

PUBLIC LAW BOARD NO. 3836

BROTHERHOOD OF MAINTENANCE  
OF WAY EMPLOYEES

-and-

SOUTHERN PACIFIC TRANSPORTATION  
COMPANY (WESTERN LINE)

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CASE NO. 8: Appeal of Truck-Crane Operator D.P. Phillips,  
SSA 569 29-7325 (7) from thirty (30) demerits.

BACKGROUND:

On December 5, 1985, Assistant Division Engineer R. Salazar conducted a Hearing regarding the charge that Phillips had violated Rule 2243, "No motor vehicle is to be set in motion until it is known that the way is clear...."

On December 27, 1985 Phillips was notified in writing that; based upon the evidence adduced at the December 5, 1985 Hearing, thirty (30) demerits had been assessed against his Disciplinary Record for having ran over a "wheel barrel grinder" on November 12, 1985.

DISCUSSION:

L.J. Fletcher, Roadmaster, Palmdale, California, was called as a witness on behalf of SOPTC, a summary of his testimony follows:

Fletcher was Phillips' supervisor on November 12, 1985 and saw him drive the "Boom Truck" over the "Grinder" - "I was standing within fifteen (15) feet of the truck when it happened." (TR 8) The

"Grinder" was standing approximately thirty (30) feet to the left front of the "Boom Truck" on the "toe of the slope of ballast." Fletcher attempted to stop Phillips from running over the "Grinder", however, when he did get Phillips stopped the "Boom Truck" "was sitting on top of the grinder." If Phillips continued forward he would have "totaled it out."

Fletcher testified that it was Phillips' responsibility to determine the path he was going to travel upon was clear. (TR 9)

Asked if Phillips knew where the "Grinder" was, Fletcher replied, "I...don't see how he could miss seeing it, as large as it is, and it was sitting right in the track where he had just insulated a rail for the welders." (TR 9)

C.R. DeVou, Foreman, Extra Gang 80, was called as a witness on behalf of SOPTC, a summary of his testimony follows:

DeVou's Gang had unloaded the "Grinder", it was a "Jessie Grinder", not under DeVou's jurisdiction. DeVou was sitting on the right side of Phillips' truck. Fletcher had directed DeVou to pick up some "joints" and the members of his Gang. When Fletcher had finished speaking to DeVou through the window, DeVou instructed Phillips to proceed. Phillips "touched the wheel barrel grinder and Mr. Fletcher jumped straight in the air and threw his hard hat." (TR 10) Asked who was responsible for knowing the path was clear, DeVou replied "The truck driver." Asked if Phillips walked around the truck, DeVou replied he had, and then added, "But in a way it's my fault, because he was going to turn out away from the obstruction and I told him to proceed straight ahead." (TR 10)

DeVou further testified that he did not see the "Grinder" "on the shoulder of the bal + section." (TR 11) That; when Phillips stopped the truck he was not on top of the "Grinder". (TR 11) That; no one made an attempt to stop Phillips from striking the "Grinder." (TR 11) That; the "Grinder" was situated "approximately two feet" from the truck. (TR 11)

DeVou also testified that Phillips' truck "leaned to the right" causing the driver's side "to life up in the air," that this was caused by a broken spring, "the spring was busted from the day we got it." (TR 11) That; Fletcher made no attempt to stop the truck from striking the "Grinder". (TR 11)

Salazar pointed out to DeVou the contradiction between his testimony and his "Accident Report" in which he wrote "Man should have looked before moving truck." DeVou acknowledged the difference, but replied "Yes, but it could be for a second time. You know like look out the window." (TR 11)

Asked by Salazar whether Phillips knew the position of the "Grinder", DeVou replied "I presume he did." (TR 11)

Finally, DeVou told Tirado that he did not know that the "Grinder" was in front of the truck.

D.P. Phillips, the Appellant, testified in his own behalf, a summary of that testimony follows:

Pursuant to DeVou's instruction to "go to the left" he turned from the right to the left and "tapped the machine and knocked it over." (TR 13) That; he did not see the "Grinder" near by and, did

not know it was close to his truck. (TR 13)

He acknowledged that the statement in his "Accident Report", i.e., "Forgot it was there and pulled forward and into it" was correct. (TR 13) (Exhibit B) (Arbitrator's underlining) However, he stated in explanation, "When that form was filled out, I was upset because of the fact that Fletcher was right beside it and when I hit it, he was watching us all the time, and he jumped up and down and threw his hard hat, jumping over the rail, which seemed to upset me a little bit, so when I wrote that I was... He proceeded to say 'You stupid son of a bitch, you don't know how to drive' and all that." (TR 13)

