

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31953
Docket No. MW-32718
97-3-96-3-21**

The Third Division consisted of the regular members and in addition Referee Charles J. Chamberlain when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Railroad**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) day suspension (August 25 through 29, 1994) and loss of foreman and assistant foreman seniority] imposed upon Tie Gang Foreman A. J. Terrones for alleged '... violation of Maintenance of Way Rule 20.1 for failure to provide proper protection for men and equipment working under your direction as Foreman of Tie Gang TP32 working on the siding at Ardmore, SD on August 3, 1994.' and [five (5) day suspension (August 30 through September 3, 1994) and loss of foreman and assistant foreman seniority] for alleged '... violation of Maintenance of Way Rule 5.4.5 for failure to place track flags in the prescribed manner to protect 10 mph slow track condition on the siding at Ardmore, SD on August 3, 1994. ***' was unwarranted, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System Files C-95-S090-4/MWA 95-2-14AC and C-95-S090-3/MWA 95-2-14AB).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. Terrones shall be '... compensated for all lost earning resulting for this improper discipline and that all seniority rights of Mr. Terrones be restored. We are also requesting that Mr. Terrones be reimbursed for all expenses he may have incurred as result of this improper discipline.'"**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On August 3, 1994, Claimant was assigned as Foreman of Gang TP32 and was working on Alliance Division at Ardmore, South Dakota.

As Foreman of the gang, the Claimant was responsible for supervising the work activities of his gang which includes protecting the employees and their equipment in the performance of their work on the track facilities of the Carrier.

At issue in this dispute is the manner in which the Claimant performed his work and the associated responsibility that goes with supervising the work activities of his gang and equipment to ensure their safety and the safe movement of trains in the area where the work was being performed on August 3, 1994.

The Carrier contends that the Claimant did not adequately protect his gang and equipment on the day of the incident. In the first instance, the Claimant was charged with the failure to properly use Form B in not including a stop order, and in the second instance, the Claimant failed to have a green flag posted for main line traffic at the end of the location where the work was being performed.

The Claimant received a letter dated August 8, 1994, instructing him to appear for an Investigation on August 17, 1994, in connection with his alleged failure to properly display track flags to protect slow track condition on the siding at Ardmore, South Dakota, at or about 6:30 P.M. on August 3, 1994, while assigned as foreman on Tie Gang TP32.

The Investigation was postponed until August 29, 1994.

Following the Investigation, the Claimant received a notice dated September 26, 1994, advising of the discipline assessed against him for violation of Maintenance of Way Rule 20.1 on August 3, 1994.

During the handling of the dispute on the property, the Organization contended that a fair and impartial hearing guaranteed by Rule 40 was not afforded the Claimant because Roadmaster Glynn assisted and/or coached the Hearing Officer during a break in the Investigation.

The transcript reveals that the Hearing Officer permitted the Organization and Claimant to present any evidence they desired and there is nothing of substance to show the Claimant was denied his contractual due process rights. The charge by the Organization that Roadmaster Glynn, a witness, talked to or coached the Hearing Officer during a break in the Investigation prejudiced the Claimant's right to a fair and impartial hearing is without support and cannot be sustained.

The Investigation as conducted served its intended purpose to develop the facts as to what transpired on August 3, 1994, the day of the incidents. Accordingly, we find no procedural defects to support the Organization's position in this regard.

With respect to the merits of the dispute, the transcript reveals that the Claimant's methods of protecting his gang were questionable. Admittedly, the side track on which the gang was working was fully protected. The Form B protection for passing trains on the adjacent main line did not provide for a stop order. The only protection afforded was action by the Claimant to alert his gang of train movement or by radio contact with train crews of the passing train. The record shows that the Claimant acknowledged that he was experiencing radio problems in one of his trucks. The Claimant's own testimony reveals that his primary method of protecting his gang was to walk along and tell them about train movements.

The record also reveals that the flag protection was improper because of the failure of the truck driver in the Claimant's gang to properly display green flags for the main line traffic.

While no serious accident occurred on the day in question, the practice employed by the Claimant in supervising and protecting his crew as discovered by the Roadmaster who witnessed and observed the events that took place on August 3, 1994, can only lead to one conclusion, that the discipline assessed against the Claimant was warranted and justified. Additionally, we cannot ignore the Claimant's past employment record which is part of the record in the handling of the dispute on the property.

The record shows five instances of a similar nature where the Claimant was involved and assessed discipline.

Accordingly, absent any evidence in the record to show the procedures followed by the Carrier in this case violated the Claimant's rights, we find no basis for overturning the discipline assessed.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of March 1997.