

PUBLIC LAW BOARD NO. 2267

Award No. 5
Case No. 6

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees

and

Union Pacific Railroad Company

STATEMENT
OF CLAIM:

1. That the Carrier violated the Agreement when on January 12, 1979 they improperly suspended, without benefit of a hearing, Sectionman Paul Howard and subsequently, after conducting a hearing, assessed him with a thirty (30) day suspension without just and sufficient cause.
2. That the Carrier now compensate Claimant Howard for loss of earnings suffered and that his personal record be expunged of any reference to the erroneous suspension.

FINDINGS:

By reason of the Agreement dated August 31, 1978, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

On January 12, 1979, Grievant was suspended from service pending formal hearing for alleged violation of General Rule F and L, Form 7908, reading, in pertinent part: General Rule F, "Defects which might affect the safe and efficient operation of the railroad must be reported promptly to the proper authority by the quickest means of communication." General Rule L, "Employees while on duty must be alert and attentive, and in case of danger to the company's property or interest, they must unite to protect it." The suspension letter to Grievant stated that "Such action is necessary account your direct responsibility as track walker in failing to observe an improper wide gauge track condition at approximately 2:00 PM January 12, 1979 at MP 404.75 between Vigo and Hoya."

The Organization contends that (1) the Carrier violated Rule 48(a) of the Parties' Agreement by disciplining Grievant prior to hearing, and (2) the Carrier failed to prove the charges when hearing was held.

Rule 48(a) states in part: "....An employee who has been in service more than sixty (60) calendar days, whose application has not been disapproved, shall not be dismissed or otherwise disciplined until after he has been accorded a fair and impartial hearing...." Rule 48 also provides, in Paragraph (o): "It is understood that nothing contained in this rule will prevent the supervisory officer from suspending an employee from service pending hearing where serious and/or flagrant violations of Company rules or instructions are apparent, provided, however, that such hearing shall be conducted within thirty (30) calendar days from the date the employee is suspended and a decision rendered within twenty (20) calendar days following the date the investigation is concluded."

There can be no question that the Parties have agreed that "nothing contained in this rule will prevent the supervisory officer from suspending an employee from service pending hearing where serious and/or flagrant violations of Company rules or instructions are apparent". The Carrier is charged with heavy responsibilities under statutory, regulatory, and common law to protect the lives and properties of the public and of the Carrier and all of its employees. The Grievant's duties as track walker directly affect the safety and well-being of fellow employees and of the lives and properties of the traveling public, of the Carrier, of the shippers, and of others. Dangerous track and roadway, reflected by defects such as an improper wide gauge track condition, "affect the safe and efficient operation of the railroad" and constitute "danger to the company's property or interest", within the meaning of General Rule F and L, Form 7908.

The authority to suspend an employee is recognized in Rule 48(o) "where serious and/or flagrant violations of Company rules or instructions are apparent." (underscoring added). This language must be construed in the light of the heavy responsibilities imposed upon the Carrier by statutory, regulatory, and common law. Necessarily, where there is no question that there exist apparent "serious and/or flagrant violations of Company rules or instructions", the authority to suspend is expressly recognized. Problem arises, however, where "serious and/or flagrant violations of Company rules or instructions" may seem to be apparent to the supervisory officer but are denied as being apparent or as existing in the view of the employee or the Organization. Where disagreement arises, or dispute exists, is the authority to suspend thereby eliminated or evaporated? Obviously, the authority to suspend must continue to be operative in order to permit the Carrier to comply with its obligations and responsibilities under the statutory, regulatory, and common law. The security, well-being, and safety of lives and property are not to be put in jeopardy.

This does not mean that the suspension authority of the Carrier is to be subject to the whim or caprice or arbitrary decision of the supervisory officer. "Serious and/or flagrant violations of Company rules or instructions" must be "apparent" under Rule 48(o). Necessarily, the condition of being "apparent" requires the physical existence of such facts and circumstances as would lead a

reasonable and responsible supervisory officer sincerely, in good faith, to believe that serious and/or flagrant violation of Company rules or instructions have been or may be committed.

