

PUBLIC LAW BOARD NO. 2946

Award No. 96

Case No. 96

Parties            United Transportation Union (C&T) .  
to                    and .  
Dispute            Southern Pacific Transportation Company (Eastern Lines)  
  
Statement        Claim is made for all time lost at the pro rata rate in  
of                   behalf of Houston Terminal Switchman J. A. Hyde from May  
Claim              4, 1983, date of suspension until such time as Claimant  
                      is permitted to return to service and exercise his  
                      seniority with vacation and all other rights 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 May 29, 1981, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant Hyde was the Foreman on Job No. 114, a yard switcher at Carrier's Englewood Yard, on June 30/May 1, 1983. During the course of carrying out his assignment, Claimant alleged that he went to No. 2 switch in the Bowl, and, in the course of throwing the switch "pulled a muscle", which he subsequently reported to the Yardmaster. Claimant then requested a 2611 form, and while on a break distributed the 2611's to the other crew members, reporting that he had injured himself while throwing a switch. Claimant then attempted to lay off, was advised that he had to get permission to fall out, and then changed his mind and finished his assignment. He was subsequently interviewed by a Carrier

officer who offered him the opportunity to be taken for medical assistance, while Claimant declined at that time, asserting that the injury was not bothering him that much. On the following day, Claimant went to his physician who determined that he had suffered a hernia.

As a result of that incident, under date of May 4, 1983, Claimant received notice from Carrier which, in pertinent part, read:

"You are hereby notified to be present in the office of the Terminal Superintendent, 7000 Liberty Road, Houston, Texas at 9:00 AM, Friday, May 6, 1983 for formal investigation to develop the facts and place responsibility, if any, concerning your allegedly feigning personal injury to avoid work while working as switchman on Yard Assignment No. 114, Englewood Yard at approximately 7:40 AM on Sunday, May 1, 1983.

You are charged with responsibility which may be in violation of the Rules and Regulations of the Transportation Department, Southern Pacific Transportation Company, Rule 801, that part reading:

'Employees will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in a manner which would subject the railroad (sic) to criticism.

Any act of hostility, misconduct or wilful disregard or negligence affecting the interests of the Company is sufficient cause for dismissal and must be reported.'

You are entitled to representation and witnesses in accordance with agreement provisions. Any request for postponement must be submitted in writing, including reason therefore to the undersigned."

The scheduled investigation was postponed due to medical treatment of Claimant for his asserted injury, and, subsequently, was held on June 10, 1983. As a result thereof Claimant was found culpable for violation of Rule 810, and by letter of June 20, 1983, was dismissed from all service with the Carrier.

Organization advances the claim on Claimant's behalf on the premise that the Carrier failed to provide sufficient credible evidence to support its conclusion that Claimant was either "dishonest", or "...careless of the safety of (himself) or others ...". In support of that position, Organization points to the Accident Investigation Report: Transportation Department made by H. L. Stark, which was done shortly after the alleged reported injury of May 1, 1983. Assistant Terminal Superintendent Stark went to the scene of the alleged injury and conducted an examination of the switch, noting on his report:

"3. Time and Date of Injury: 4:10 am 5-1-83  
Exact Location: (Name of Track, E/W Switch:  
Which side of Tract, etc.  
Attach diagram if appropriate)  
West Switch Bowl 2

4. Time and Date Officer notified of injury  
7:40 am 5-1-83

5. Time and Date Employee Interviewed  
7:40 am 5-1-83

6. How did injury occur:  
A. In your Opinion Don't really believe employee injured himself on switch - Switch could be lined one handed and was lined by Mr. Hand, Mr. Medley and H. L. Stark several times.

B. Employee's account on Form CS-2611 Pulled muscle while throwing switch

7. In your opinion, what, if any, rule or rules violated by employee?  
Rule M. Rule 801

o o o

9. Was inspection made of area, tool, equipment or other property? Yes By Whom? Bill Hand, D. K. Medley, H. L. Stark What did inspection reveal? Switch was normal and throw very easily

o o o

17. Is injured employee under doctor's care?

Not to my knowledge

Who? Dr. Grady

18. When is next doctor's appointment? Unk
19. Actual or estimated date of return to duty?  
5-1-83
20. What is preliminary medical diagnosis?  
Unk - Complained of pulled stomach muscles
21. State Educational handling or counseling given employee? Did not counsel employee due to fact we don't feel he hurt himself on switch mentioned above. "

This report, Organization contends, is replete with subjective expressions of opinion and conjecture of the Carrier official who created the document, and is the only evidence relied upon by the Carrier. Organization argues that none of the testimony establishes that any one witnessed the incident, or was in a position to witness same but failed to see that which Carrier alleges never occurred, to wit: Claimant did not injure himself while throwing the No. 2 switch in the Bowl.

Organization points to Claimant's unchallenged testimony that he timely went to the Yardmaster to report his injury, requested the 2611 forms, sought permission to be off, which was denied, and then finished his assignment. Organization contends that Claimant's behavior complied fully with the expression and intent of the rule, and no Carrier witness testified to the contrary.

Additionally, Organization points to the fact that Claimant went to see Dr. Gready, his personal physician, on May 2, 1983. Claimant was subsequently admitted to St. Joseph's Hospital on May 5, 1983, and underwent surgery on May 6, 1983, to correct a hernia on the right side, and was subsequently released from the hospital on May 13, 1983.

