PUBLIC LAW BOARD NO. 4373

PARTIES	SOUTHERN PACIFIC TRANSPORTATION CO. (EASTERN LINES)	
TO	AND	AWARD NO. 4
DISPUTE	BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	CASE NO. 4

STATEMENT OF CLAIM:

1. Carrier violated the effective Agreement when Machine Operator R. R. Chafin was unjustly suspended from service by letter dated March 11, 1987.

2. Claimant Chafin shall now be paid for 180 hours at Ballast Regulator straight time rate of pay and with charge letter dated March 11, 1987 removed from his personal record.

HISTORY OF DISPUTE:

At the time of the events leading to the claim in this case Claimant was employed as a machine operator on the Carrier's Houston Division assigned to Tie Gang T2 with headquarters at Livingston, Texas.

On March 6, 1987 Claimant and his crew were working in the vicinity of Cleveland, Texas near MP 50.27. Claimant was having difficulty operating the ballast machine which, due to oil left on the track, could not gain traction in some areas. As a result, Claimant could not pull ballast onto the track shoulder as should have been done.

Some time after Claimant and his crew had worked the track area in the vicinity of MP 50.27 and after at least two trains had passed through the area a Relief I&R Foreman discovered a seven-inch misalignment and a buckling extending for 25 or 30 feet of the rail which he attributed to a lack of ballast.

By letter of March 11, 1987 the Carrier notified Claimant that he had violated Rule 607 barring indifference to duty or to the performance of duty as well as Rules A, D and I concerning safety of persons and the economical maintenance of track and roadbed. The letter also informed Claimant that he had been assessed ten days suspension.

Claimant requested an investigation, which the Carrier granted. By letter of May 1, 1987 the Carrier notified Claimant that the evidence adduced at the investigation substantiated his guilt and that his ten-day suspension was sustained.

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.

At the outset we note that the claim as stated is for 180 hours. The Organization acknowledges that the claim is for 80 hours. The award in this case is rendered on the basis of a claim for 80 rather than 180 hours.

The Organization contends that the record in this case does not contain evidence substantiating Claimant's guilt. We cannot agree. Claimant

admitted that due to oil on the tracks there were some places where he could not pull ballast with his machine. Yet, Claimant apparently never informed his supervisors of that fact thus leaving the track area in the vicinity of MP 50.27 without proper ballast. As a result, such condition existed when at least two trains passed over the rail in all probability misaligning and buckling it. That Claimant's machine was malfunctioning is irrelevant. The fact remains that Claimant could not pull ballast with the machine but did nothing to see that supervision was informed that the track area around MP 50.27 did not have sufficient ballast. Under these circumstances it is clear that Claimant violated the rules as found by the Carrier.

The Organization contends that the Carrier failed to call all witnesses who could give testimony as to the material facts in this case. Ordinarily, such omission by the Carrier would be grounds to set aside the discipline without regard to the merits. Moreover, such an omission may impact upon the question of whether the Carrier has sustained its burden of proof. However, in this case Claimant virtually convicted himself by his own testimony. A Carrier is not required to prove material facts which are admitted by an accused.

Nevertheless, we believe the discipline assessed Claimant was too harsh. It does not appear that the discipline was progressive. We believe the record in this case will support only half the discipline assessed.

AWARD

Claimant's suspension is reduced to five days or forty hours. Claimant shall receive restoration of benefits and pay for all time out of service in excess of five days.

Claim denied in all other respects.

The Carrier shall 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