The facts and circumstances of record justify the conclusion that the supervisory officer sincerely, in good faith, reasonably believed that Grievant was in serious or flagrant violation of Company rules or instructions and that it was necessary to suspend him. Grievant was assigned to walk track on January 12, 1979, between M.P. 405 and 404, and did in fact do so. Grievant admitted to the supervisory officer that he saw the wide gauge spot, although his testimony is not consistent on this. Grievant admitted that he did not report the wide gauge condition to his Foreman. The supervisory officer knew Grievant "for many years as Sectionman and had a great deal of faith in his ability." The supervisory officer had "no doubt" that Grievant recognized the wide gauge condition at MP 404.75. The supervisory officer felt that Grievant's "removal from service was necessary at that time for the safe operation of the Railroad and the protection of his fellow employees account his attitude at the time of this incident." The supervisory officer testified, in asking Grievant why he had not reported the wide gauge to Foreman, that Grievant "became agitated and wanted to argue and raise his voice and I advised him that we would discuss the matter in a calm fashion and just the facts would be brought out and I again asked him why he had not notified the Foreman of his findings concerning the wide gauge and he said he already knew it and I asked who already knew it and with an out thrust of his chin he indicated in the direction of Foreman. This happened three times." Grievant displayed outward animosity toward Foreman, according to the supervisory officer. In the circumstances, it was not unreasonable for the supervisory officer to believe, in good faith, that Grievant's attitude towards his Foreman made questionable Grievant's carrying out of his duties to report dangerous track conditions and that such attitude had resulted in violation of Company rules and instructions and required the suspension of Grievant prior to formal hearing. Accordingly, the suspension of Grievant was not in violation of Rule 48(o) of the Parties' Agreement.

The exercise of authority to suspend pursuant to Rule 48(o) is, of course, not the same question as whether charges are proved in a "fair and impartial hearing" pursuant to Rule 48(a) of the Parties' Agreement. Although the authority to exercise suspension may be upheld, this is a far cry from concluding that any discipline at all is justified. In the instant case, the facts and circumstances of record do not support the charges.

There remains some doubt as to whether Grievant, as a matter of fact, had detected the wide gauge track condition at MP 404.75. His testimony goes both ways. Since it was clearly necessary to use an interpreter, it is evident that some confusion may exist in the meanings attached to the questions and answers, especially in the instant case where contradictory answers are supplied. Grievant had no instruments for wide-gauge measurement at the time, none being supplied to him. The wide gauge condition was on a curve, and this may have made detection less obvious. There is no doubt that Grievant repeatedly stated that reporting of wide gauge track condition at MP 404.75 to Foreman was not necessary because Foreman had already been informed by Track Inspector on January 11 before quitting time of the wide gauge condition at MP 404.75. Exhibit D, dated January 11, 1979, by Track Inspector, and delivered to Foreman on January 18, 1979, supports verbal testimony that Track Inspector informed Foreman and crew on January 11 of wide gauge

"M.P. 404.60 to 404.80". Although there is some inconsistency in the testimony of various witnesses, including Foreman, as to whether Track Inspector informed Foreman of the wide gauge at M.P. 404.75, Exhibit D strongly supports Grievant's stated understanding that the wide gauge condition at M.P. 404.75 had already been reported to Foreman and that it was not necessary that Grievant do so. In this view of the matter, the report of the Track Inspector to the Foreman on January 11, 1979 should have been sufficient so as to preclude violation of General Rule F and L, Form 7908.

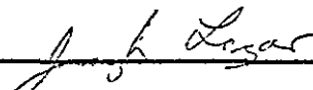
A W A R D

1. The Carrier is not in violation of Rule 48(o) of Contract.

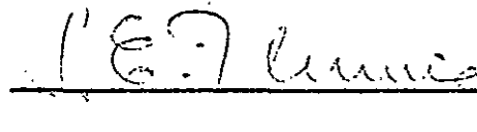
2. Grievant was disciplined without just and sufficient cause.

The Carrier shall compensate him for loss of earnings suffered and his personal record shall be cleared.

PUBLIC LAW BOARD NO. 2267



JOSEPH LAZAR, Chairman and Neutral Member



S. E. FLEMING, Employee Member



E. R. MYERS, Carrier Member

Dated: March 19, 1980