

SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 495

Case No. 495

File 900490

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

Statement

of Claim: (1) Carrier violated the Agreement, especially Rule 12, when employees J. R. Gonzales, J. A. Gonzales were dismissed from service on July 6, 1990.

(2) Claim in behalf of Claimants for wage loss suffered beginning June 18, 1990, until reinstated with seniority, vacation, and all other rights unimpaired.

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

This case is related to that of Award 494 the findings of which by reference are incorporated herein. In Award 494 Manager Track Maintenance, N. Ruiz, after being advised of an injury to Machine Operator J. R. Gonzales, asked the question whether the three employees had performed their physical exercises after lunch. In that first investigation, held on the morning of June 18, 1990, according to the testimony of Ruiz, Track Foreman J. A. Gonzales had told Mr. Ruiz that he and J. R. Gonzales had done their exercises while A. Canta was away at lunch. Ruiz, according to the transcript, brought A. Canta and J. A. Gonzales together and asked each the same question. Canta, in essence, said that he would not lie that they had not done them. That apparent conflict in their stories gave birth to the charge of dishonesty being placed against J. A. Gonzales and J. R. Gonzales. The second investigation was held on the charge:

"...with the report that you allegedly were dishonest with Manager of Track Maintenance N. Ruiz on June 15, 1990, at approximately 7:00 a.m. in Harlgen, Texas, while you were members of service gang 2813."

In the transcript of this investigation (T-9) Ruiz repeated his testimony, i.e., he asked Gonzales the question had he performed his exercises, to which he replied, yes he had. However, when he asked Antonio Canta the same question Canta's response was that he was not going to lie and said no they had not. That was said in the presence of J. A. Gonzales. Ruiz then went back into his office and asked J.

R. Gonzales the same question who said that he did and that Tony, i.e., Antonio Canta, had conducted the exercise session.

At T-11 Ruiz was asked the question:

"Q: Did--when you asked J. A., Mr. J. A. Gonzales, the Foreman, if they had done any of their exercises, was anybody else present with you?

A: At that time, no.

Q: Did you ask him at any time in front of any other people whether he had or not?

A: No, I did not.

Q: Ok. Did you at any time have three people, all three individuals, in there at the same time and ask them again?

A: No, I did not."

Machine Operator Canta, at the second investigation on the charge of dishonesty, testified at T-21:

"Q: Okay. What about the afternoon exercises what was your reply? Pause

A: No, I told him that I--I didn't do it.

Q: You told him that you hadn't done them?

A: Yes.

Q: Did you also tell him--that Foreman J. A. Gonzales and--and Operator J. R. Gonzales had also failed to do them?

Pause. Mr. Xavier Rivera (Hearing Officer) alright, Mr. Soliz is going to answer for Mr. Canta since he is not sure of the--the exactly how to answer that in English.

Mr. J. P. Soliz: I think that what Mr. Canta is trying to tell you, Mr. Rivera, is that he told Nat that he didn't do the exercises that day. And as far as Mr. Gonzales or Mr. Gonzales that he didn't know whether they had done them or not cause he was not there. That

is what he is trying to say. Is that correct Mr. Canta?

Mr. A. Canta: Yes sir (T-22)

Mr. Xavier Rivera questioning:

Q: Alright Mr. Canta, again for the record, I am going to ask you again you never during any course of the conversations you had with the Manager of Track Maintenance on the morning of that June 15 at approximately 7:00 a.m., you never once told you that you ever--at one time tell Manager Track Maintenance Nat Ruiz the exercises were not perform--performed?

Pause.

A: No, sir.

Q: Ok. Mr. Canta during the morning of approximately 7:00 a.m. June 15 did you talk to roadma--or Manager of Track Maintenance Nat Ruiz, in private or in the company of Foreman J. A. Gonzales?

A: Yes, sir.

(T-23) Q: Mr. Canta, during Mr. Ruiz' questioning of yourself and Mr. Gonzales--J. A. Gonzales, was there any doubt as to any--(inaudible)--of you?

A: No, sir.

Q: Did you fully understand the questions he was asking you?

A: I say, yes, sir.

Q: Ok. Did he--did Manager of Track Maintenance Nat Ruiz at any time indicate to you that--that perhaps Foreman J. A. Gonzales had already answered his question in the affirmative manner?

Pause.

A: I said, no, sir.

Q: Ok. Is it--in your words, then, your--your actually just saying then that--that to your knowledge, the question was asked of you and--and you did not know the responses from the other two members of your gang, is that correct?

Pause.

