SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 281

Case No. 281
File 247-7129

Parties Brotherhood of Maintenance of Way Employes

to and

Dispute Union Pacific Railroad Company
(Former MOPAC)

Statement of Claim: (1) Carrier violated the current working agreement especially Rule 12, when Track Welder H. D. Pelton and Track Welder Helper J. T. McGohan were dismissed from the service effective December 13, 1985.

(2) We are therefore requesting that Mr. Pelton and Mr. McGohan be returned to service with all wage loss suffered and have their record cleared of all discipline in the charge. Also, that they have all vacation rights restored, including seniority and vacation restored unimpaired.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated January 5, 1959, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant Pelton, a Welder with over 14 years of service, and Claimant McGohan, a Welder Helper with 11 1/2 years of service, on November 26, 1985, were assigned to Welding Gang No. 7246 working in the vicinity of Little Rock, Arkansas. Both Claimants were working near MP397 on the North Little Rock subdivision assisting a track gang in replacing a defective rail.

Claimants were required to operate their assigned vehicle to clear the track in order to permit a number of trains to pass. Claimants Pelton and McGohan with McGohan operating the vehicle headed south and moved into McDonaldson Siding. After the trains had passed, the hi-rail 6947, operated by McGohan, then proceeded back north from McDonaldson Siding to MP397, where Section Foreman Stewart and the members of his track gang were engaged in changing out a broken rail.

Said hi-rail vehicle approached the area where Stewart's gang were working, when within 1/2 mile south thereof, it was raining lightly at the time, Claimant McGohan let up on the accelerator and the vehicle continued in a northerly direction until it reached a distance approximately 2 pole lengths south of where Foreman Stewart and his gang were working. McGohan informed Pelton that he did not believe that he would be able to stop hi-rail 6947. Pelton immediately got on the outside of the vehicle and attempted to warn the employees working on the track. Said employees did not hear or see the vehicle. The hi-rail vehicle struck Foreman Ray Stewart, who as a result suffered a fractured right hip, and also Track Laborer Q. C. Baker who was in the center of the track removing anchor bolts. Thereafter, hi-rail 6947 continued in a northerly direction and finally rolled to a stop a distance of approximately 100 feet from where Foreman Stewart was struck.

A formal investigation was held in connection with the incident. As a result each Claimant was notified by the Superintendent under December 13, 1985:

> "You are hereby advised that your record has this date been assessed with `DISMISSAL' account your violations of Rules 1419 and 1421 of the MofW Rules dated April 28, 1985, in connection with failure to properly control hi-rail 6947 resulting in striking and injuring track Foreman M. R. STEWART, while working as welder helper (welder) on the Little Rock Subdivision at about 11:30 AM, November 26, 1985 near Mile Post 397 on the Little Rock Subdivision.
>
> Your record now stands `dismissed'."

It appears that Carrier invoked the doctrine of res ipsa loquitor (the thing speaks for itself). Said evidentiary rule permits the inferring of negligence to the wrongdoer (claimants), simply stated, because the accident happened. Track Foreman Stewart while working with his gang was struck by an on track hi-rail vehicle operated by Claimant Welder Helper J. T. McGohan.

In applying that doctrine it requires that the nature of the accident and the circumstances surrounding it reasonably lead one to believe that in the absence of negligence the injury or incident would not have occurred. Further, it requires that the thing causing the injury or incident be demonstrated to be under the exclusive control of the wrong doer, i.e., the claimants.

It was the injury to Track Foreman Stewart that became the linchpin in Carrier's charge:

> "That you failed to properly control said vehicle resulting in Track Foreman M. R. Stewart being struck and injured..."

It is found that the evidence was too insufficient to support the conclusion of culpability on the part of Claimant Track Welder H. D. Pelton. The evidence failed to show what Pelton did that contributed to Foreman Stewart being injured, or, as charged, what did Pelton do or contribute to the failure of McGohan to properly operate hi-rail

vehicle 6947. Conversely, what did Claimant Pelton fail to do that he should have done? Consequently, the claim on behalf of Claimant Pelton must be sustained.

The essence of the conclusions reached were that Claimant McGohan asserted the hi-rail vehicle hydroplaned on the wet track. (Note) Track Foreman Stewart was cutting the rail.The two men and the Foreman were engaged in work at the time of the incident. Mr. Brown, one of the gang members who was not hit, testified that after the incident he was transported from the work location back to a crossing by hi-rail 6947 truck, which was involved in the incident and driven by Claimant McGohan, and that it experienced a slide the length of some 2 or 3 poles. Thus, to that degree there was corroborated testimony that the truck did slide on a wet track on November 30, 1985 at 11:30 AM. Whether such, in fact, hydroplaned or represented a brake malfunction was not demonstrated. Against that, however, there appears to have been new hi-rail brake lines installed on the truck after the accident.

