing in the testimony of the Crane Operator which contradicted the Claimant's statements. The Operator stated that he had not run over the Claimant which the Claimant had never contended. He further stated he was not aware that his machine had touched the Claimant. Thus his testimony did not add much to the record.

The Organization stressed that the Carrier repeatedly violated the Claimant's contractual rights to a fair and impartial hearing. When the scheduled October 30, 1976 hearing convened, neither the Roadmaster nor the Foreman were present although they had been directed to appear by the October 14, 1976 Letter convening the hearing. Nevertheless, the Hearing Officer proceeded to hold the hearing without any Carrier witnesses present to sustain the charges filed against the Claimant. This was in gross violation of basic fair play and violative of the Carrier's obligation to carry the burden of proof. The Union stated as the hearing continued, and the Hearing Officer became aware that the charges against the Claimant were not being sustained, he abruptly closed the hearing and insisted he would have to reschedule it in order to obtain the testimony of the Crane Operator. The Union Representative vigorously protested this improper action.

At the rescheduled hearing the Carrier not only produced the Crane Operator but also the Roadmaster and Foreman even though the record was in fact closed, as to them. Moreover, although the hearing was concluded on November 12, 1976, the Carrier did not inform the Claimant of the outcome until December 10, 1976, even though Rule 48(a) requires the decision be rendered within 20 days after the completion of the hearing.

The Organization stated that the Carrier repeatedly breached Rule 48 and failed to meet its burden of proof and therefore the discipline assessed against the Claimant must be vacated and he should be restored to his job and made whole.

Findings: The Board, upon the whole record and all the evidence, finds that the employee and Carrier are Employee and Carrier within the meaning of the Railway Labor Act; that the Board has jurisdiction over the dispute and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds that the Carrier committed material and prejudicial errors in its conduct of the disciplinary proceedings against the Claimant.

The Carrier produced no competent proof against the Claimant that he was guilty of the charges at the October 30, 1976 hearing in the absence of the complaining witnesses, i.e., the foreman and roadmaster. The Hearing Officer was not privileged to proceed to hear the Claimant's version of the contraverted events and to state he

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would rely on what he had been told by the supervisors. The failure of the supervisors to be present, after being properly notified, and to confront the Claimant and be subject to cross examination violated basic due processes, and it was gross prejudicial error for the Hearing Officer to state that he would weigh what the Claimant testified to as against the ex parte statements he had received from the Carrier's complaining witnesses, i.e., the cognizant supervisors. The affected supervisors had received clear and timely notice to be present at the Hearing and their failure to be present militated against the Carrier's case being proved.

The Carrier is not privileged to continue a hearing, without the Organization's consent, in order to procure testimony against the Claimant. At the conclusion of the October 30, 1976 hearing, absent the Carrier's principal witnesses, the Carrier had failed to make even a prima facie case against the Claimant and it should have dismissed the case against him at that juncture. It is not privileged to engage in a "fishing" expedition to see if it could procure some additional evidence at a subsequent date against the Claimant... The Carrier's actions in this case militate against the concept of a speedy trial which underlies the Claimant's contractual rights pursuant to Rule 48.- The Carrier having chosen to proceed with the October 30 hearing was conclusively bound by the quantum of proof, or the lack thereof, adduced at this hearing. It cannot reschedule hearings to get additional evidence.

The Board finds that since the Carrier adduced no proof against the Claimant at the initial investigation to sustain



the charges, it had no recourse but to dismiss the charges and return the Claimant to his post. Its failure to do so has materially tainted the Carrier's subsequent disciplinary proceedings, and they must therefore be vacated as violative of Rule 48 for a prompt hearing as well as for failure to meet its burden of proof imposed upon it as the charging or complaining party.

Award: Claim sustained.

Order: The Carrier is directed to comply with the Award,  
on or before March 6, 1978.

Jacob Seidenberg  
Jacob Seidenberg, Chairman and Neutral Member of Board

E. R. Myers  
E. R. Myers, Carrier Member

S. E. Fleming  
S. E. Fleming, Employee Member

February 5, 1978