Q: Alright, say that again.

A: Rr--no, sir.

Q: And yet do you reply at any time to Mr. Nat Ruiz that the exercises were not performed.

A: I said, no, sir.

Q: Do you remember to the best of your recollection what you--your reply to Mr. Nat Ruiz was?

Pause.

A: Yes, sir. I told him, I didn't do it. I didn't do the exercises on--on--on the--the 14th, June 14, on the evening, I didn't do it."

At T-25 Canta testified that he went to eat for 15 minutes. At T-26 Canta testified that he did not know if Mr. J. A. Gonzales and J. R. Gonzales performed their exercises in his absence. Canta admitted, at T-26, talking in Spanish and English to Mr. Ruiz. He believed that Mr. Ruiz could not have misunderstood him and that in his mind (Canta's) he was the only one that did not do the exercise that date.

The transcript at T-28 has a statement from the hearing officer at this time, in order for the people reviewing the transcript, due to Mr. Canta not clearly understanding the questions being asked of him in English, that they had been translated as needed, by Local Chairman J. P. Soliz and himself.

Mr. Ruiz on redirect at T-29 stated:

"Q: Mr. Ruiz, in previous testimony you stated that Mr. Canta had replied to you in the negative manner that the Gang 2813 had done their exercises, is that correct?

A: When you say negative, Mr. Rivera what are you--

Q: Did he tell you that--no sir, they had not done them?

A: Yes, he did.

Q: Was he speaking about himself or was he speaking as a gang as a whole?

A: The gang as a whole.

Q: Did he tell you at any time during the course of your questioning that it was only himself that had not done--had failed to do the exercises?

A: No, sir. I question, I said, do you all do them? He said, no, we did not and that there were referring to the whole gang. And he testified that he, there was no possibility that he could not have misunderstood Mr. Canta was saying."

The Hearing Officer asked no questions on the charge under investigation. All the testimony elicited was done on cross examination which, of course, had nothing to do with the direct examination. This was undoubtedly so because of holding the other investigation (Award No. 494) held an hour or two earlier.

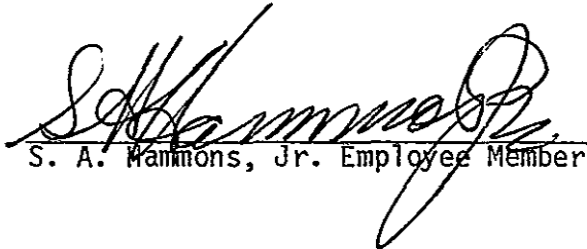
The question of due process under Rule 12 must be addressed. The question that arises is whether in consonance was the notice precise. Because Gang Foreman J. A. Gonzales and J. R. Gonzales had given differing answers to Ruiz' question as to whether they had done their exercises after lunch and the fact that then the concern as to whether or not they had done their exercises at noon time could be the only reason for which they were being removed from service. It surely was not because J. R. Gonzales had suffered a back injury. They knew they had not told the same factual story as to whether they had done their exercises or not. While the notice of investigation would have been more precise if they had inserted words to the effect of not being truthful as to whether you had performed your afternoon back exercises while you were members of surfacing Gang 2813.

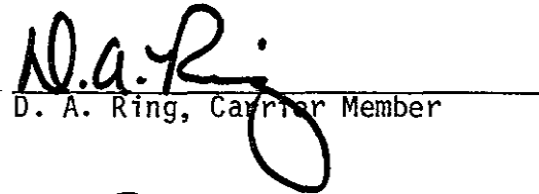
The Board is satisfied that all of the principals at the investigation spoke and understood Spanish and English fluently except, possibly, A. Canta. The Board believes that it is possible that Canta did not understand the questions clearly. The Carrier chose to believe the testimony of its witness and the record does provide support for that conclusion without the Carrier appearing arbitrary or capricious. Nevertheless, the Board will reinstate

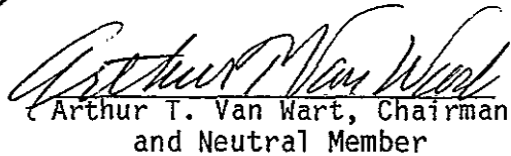
the Claimants to service with all rights unimpaired but without any money for the time out of service and place them in a probationary status for six (6) months with the understanding that they realize that they must do their physical exercise.

Award: Claim disposed as per findings.

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


S. A. Mannons, Jr. Employee Member


D. A. Ring, Carrier Member


Arthur T. Van Wart, Chairman
and Neutral Member

Issued November 30, 1991.