Vehicle 6947 was tested by J. W. Pangle, Roadway Equipment Supervisor, on November 27th in 6 simulated tests. All 6 tests demonstrated that the vehicle could have normally stopped short of where Mr. Stewart had been working. Thus, the Carrier concluded that it was more probable than not that the fact that the vehicle had struck Foreman Stewart was more the fault of the operator than that of the machine aside from any facts to the contrary.

The Board finds that the record is suspectible to that conclusion.

The Board finds that there are circumstances which serve to mitigate Claimant McGohan's discipline despite his poor service record. Claimant Track Welder Helper K. T. McGohan will be provisionally reinstated to service with all rights unimpaired but without pay for time out of service and be placed in a 12 month probationary status.

Award: Claim disposed of as per findings.

Order: Carrier is directed to make this Award effective within thirty (30) days of date of issuance shown below.

S. A. Hammons, Jr. Employee Member

J. J. Shannon, Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued October 20, 1987.

SPECIAL BOARD OF ADJUSTMENT NO. 279

Interpretation
of
Award No.281

Parties	Brotherhood of Maintenance of Way Employees
to	and
Dispute	Union Pacific Railroad Company (Former MOPAC)

Statement of Claim

(1) Carrier violated the current working agreement especially Rule 12, when Track Welder H. D. Pelton and Track Welder Helper J. T. McGohan were dismissed from the service effective December 13, 1985.

(2) We are therefore requesting that Mr. Pelton and Mr. McGohan be returned to service with all wage loss suffered and have their record cleared of all discipline in the charge. Also, that they have all vacation rights restored, including seniority and vacation restored unimpaired.

FINDINGS

The above claim was heard by this Board on July 13, 1987 in Washington, D.C. and the Claimant was present. The Board, having had the benefit of the parties submission beforehand and on the basis of the proper record before it, concluded that there was an insufficiency of evidence to support Carrier's conclusion of culpability and issued an interim bench ruling that Claimant H. D. Pelton be reinstated to service subject to his passing the necessary return to service examinations, including physicals. Carrier, in compliance therewith, reinstated him to service on July 27, 1987.

A formal Award and Order was subsequently issued October 20, 1987, therein sustaining the claim of H. D. Pelton.

The claim before this Board requested three things:

1. Restoration to service with all wage loss suffered.

2. Record cleansed of all discipline.

3. Restoration of all vacation rights unimpaired.

Carrier responded to No. 2 by clearing Claimant's record.

It then set out to pay "all wage loss suffered". Carrier, pursuant to past settlements, computed the straight time work opportunities which would have fallen to Claimant had he worked from November 27, 1985 to July 27, 1987, i.e. 2143 hours at the rate of $12.6133 and 1376 hours at $12.93439 (reflecting a 2.55% increase 12/1/86).

Claimant's Railroad Retirement Board "R.U.I.A." benefits were deducted therefrom along with the required State and Federal tax withholdings. Also, his RRB benefits were credited for the period covering December 1985 through July 1987. Claimant was then given a sight draft in the net amount of $20,929.80.

The Manager-Personnel Accounting was advised by Carrier's Labor Relations Department that Claimant was entitled to two lump sum payments under the terms Article I of the October 17, 1986 National Agreement of $565 and $450, respectively, and also a pro rata share of the third lump sum payment of $535. The net thereof, i.e., $342.32, $272.65, and $363.37, respectively, was authorized for payment January 14, 1988.

The General Chairman, under date of January 12, 1988, wrote the Carrier's designated representative. He asserted, among other things, that because the Carrier failed to pay Claimant his "wage loss" by November 19, 1987, as ordered by Award No. 281, a 10% penalty "on the full amount Carrier owes Claimant Pelton" was requested. The General Chairman, apparently, defined the "full amount" when he itemized the following:

		Chairman's Comments
"1.	Hourly wages since November 27, 1985 (paid one hour on the 27th) until July 18, 1987, first day back to work. (3,471 hours not including holidays on weekends).	No comment. No record thereon.
2.	All overtime during the period in number 1, paid on jobs 7246 and 1154.	No comment. No record thereon.
3.	Lump sum payments (two).	Appears to have been paid.
4.	Three weeks vacation due in 1987.	Entitled to an adjustment thereon.
5.	Personal days not taken per working Agreement.	Entitled.
6.	Months credited to his BA-6, Railroad Retirement funds, lost during period Nov. 27, 1985 to July 28, 1987.	Appears to have been taken care of.
7.	Health Benefits: Premiums to his hospital association, Travelers Insurance and to Aetna Insurance (dental). Mr. Pelton paid $1,731.00 to Travelers, was out $180.40 on his wife's hospitalization, that normally would have been covered; plus prescriptions paid during period off.	If paid, Claimant is entitled to be reimbursed. I cannot pass on this $180.40 at this time.
	On Dental Benefits, Mr. Pelton has been out $999.00 since November, 1985.	I cannot pass on this item at this time.
8.	Right to Carrier purchased eye glasses. Claimant needed new ones but could not afford them. Carrier would have paid for two pair during this period if he had been working.	Hypothetical. If not purchased, no reason to raise an inquiry thereon.
9.	Out of pocket expense to attend Special Board of Adjustment of air fare $259.00 and hotel $195.00, total $454.00."	No entitlement. No requirement therefor.

Note: The essence of the above was presented by the Claimant to Board at the Washington hearing, July 13, 1987 as his 'partial list'.

The General Chairman, on January 18, 1988, again wrote the Director of Labor Relations augmenting his January 12, 1987 claim, on behalf of Claimant, by adding:

"(1) Doctors bills & prescriptions ..... $ 141.11

(2) Bills on Dependents (would have been covered under Travelers GA-23000... $1,840.14

(3) Dental Bills (Covered by Aetna) ... $1,067.00"

The parties subsequently conferred, discussed and exchanged qualifying material as well as viewpoints.

The General Chairman on or about June 9, 1988, wrote the Chairman of SBA No. 279 the following:

"REQUEST FOR INTERPRETATION:

		Chairman's Comments
The Brotherhood of Maintenance of Way Employees respectfully petitions this Board to interpret Award 281 so as to resolve the following:		
(A)	Does the Award include the four lump sum payments as granted by the National Agreement of October 17, 1986, for the period of time Claimant was wrongfully withheld from service?	Covers only the period of time out of service- Sections 1,3,&5 of Article 1, have been paid.
(B)	Does the Award include the payment of Claimant's insurance premiums and medical expenses incurred when the Claimant was dismissed from service and his employee health benefits severed, up to the time of his reinstatement?	Not payments per se. Claimant to be made whole as if he never had been wrongly discharged. If he made payments for coverage - yes.
(C)	Does the Award allow the Claimant to receive creditation of Railroad Retirement funds lost between the time of his dismissal and his reinstatement date?	Yes.

(D)	Should the Claimant under the Award receive the designated ten percent penalty charged to the Carrier on the full amount due Claimant, since the Carrier failed to pay the sum within a reasonable time after the Award was issued?"	No. Neither rules nor authority so permit.

Carrier interposed procedural questions as to the Board's jurisdiction to consider the subsequent varied claims filed. It also argued, among many things, that Award No. 281 settled the dispute once and for all, that the doctrine of res judicata, estoppel by judgment and stare decises, bars the untimely and improper claims.

The Union offered Awards in support of its requests.

It appears to the Chairman that there are some misunderstandings as to the rights, responsibilities, and obligations of the parties. A sustaining award does not provide a basis for instituting what appears to be new claims. Nor should the Award be a basis for continuing or creating a dispute. The Claimant and the provisions of the applicable Agreement should be fairly considered. He is to be treated as if never out of service and entitled to all benefits of his Agreement. The parties Schedule Agreement provides the specific terms therefor in Discipline Rule 12, Section 1(3), when claims are sustained, i.e. reinstatement, clear the employee's record and compensation for wage loss suffered. Its terms are not to be construed narrowly or as broad as here sought.

The claim that SBA 279 had properly before it, as hereinbefore pointed out, covered the three areas specifically set forth in Rule 12. Except to the extent that the new claims may fall within the three areas of obligatory adjustments contained in Rule 12, some of the claims belatedly made, by the Claimant and the General Chairman, no matter how

appealing or morally righteous, appear to be outside of the claim properly presented to Board 279. The Board, absent a proper record to base its answers on, is without competence or authority to pass thereon.

A request for an interpretation of an Award should arise from a dispute bottomed on a difference in opinions as to the proper application of the provisions on an Award. In the instant case it is not quite clear how this request arose. Carrier implemented the Award. Carrier reinstated the Claimant. Also, it expunged the incident from his service record. That part of the claim (and Rule 12) had been satisfied. Further, the Carrier paid a "wage loss". The record doesn't permit comment on whether the payment was accurate or was not.

Any question as to the timeliness of the enforcement of the Award is a matter to be mandatorily pursued under Section 3, First, (P), of the Railway Labor Act, as amended. This Board is without jurisdiction thereof.

