

PUBLIC LAW BOARD NO. 4338

PARTIES) UNION PACIFIC RAILROAD COMPANY
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

SEP 15 1988
VICE PRESIDENT
LABOR RELATIONS

STATEMENT OF CLAIM:

1. The hearing held May 27, 1988 in connection with the discipline case involving Assistant Foreman Flagman G. S. Mang was procedurally defective in that:

- (a) It involved charges that were not precise in violation of Rule 48(c);
- (b) The hearing officer D. R. Borla would not allow pertinent questions to be asked and the two (2) attached letters to be entered into the hearing to develop the facts of the case.

2. The discipline assessed (thirty((30) days suspension including five (5) days ADEPT training during said suspension) was arbitrary, capricious and unwarranted.

3. The claimant's record shall be cleared of the discipline referred to in Part (2) hereof and he shall be compensated for all time lost.

FINDINGS: This Public Law Board No. 4338 finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

In this dispute the claimant was notified to attend an investigation in Los Angeles, California on May 13, 1988 to determine his responsibility, if any, concerning charges that on April 28, 29 and 30, 1988 he absented himself from duty and failed to give all the facts regarding this irregularity when he falsified his time when calling it in to Gang Management, indicating a violation of General Rules A, B, 604, 607(2), 607(4) and 621 of Form 7908, Safety, Radio and General Rules for All Employees, revised April, 1985.

Pursuant to the investigation the claimant was found guilty and was assessed thirty days suspension. The Union filed a claim in the claimant's behalf which is now before this Board for a decision.

Steve Johnson, Manager of Track Maintenance, testified that the San Pedro Branch was under his territory. He stated that on Thursday morning, April 28, he was hi-railing down the branch and attempted to get in touch with the claimant on the maintenance of way mobile on Channel 1 and 2 and was unable to reach him.

Mr. Johnson further testified that he passed through Mile Post 17.38 at approximately 10:45 a.m. and could not find the claimant at the flagging position. He stated there was a forklift on the track, and he talked to the contractor briefly and thought maybe the claimant was down on the island flagging another construction site just over the Henry Ford bridge, but when he went down there and checked with the contractors, they said they hadn't seen the claimant.

This witness also testified that Bob Brooks was the only one from the Union Pacific who ever inspected that site. He stated that Gary or Jerry Parker, B&B Supervisor, was with him. He stated that he then went to lunch, and then went back to Mile Post 17.38 and looked around for a while and could not find the claimant in the area or on the radio. He testified that he checked with Hobart and Mead Yard, and they had not seen the claimant.

Mr. Johnson testified that he returned on Friday around 11:00 a.m. and noon and spent the rest of the day searching the area and talking to the contractors but could not find the claimant anywhere. He stated that the contractors advised him that the claimant had not been there that day. He stated he searched the grounds one more time before departing Friday at approximately 4:15 p.m.

Mr. Johnson testified that the grievant was afforded a company vehicle which had a radio with Channels 1 and 2. He testified that the claimant turned in Form No. 1 which indicated he had worked eight hours on April 28 with two and one-half hours of overtime; also the time turned in for April 29 indicated eight hours of straight time and two and one-half hours of overtime; also the evidence indicated the claimant turned in time for five hours at the overtime rate for April 30 which was a rest day. Mr. Johnson stated that the contractors were not working on April 30.

Mr. Johnson testified there was no Section Foreman with the gang, and as the assistant Section Foreman, the claimant would or should have called in his time. Jerry Parker, Manager of Bridge Maintenance, testified regarding the claimant's absence from duty.

The claimant testified he reported for duty at 6:00 a.m. on April 28 at Los Angeles Yard. He stated he arrive at Mile Post 17.38

at about 8:30 a.m. He testified that he departed that location at about 4:15 p.m. He did state that he was away from the job site for two, three or four hours. He testified he was no further away than Del Amo or to the contractor's office on the south side of the tracks.

The claimant also testified that he talked to the contractors on Friday and asked if they were going to be working on Saturday, and the contractor who was working near the railroad track said he was not, but he said to check with other contractors because they might be. The claimant stated that he thought they might be working, and for the protection of the train, he went to work on Saturday and stayed until about 10 or 11 each Saturday.

The claimant attempted to introduce a letter from a project manager of the contractor regarding his presence. The Hearing Officer would not admit the letter but stated the claimant could include it in his closing statement.

The claimant also attempted to introduce a letter from a travel agent stating that she delivered tickets to the claimant at the job location on a particular date. The evidence later established that it was not the ticket agent who delivered the tickets but was his sister. The Union requested that her statement be entered and placed into evidence, but such was not admitted.

The Union attempted to question another witness regarding the practice of working on Saturdays, but such testimony was not admitted by the Hearing Officer. The Hearing Officer was proper in refusing to admit such testimony. It is immaterial whether or not the practice had been to work on other Saturdays.

Steve Johnson testified there was not any way he could have missed the claimant on April 28 and 29 between the hours he was at Mile Post 17.38.

The claimant and his representative both made statements at the conclusion of the hearing. The Union contended that the two statements not being admitted was very unfair. The claimant's representative also contends that it was the practice of the flagman to show up on Saturdays to make sure that the contractor was protected on Saturdays and be paid for that particular service, as the claimant and Witness Santoscoy testified.

The letter from the contractor was read into the record by the claimant's representative. That letter stated that the contractor's record indicate that the claimant had missed only the dates of May 2 through May 4, 1988 in support of their contract.

The second letter was also read which stated that the claimant was in the vicinity of Santa Fe Avenue and Del Amo on April 29, 1988 at 1:00 p.m. in the City of Long Beach.

Those letters should have been admitted into evidence. However, it is not reversible error to exclude the letters.

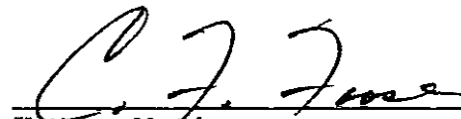
The Board has had the opportunity to study the letters and to determine their value. Certainly their value is not the same as witnesses appearing and testifying and being subject to cross-examination. Normally letters of this type are admitted and are granted whatever weight of evidence is deemed proper by the Hearing Officer.

The Board has considered the claimant's statement in closing the investigation. It appears there is no question but that the claimant has an extremely good record and is proud of his employment. At the same time the evidence is sufficient for the Carrier to determine that the claimant was guilty of the charges made. Under the circumstances the Board has no justification to set the discipline aside.

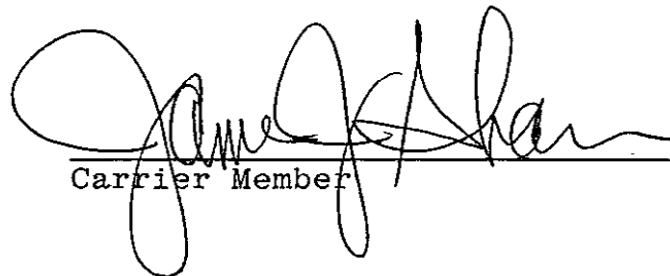
AWARD: Claim denied.



Preston J. Moore, Chairman



Union Member



Carrier Member