

Award No. 2
Case No. 3

PUBLIC LAW BOARD NO. 2699

PARTIES Brotherhood of Maintenance of Way Employees
TO
DISPUTE: and
Union Pacific Railroad Company

STATEMENT Claim in behalf of Welder Foreman F. A. Martinez
OF CLAIM: for removal of forty-five (45) demerits assessed
against his personal record account alleged
failure to provide proper flagging protection
for Welding Gang 1807, February 26, 1979.

FINDINGS: By reason of the Agreement entered into by and between
the parties on August 31, 1978, and upon all the
evidence and the whole record, the Board finds that the parties
are employees and carrier respectively as defined in the Railway
Labor Act, as amended, and that it has jurisdiction.

Rule 48(1) strongly implies that demerits are
assessed by the Division Engineer, who is also the accredited
and designated officer to render a written decision following an
investigation.

By a letter dated March 1, 1979, Claimant was advised
that pursuant to Rule 48 he was assessed 45 demerits for violating
Rule 99E. This letter was signed by W. W. Saunders, Roadmaster.
Claimant declined to accept the demerits. Accordingly, an
investigation and a hearing notice was directed to the Claimant
on March 15, 1979, which was also signed by Mr. Saunders. The
investigation was conducted in a most unorthodox manner by General
Roadmaster A. C. Vogt on March 27, 1979. Witnesses were interrupted
and called out of turn with no order or sequence. A letter dated
April 9, 1979, addressed to the Claimant and signed by Mr. Vogt
states: "I find that you did violate Rule 99-E as charged by
Roadmaster Saunders, and your personal record will be assessed
with 45 demerits".

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Under Rule 48, Mr. Saunders had no authority to assess the Claimant 45 demerits. Only the Division Engineer had that authority. Similarly, Mr. Vogt had no authority to assess Claimant with 45 demerits after the investigation. Again, only the Division Engineer had that authority. And there is no probative evidence in the record that either Saunders or Vogt acted as agents for the Division Engineer.

Further, the investigation hearing is so replete with procedural errors and disorder that it is difficult to arrive at any conclusive decision on the merits of the alleged incident.


Upon this record, it is the finding of the Board that the claim has merit.


AWARD

Claim sustained. The Carrier is directed to comply with this award within thirty (30) days from the date hereof.


DAVID DOLNICK, Chairman and Neutral Member


E. R. MYERS, Carrier Member


S. E. FLEMING, Employee Member

DATED:  November 5, 1980

CARRIER MEMBER'S DISSENT TO AWARD NO. 2,
CASE NO. 3, P. L. BOARD NO. 2699 (BMWE AND UPRR)

The second and fourth paragraphs of the Findings serve to interpret Rule 48(i), which provision was not at issue before this Board. The parties' respective submissions are barren insofar as that proviso is concerned. The claim before this tribunal, and as handled on the property, sought the removal of demerits based on alleged prejudgment by the Hearing Officer and the alleged failure of the Carrier to afford Claimant a fair and impartial hearing. The interpretation and application of Rule 48(i), not having been raised at any stage on the property or in the Petitioner's Submission, was improperly injected in this Award.

Revised Rule 48 went into effect on October 1, 1978, and various supervisors subordinate to the Division Engineer have proffered demerits, and demerits have been assessed by various hearing officers subordinate to the Division Engineer without procedural protest heretofore. As a consequence, the comments relative Rule 48(i) should not serve to support any pending or future claim based on the practice in effect. If a change is desired, the recourse of the parties is pursuant to letter agreement dated August 11, 1978, wherein they expressed a willingness to meet in conference on any mutually agreeable date to give further consideration to the handling and/or problems that may develop under the revised rule.

The comments expressed herein are also pertinent to the Findings at Page 2 of Award No. 5, Case No. 7, of this Board.

E. R. Myers
Carrier Member