SBA 279 has enunciated through its previous awards the application that is to be accorded to the term "wage loss" in Rule 12(e). Based thereon and simply stated, it means compensation for "all time lost". That phrase does not include time otherwise not paid for by Carrier. However, the hours lost, including overtime hours, are to be paid for at the straight time rate less deduction for outside earnings, if any, and Claimant has an obligation to disclose same and by whom.

Health and Welfare benefits are an integral part and cost of the wage factor. It is a fact that Travelers Policy GA-23000, as amended, now does provide coverage for suspended or dismissed employees after adjustments who are reinstated and, as here, awarded full back pay. Hence, if there be serious questions that then would be an

administrative matter under the Policy that Claimant has to first handle with Traveler's and/or Aetna Insurance Companies before SBA 279 assumes jurisdiction thereon.

Carrier has directed the Railroad Retirement Board to credit Claimant for the period of time out of service. The presumption must be that matter has been taken care of. Inquiry may be made to that Board for a check thereon.

As to the lump sum wage matter: It arises under Article 1, Sections 1, 3, and 5 of the October 17, 1986 National Agreement. Carrier paid three of them. I've not had argument from Claimant as to the proprieties of the payments already made. However, I do understand that the subject matter is in National handling. Consequently, in the interest of uniformity and consistency of Agreement application, any alleged differences should be instituted at that level's appropriate forum. I would defer to that jurisdiction. When appropriate guidance is forthcoming the matter may be brought up again [here] consistent therewith.

AWARD: As per findings, request disposed of.

Arthur T. Van Wart
Arbitrator and Chairman

Issued: October 4, 1988.

Mr. Arthur T. Van Wart,
Chairman and Neutral Member
Special Board of Adjustment No. 279
1401 Pennsylvania Ave.
Wilmington, Delaware 19806

Re: Award No. 281 - H. D. Pelton

Dear Mr. Van Wart:

The parties are in apparent disagreement as to the amount of compensation due the Claimant under Award 281. Claimant Harold D. Pelton was wrongfully withheld from service on December 13, 1985, and fully reinstated on October 20, 1987 through Special Board of Adjustment No. 279 Award 281. The Award sustained the claim with the following language:

> "It is found that the evidence was too insufficient to support the conclusion of culpability on the part of Claimant Track Welder H. D. Pelton."

The Brotherhood of Maintenance of Way Employes respectfully petitions this Board to interpret Award 281 so as to resolve the following:

(A) Does the Award include the four lump sum payments as granted by the National Agreement of October 17, 1986, for the period of time Claimant was wrongfully withheld from service?

(B) Does the Award include the payment of Claimant's insurance premiums and medical expenses incurred when the Claimant was dismissed from service and his employe health benefits severed, up to the time of his reinstatement?

(C) Does the Award allow the Claimant to receive creditation of Railroad Retirement funds lost between the time of his dismissal and his reinstatement date?

(D) Should the Claimant under the Award receive the designated ten percent penalty charged to the Carrier on the full amount due Claimant, since the Carrier failed to pay the sum within a reasonable time after the Award was issued?

It is the Organization's position that the above contentions, A through D, should be answered in the affirmative. Award 281 absolved Mr. Pelton completely from any responsibility in the incident and granted that all wage loss suffered be restored. Therefore, the Claimant deserved complete compensation for all wage loss, Railroad Retirement benefits loss, and all loss of health benefits, resulting from the Carrier's wrongful termination.

The Carrier interpreted Award 281 by paying Mr. Pelton only the straight rate of pay he would have received if he had worked during the time of his dismissal. The Carrier also issued Mr. Pelton the compensatory wages on December 22, 1987, or thirty-two days after the order date of November 19, 1987. Mr. Pelton not only received the payment late for the hourly wages, but he failed to receive any compensation for loss of health and railroad retirement benefits. Under the claim, the Organization requested that the Claimant be fully reinstated to service with any loss in benefits restored. By sustaining the claim, the Carrier had the obligation of restoring the Claimant to his former position with all rights unimpaired. Thus, the Carrier failed to completely restore Mr. Pelton to the position he would have been in had the Carrier not charged him, by the Carrier's failure to restore his benefits and expenses incurred from his unwarranted discipline.

Award 281 directed the Carrier to make whole the losses Mr. Pelton suffered as a direct result of the Carrier's unjust dismissal. Denying Mr. Pelton lump sum payments, health and Railroad Retirement benefits, while paying him a month later than the order date, violated the language of Aware 281 and violates the intent and purpose of dispute resolution through arbitration.

We respectfully petition the Board to interpret Award 281 and direct the Carrier to compensate the Claimant according to Items A, B, C, and D as outlined in this letter.

Very truly yours,

L. W. Borden

L. W. Borden
General Chairman

cc:Mr. J. J. Shannon
Director of Labor Relations