Phillips stated that the "Grinder" was on the road, not on the slope of the ballast. (TR 13) Phillips contended that the "Grinder" was "about thirteen to fifteen feet from his truck." Phillips did not know that the "Grinder" was there until he struck it. "It didn't flash in my mind because I was going to the right up to the highway." "No, I didn't know it was there." (TR 14) Phillips avers that Fletcher observed the truck up to the time it struck the "Grinder" but made no effort to stop the truck. (TR 14)

District Chairman, BMWE, argued in closing the charges against Phillips should be dropped, he did walk around his truck pursuant to the requirement of Rule 2243, as stated by Phillips, "and a witness for the Carrier (DeVou)." Fletcher watched and made no attempt to stop the accused from striking the "Grinder", as stated by Phillips, "and a witness for the Carrier (DeVou)."

SOPTC may not assess more than Phillips was already offered. (TR-15)

OPINION AND FINDINGS:

This is a discipline case, thus SOPTC has the obligation to establish by "Substantial Evidence" adduced in this record that; Phillips did violate Rule 2243. Phillips had no obligation to prove that he did not violate the Rule.

Neither SOPTC or BMW E dispute the fact that; Phillips' truck came into contact with the "Grinder". However, there is nothing in the record concerning the amount of damage caused - was it minor damage, or serious damage. Further, the record was closed without any effort by SOPTC to resolve the conflicts between the statements of DeVou and Phillips and Fletcher.

To cite some of the conflicts:

Fletcher's version (TR 8) is; when he got Phillips stopped, Phillips was "sitting on top of it," he backed him off, "if he had continued...he would have totaled it out." (TR 8)

DeVou's version, he (Phillips) "touched" the "Grinder". (TR 10)

Question to DeVou: When Mr. Phillips stopped the truck, was he on top of the machine? DeVou's answer: No. (TR 11)

Mr. Fletcher, did you make an attempt to stop Mr. Phillips from running over the grinder? Answer: Yes, I did. (TR 8)

Question to DeVou: Did anyone make any attempt to stop Mr. Phillips from hitting the grinder? Answer: No.

Question to Phillips: And he (Fletcher) made no attempt to stop you before you struck the machine? Answer: No, he didn't. (TR 14)

Notwithstanding the failure of the Hearing Officer to make any attempt to resolve these various conflicts in the testimony of the witnesses, this PLB FINDS AND HOLDS that; based upon a careful analysis of the entire record, the requirements of Rule 45 were satisfied by SOPTC, i.e., Phillips did receive a "Fair and Impartial Hearing."

As to the question of whether there is "Substantial Evidence" in the record establishing Phillips' guilt, this PLB accepts Phillips' statement in his "Accident Report" as credible, i.e. "forgot it was there and pulled forward and into it." (Exhibit B)

It is now appropriate to answer the question, is the discipline proposed "Excessive". To answer this question the Board considered the following factors:

- 1) Phillips does not have a prior disciplinary record.
- 2) Thirty (30) demerits are one-third of the number of demerits required to place Phillips in jeopardy of discharge.
- 3) The particular circumstances involved in this case.

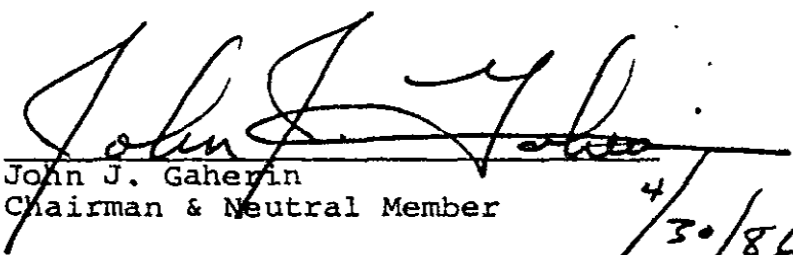
Accordingly. this Board FINDS AND HOLDS that the proposed discipline of Thirty (30) demerits is "Excessive" - we will reduce the discipline proposed to ten (10) demerits.

AWARD:

Phillips' appeal, aforesaid, is sustained to the extent set forth in the "Opinion".

SOPTC shall amend Phillips' disciplinary record, forthwith, in the manner and, to the extent necessary, to show that the proposed discipline has been reduced to ten (10) demerits.

IT IS SO ORDERED:

  
John J. Gaherin  
Chairman & Neutral Member

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