

SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 335

Case No. 335

File No. 870014

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

Statement

of Claim: (1) Carrier violated the Agreement, especially Rule 12, when Trackman D. B. Arguello was dismissed from the service on September 4, 1986.

(2) Claimant Arguello should now, therefore, be allowed compensation for time lost from August 28, 1986 until reinstated with all past privileges, vacation and seniority rights unimpaired.

Findings: The Board has jurisdiction by reason of the parties Agreement establishing this Board.

Claimant, on March 6, 1986, was working as the Trackman on Tie Gang 5899 in Carrier's Centennial Yard, Ft. Worth, TX. Said gang was assigned to a sledding operation in the 300 yard. The Claimant was assigned to help with the sledding and specifically to assist in removing ties from under track 306.

Assistant Gang Foreman Brown about 1:30 PM on March 6th, gave Claimant a job briefing describing the procedure for pulling the ties out from under 306 track. Immediately thereafter the Claimant jumped to the task and began removing the ties by himself. Assistant Foreman Brown stopped Claimant and advised him that two men were needed to drag the ties out from under the rail and that he should wait for help. Claimant complained to Foreman Brown that in his opinion, the sled gang was short handed and short on tools.

When Tie Gang Foreman Usher approached the job site to see how things were progressing, the Claimant requested that a tie handler machine be brought in to assist him pulling the ties. The Foreman told Claimant the work could be performed safely manually by two men working together but that he would try to get the tie handler to assist. He was unable to get the tie handler but did secure two other men to assist Claimant in removing the ties.

Instead of waiting for the promised assistance Claimant again started to jerk, lift and wrestle the ties out by

himself. Trackman Couch arrived at the work site just as Assistant Foreman Brown admonished Claimant to get out from between the rails to permit Couch and himself to raise the ties with the tie bar before attempting to pull the ties out. The Claimant ignored the instructions and continued to pull the ties he was preoccupied with until he finally succeeded in pulling the ties out.

Trackman Couch, in the presence of Claimant, was given a job briefing by Assistant Foreman Brown who emphasized that the work needed to be done cooperatively. After this final admonition the Claimant and Trackman Couch started working together. However, Claimant repeatedly tried to remove some of the ties before they were loosened with a claw or lining bar.

He did not complain to anyone about having hurt his back but he did confide to Trackman Couch that he was very upset about having to do the job and further "if he hurt his back, the company would pay for it." By the following morning, Claimant, apparently, began to experience pain in his lower back. He reported an on-duty personal injury to Foreman Usher at 6:50 AM on March 7. After filling out the personal injury form, he was taken to a clinic to receive medical attention. The General Roadmaster notified the General Superintendent about 7:30 AM that Claimant Arguello had allegedly sustained a personal injury the previous afternoon while removing ties. He also advised that the Track Gang Foreman and Assistant Foreman and Trackman Couch were present and had something to say about Claimant Arguello's injury.

The Terminal Superintendent interviewed each of the three employees separately. Thereafter, they were requested to sit down and dictate a true statement of the facts as they knew them, verify the statement and sign them.

Subsequently a notice of a formal investigation was sent to Claimant on the charge:

"...you failed to comply with the instructions of Asst. Foreman Brown at about 1:30 PM March 6, 1986 resulting in a personal injury to yourself..."

The postponed hearing was held on August 28, 1986. Carrier concluded therefrom that Claimant was culpable. He was dismissed from service as discipline therefor.

Carrier's highest officer, on December 1, 1986, offered to reinstate Claimant to service in exchange for withdrawal of his claim for pay lost. General Chairman, on January 28, 1987, advised that such offer was not acceptable.

The Superintendent notified Claimant on January 20, 1987 that effective that date he was being reinstated to the service.

Claimant's physician, on January 27, 1987, examined Claimant with regard to his back injury and advised the Superintendent Rhine that as of that date Claimant was still unable to perform service as a Trackman but "could be given a qualified release to return to work, if he could be given a job that did not have bending or heavy lifting."

The Union raised a procedural objection as to the absence of witnesses and the use of their statements in lieu thereof. The record reflects that the Union postponed the investigation several times from March 14, 1986 until August 28, 1986, some five months. During that interim period Gang 5899 was disbanded and its members disbursed throughout the system. When the meeting opened, the transcript (T-2) reflects the Union statements as follows:

"The witnesses required for this investigation were called by the Carrier and we do not deem it necessary to call anyone else. The 3 witnesses listed, we thought would be here and they are not. At this time Brother Arguello would like to proceed with the investigation without these witnesses.

Q. Are you now ready to proceed with this investigation?

A. Yes, I want to proceed without the witnesses called."

Objection by Mr. Borden (T-3) when Assistant Superintendent Whiteamire attempted to read into the record the three written statements of the three witnesses previously listed.

"The three (3) men, Mr. Usher, Mr. Brown and Mr. Couch, were called as witnesses by the Carrier and statements brought in instead of witnesses, is not admissible as evidence in these proceedings; being that the charge and the organization have no chance to cross examine these witnesses or to verify their signature on these statements. We ask at this time that these statements not be permitted in this hearing."

Answer by Mr. Hines:

"Mr. Borden, if you desire, we can recess the investigation until the time that we can arrange for the witnesses to be present, or we can continue on with this investigation now."

Mr. Borden -

"Mr. Arguello has requested that the investigation proceed without the witnesses. The organization's objection is to the entering of statements allegedly made by Carrier's witnesses."

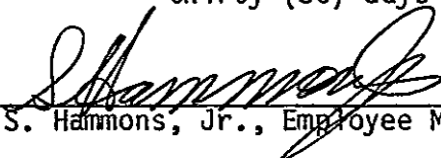
It was not unreasonable to conclude that the presence of the witnesses were waived and that their absence provides no grounds for objection by the Union. However, the statements (Exhibits 1, 2 and 3) and the recapitulation thereof given by Mr. Whiteamire were categorically denied by the Claimant. In such circumstances such evidence is worthless in the absence of the presence of the witnesses to be cross examined because of Claimant's story being completely opposite thereto. While hearsay evidence is admissible its relevancy and probity when denied by the principal under charge is of no value or weight. Such evidence is meaningless without the right of examination particularly as to the authenticity and truthfulness of the statement.

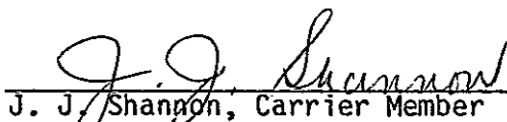
The right to confront witnesses is so intrinsic to an employee's defense that it is beyond the need for discussion at this stage. However, their presence was waived. Their statements were protested and when as here, denied as to correctness thereof their use provided no basis for Carrier's conclusions of culpability. Mr. Whiteamire's versions of what was told him by the three witnesses became less meaningful as evidence when the Claimant told a story diametrically opposed thereto. Carrier's conclusions that Claimant was culpable must be found to be at fault.

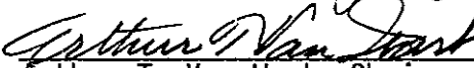
This claim will be partially sustained. While Claimant may be allowed pay for time lost as per Rule 12, there is nothing in this record that demonstrates Claimant was, or is, able to work. Instead it appears to the contrary. He should be reinstated with all rights unimpaired but without any pay for time out of service subject to passing a return to work physical examination.

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. Hammons, Jr., Employee Member


J. J. Shannon, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member