

PUBLIC LAW BOARD NO. 4373

PARTIES	SOUTHERN PACIFIC TRANSPORTATION CO. )	
	(EASTERN LINES) )	
	)	AWARD NO. 3
TO	AND	)
	)	CASE NO. 3
	BROTHERHOOD OF MAINTENANCE OF WAY )	
DISPUTE	EMPLOYES )	

STATEMENT OF CLAIM:

1. Carrier violated the effective Agreement when Track Foreman E. Drain was unjustly suspended from service by letter dated March 12, 1987, and did not receive a fair and impartial investigation.
2. Claimant Drain shall now be paid for 120 hours at Foreman's straight time rate of pay and the charge letter of March 12, 1987, removed from his personal record.

HISTORY OF DISPUTE:

At the time of the events giving rise to the claim in this case Claimant was working as Track Foreman with Tie Gang T2 on the Carrier's Houston Division.

On March 6, 1987 Claimant and his crew worked at and in the vicinity of MP 50.27 near Cleveland, Texas. Claimant reported the area safe and set a 25 MPH speed limit for it. Subsequently, after at least two trains had passed over that area, an Assistant Foreman who was relieving the I&R foreman inspected the track and found it to be unsafe. Specifically, he found the track out of line seven inches and buckled for a distance of twenty-five to thirty feet. He attributed the cause of the condition to a lack of ballast because there was very little ballast on the sides of the ties and none in the middle.

By letter of March 12, 1987 the Carrier informed Claimant that he had failed to inspect the track to be sure ballast had been pulled up on the shoulder and had issued a speed limit excessive for existing conditions in violation of Rule 1051 as well as Rules A, D, E and I governing the safety of persons and equipment as well as the economical maintenance of track and roadbed. The letter also informed Claimant that he was suspended for fifteen days. The Organization requested and received an investigation. By letter of May 1, 1987 the Carrier confirmed its findings of Rules violations by Claimant and reaffirmed the discipline assessed.

The Organization grieved the discipline. The Carrier denied the grievance. The Organization appealed the denial to the highest officer of the Carrier designated to handle such disputes. However, the dispute remains unresolved, and it is before this Board for final and binding determination.

FINDINGS:

The Board upon the whole record and all the evidence finds that the employees and the Carrier are employees and Carrier within the meaning of the Railway Labor Act, as amended, 45 U.S.C. §§151 et seq. The Board also finds it has jurisdiction to decide the dispute in this case. The Board further finds that the parties to the dispute, including Claimant, were given due notice of the hearing in this case.

The Organization argues that the Carrier has failed to sustain its burden of proof with respect to Claimant's guilt. We agree.

At the heart of the Carrier's finding of guilt is the Carrier's conclusion that Claimant was responsible for the condition of the track as

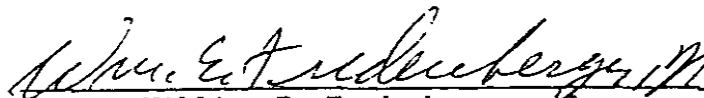
discovered by the Relief Foreman. The misalignment and buckling of the rail easily could have been caused by the trains which passed MP 50.27 between the time Claimant and his crew completed their work at that point and the time the unsafe condition was discovered. The absence of proper ballast on the track is in the first instance the responsibility of the machine operator. While it is true, of course, that it is part of Claimant's responsibility to supervise the machine operator, as a practical matter it is not possible for a Track Foreman to personally oversee the work of each member of his crew. Moreover, in this case there also was an Assistant Track Foreman working with the crew who followed the work of the crew. However, the Carrier failed to call that employee as a witness and refused the Organization's request to make him available. Claimant testified that when he last observed the track area in the vicinity of MP 50.27 before he went off duty, the track area was in good condition. There is no record evidence to refute Claimant's testimony. Under these circumstances we must conclude that the Carrier simply has not proven its case against Claimant.

The Organization raises procedural objections to the investigation. However, in view of our finding above we do not reach them.

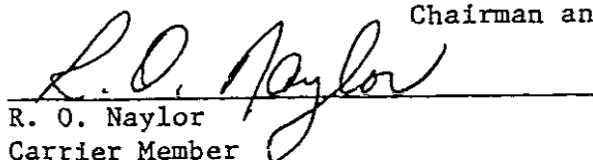
AWARD

Claim sustained.

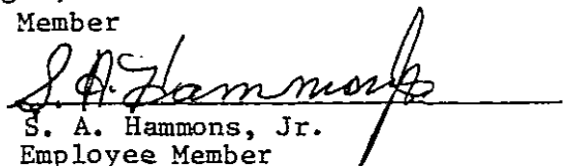
The Carrier will make this award effective within thirty days of the date hereof.



William E. Fredenberger, Jr.  
Chairman and Neutral Member



R. O. Naylor  
Carrier Member



S. A. Hammons, Jr.  
Employee Member

DATED: June 28, 1988