Claimant remained under doctor's care for an additional period of approximately 12 weeks.

Carrier responds that the investigation established that Claimant alleged an unwitnessed and unconfirmed injury which occurred on May 1, 1983, when he allegedly lined a switch that was hard to throw. Carrier contends, however, that three Carrier officers conducted an investigation which revealed no malfunction of the switch. In support of its position, Carrier points to the fact that none of the other crew members have any knowledge of Claimant's alleged injury, none of them witnessed it, and no Carrier official was ever notified about the malfunctioning switch. Consequently, Carrier concluded that Claimant was adjudged not to have injured himself on the property as he asserted; rather, Carrier asserts that Claimant feigned the injury on the property and sought thereby to place responsibility for his condition on his employer.

The Board, having read the transcript, is at a loss to understand on what basis Carrier determined that Claimant was in violation of Rule 801, either in that portion where the rule provides that "Employees will not be retained in service who are careless of the safety of themselves...", or that portion which provides that "Employees will not be retained in service who are ... dishonest ...".

What Claimant's investigation disclosed was that some time after 1:00 PM Claimant reported back to the Yardmaster at the tower advising the he had experienced an injury while throwing a switch, requested the 2611 forms, and requested of the Yardmaster that he be given permission to be off, which was denied him. Claimant then did get the 2611 forms, distributed them to the other crew members, who, because of their respective different responsibilities, were not in any position to

observe Claimant when the alleged injury occurred and, consequently, had no knowledge of the injury. The Carrier witnesses testified that there was no observable malfunction of the switch, that it operated "easily", and that they could find nothing wrong in its operation or condition.

No witness ever testified what Claimant did or did not do that was "... careless of the safety of (himself)...", nor did anyone testify that Claimant did not injure himself as he asserted he did. While Assistant Terminal Superintendent Stark may have subjectively believed that Claimant either feigned the injury, or in the alternative, did not injure himself in the manner which he contended, it was never established how or where Claimant was ever injured. Nobody sought to introduce any medical testimony or hospital records concerning Claimant's injury. Carrier's officers could have required Claimant, before taking any disciplinary action, and after being released by his physician, to report to Carrier's medical officer for examination. Carrier's medical officer could then have obtained Claimant's medical records to determine whether or not Claimant had stated to his physicians the nature and cause of his injury. However, there is not one scintilla of evidence to support a conclusion that Claimant was careless by virtue of an action or inaction in the handling of the switch. No witness testified that Claimant did not throw the switch as Claimant asserted that he did. Nor did Carrier develop in its examination of Claimant how he threw the switch, which could have established the basis that he was careless in the manner in which he operated the switch on May 1, 1983.

Additionally, the Board is mystified as to what constitutes the basis for the conclusion, if, in fact, that is the basis for the

discharge, that Claimant was "dishonest" in reporting his alleged injury to the Yardmaster, and, subsequently, filling out the 2611 form. Again, there is not one scintilla of evidence, other than the expression of a subjective opinion by Assistant Terminal Superintendent Stark, who stated in his Accident Investigation Report that, ". . ."In (his) Opinion: Don't really believe employee injured himself on switch - switch could be lined one handed . . .". We find such evidence, without more, to be insufficient to support a conclusion that Claimant was attempting to defraud his employer, or was "...dishonest...", however suspect the circumstances state by claimant.

Claimant, in his investigation, gave the following response to the following question:

"Q - Did it appear that the switch was in proper working order?

A - No.

Q - Did you report the switch as not working properly to anyone?

A - No, because on numerous occasions, up and down the north side lead, where I had been working on Job 114 for probably the last year, I have several times in the past reported to the Yardmaster, my immediate supervisor, switches which are not being properly maintained and oiled regularly and are drying out and becoming rusty and hard to throw, there has been little if any, response on the Carrier's part to correct this situation, so I felt it fruitless on the night in question to report that the switch was hard to throw. It seems that it has become common place that these switches are going to remain in this condition."

It would appear from the record that what Carrier sought to prove, and perhaps to its satisfaction did prove, was that the switch was in proper working order. If Carrier concluded that Claimant was careless merely because he suffered an injury in the operation of the switch,

with nothing more, then we must conclude that that fact, does not, ipso facto, support a conclusion such as arrived at in the instant case.

In determining discipline, Claimant was found to be in violation of Rule 801. He was not charged with any other rule violation, and we do not find any other rule cited as the basis for discipline. Accordingly, Carrier must have considered Claimant's failure to report the condition of the switch as forming part of the basis for discipline, but it never charged Claimant with any other rule or portion of a rule other than 801.

The Board, on the basis of the record before it, must conclude that there was insufficient evidence adduced to support a conclusion that Claimant was either "... dishonest ..." or "... careless of the safety of (himself) or others ...".

For the reasons set forth above, we are impelled to conclude that this claim must be sustained.

AWARD: Claim Sustained.

ORDER: Made Effective Within 30 Days.

*C.H. Hornsby*

*J.F. Dessens*  
J. F. Dessens, Employee Member

C. H. Hornsby, Carrier Member

*A. Thomas Van Wart*  
A. Thomas Van Wart, Chairman  
and Neutral Member

Issued:

September 5, 1984