

PUBLIC LAW BOARD NO. 2774

PARTIES Brotherhood of Maintenance of Way Employees
TO
DISPUTE: and
 Atchison, Topeka & Santa Fe Railway Co.

STATEMENT OF CLAIM:

1. That the Carrier's decision to disqualify former Old Kansas City District Machine Operator, Mario Moreno, from operating Group 7, Classes 1 and 2 machines, was unjust.
2. That the Carrier should now be required to reinstate the Claimant, Group 7, Class 1 and 2 seniority, and made whole for all time lost beginning May 2, 1991.

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant had been employed by Carrier on February 15, 1977, and was promoted to Machine Operator on September 4, 1979. Thereafter he continued to function as a Machine Operator. On April 13th, while functioning as an Operator of a Ballast Regulator, Claimant was on the machine, running it, when it was overturned. While no one was injured by this accident (Claimant and one other employee on the machine were not injured) there was approximately \$6,000 worth of damage to the machine. Carrier thereafter on May 2nd, 1991, addressed the following letter to Claimant:

On August 27, 1990 you were injured when Burro Crane AT 1780 overturned while you were at the controls. Fortunately, your injury was not of a very serious nature, but the potential for very serious injury was present. Equally fortunate, none of your fellow workers were injured. The Burro Crane was damaged beyond repair. Replacement cost of this crane is approximately \$250,000.

On April 13, 1991, while under your operation, Ballast Regulator LM 99092 overturned when you lowered the turntable of the machine onto a self-guarded frog. Again, you and the other employees in the immediate area were not injured when the machine overturned. Approximately \$6,000 damage to the machine resulted when you used poor judgement by allowing the engine to continue to run while on its side and unable to pump oil to the engine.

These accidents resulted because you failed to follow proper operating procedures, you were inattentive, negligent and careless in your operation of company machines.

A very serious trend appears to have developed, and if left unchecked, could result in a more serious accident.

Therefore, you are hereby disqualified from operation Group 7, Class 1 and Class 2 machines.

In response to this letter, Claimant requested an investigation pursuant to the schedule Agreement (Rule 8). Thereafter, he received a charge letter dated June 11, which indicated that the purpose of the investigative hearing was "your entire record will be reviewed at the hearing." Following the investigation, which was held on June 27, a letter was addressed to Claimant advising him that as a result of the investigation, he was disqualified from operating Group 7, Class 1 and 2 machines, resulting in the dispute herein.

The Organization notes in its position, that Carrier treated the Burro Crane accident as a discipline case, and following that incident Claimant was suspended for 20 days without pay. In the case of the accident, which triggered this entire matter, the question of the Ballast Regulator incident, Carrier admits that Claimant

may have used poor judgement by allowing the engine to continue to run while the machine was on its side. However, there was no question raised with respect to Claimant's qualifications, merely, the question of "good judgement". The Organization maintains that questions with respect to good judgement do not prove disqualification. The Organization notes that a further incident, which occurred on October 7, 1991, was referred to by Carrier when Claimant allowed the boom of a crane to come in contact with an overhead power line. The Organization notes further that in the final letter of October 22, 1991, the Carrier summed up its case against Claimant with the specific indication that one of the key questions was his performance record, which indicated indifference to instructions. Thus, Carrier believed that Claimant who did not properly and safely operate machinery had become a potential liability to the safety of the operation. As a result of the investigation and the arguments raised by Carrier, the Petitioner believes that Carrier failed to prove that Claimant was not qualified to operate machines. Furthermore, the investigation was confined to the single issue of whether he was qualified or not, thus the burden of proof rests with Carrier to prove that he was indeed not qualified to run the machines in question.

The Organization notes particularly that Claimant was not charged with any rule violation, and was not found guilty of violating any rules. The Organization believes that it is too late for Carrier to come forward with a notion that disqualification may be used as a disciplinary measure.

Carrier believes that its action of disqualifying Claimant from operating Group 7, Class 1 and 2 machines was both warranted and justified. Specifically, Carrier notes that in its judgement, the Claimant had shown a history of on-the-job accidents, and also routinely refused to follow instructions from work equipment personnel concerning proper operating procedures. Further, according to Carrier,

in slightly over seven months, Claimant was involved in three accidents, which although not resulting in injury to any person, were of a very serious nature and cost the Carrier a great deal of money. In this respect, Carrier notes that on August 27, 1990, when the crane was overturned, it resulted in damage costing the Carrier \$250,000. On October 7, after repeated warnings, Claimant allowed the boom of the crane he was operating to contact a power line. No damage number was assessed in this instance. Finally, on April 13th, in the incident herein, the Ballast Regulator was overturned, and while under Claimant's control, the motor kept running resulting in a \$6,000 damage cost.

In addition to the specific accidents, Carrier notes that Claimant's on-the-job performance over a period of time, indicated that he had a history of disregarding instructions regarding the proper handling and operation of machines. Based on the evidence indicated, in Carrier's opinion, its decision was eminently justified, and the claim should be denied.

The Board believes that it is difficult to make the connection between Carrier's conclusions and the fact that Claimant operated the particular machinery for over 11 years without problems with respect to his qualifications. In this instance, Carrier has apparently equated bad judgement at least in one of the incidents, to being unqualified. In fact the bad judgement in question occurred after the claim was turned over. Furthermore, an examination of the record of this case, indicates no evidence whatever that Claimant could not operate the crane in question or that he was unqualified in general to operate the machines specified. It is the Board's view that Carrier was using disqualification as a type of discipline in this case, and this was inappropriate. The inappropriateness of this action is bolstered further by the fact that Claimant was already disciplined for one of the two incidents, which Carrier's notes was a major consideration in its decision in this case.

In examining the entire picture of what occurred in this instance, it is apparent that Claimant did indeed use bad judgement and had been remiss in terms of following instructions. This does not amount to a lack of qualification. There was no evidence in fact whatsoever to come to that conclusion. Therefore, the Board believes that Claimant should be reinstated to his former position as an operator of Group 7, Class 1 and 2 machines, but should receive no pay for losses sustained during the hiatus after the investigation and until the present, with respect to his activities. This period of time shall serve as an appropriate reminder to Claimant, that he must indeed obey instructions with respect to the operation of the equipment, which he is qualified to use.

AWARD

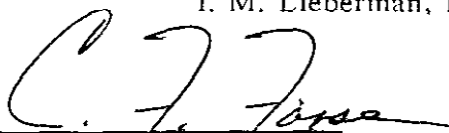
Claim sustained in part. Claimant shall be reinstated as a Class 1 and 2 Machine Operator, but will not receive pay for time lost in the use of this equipment.

ORDER

Carrier will comply with the Award herein within 30 days from the date hereof.



I. M. Lieberman, Neutral-Chairman



C. F. Foote
Employee Member



Lyle Pope
Carrier Member

Schaumburg, Illinois
June 30, 1993