

PUBLIC LAW BOARD NO. 4104

Case No. 45

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way
Employees vs.
Burlington Northern Railroad

STATEMENT OF CLAIM: "Claim of the System Committee of the
Brotherhood that:

1. The disciplinary demotion of Foreman M.R. Diaz and the thirty (30) days suspension imposed upon him for alleged 'violation of General Rule A and 271 of the Maintenance of Way Rules' was excessive and wholly disproportionate to the charge leveled against him

2. Mr. M.R. Diaz shall be reinstated as a foreman with seniority as such unimpaired, his record cleared of the charge leveled against him and compensated for all wage loss suffered."

OPINION OF BOARD: At the time this dispute arose, Claimant, M.R. Diaz, held a position as Foreman at Hinckley, Illinois. On September 13, 1984, Claimant's gang was scheduled to perform surfacing work near Hinckley. Claimant obtained a track and time permit which restricted train movement from 6:32 a.m. until 2:00 p.m. He then requested an extension to 2:30 p.m. The extended track and time period was not cleared by Claimant until after a train delay occurred and he was contacted by radio.

As a result of this incident, Carrier conducted an investigation on September 25, 1984. On October 23, 1984, Claimant was assessed a thirty day suspension and future work restriction to laborer duties.

The Organization appealed Carrier's discipline of Claimant. Carrier denied the appeal. Thereafter, the claim was handled in the usual manner on the property. It is now before this Board for adjudication.

The Organization contends that Carrier did not afford Claimant a fair and impartial investigation as required by Rule 40(c) of the Agreement. It points out that Claimant received a notice to attend an investigation for "...alleged failure to release track and time limits...". However, when Claimant received his discipline letter he was charged with violation of General Rule A and 271 of the Maintenance of Way Rules. Rule 40(c) states that the notice must specify the charges for which the investigation is being held. Thus, the Organization argues that Carrier violated Rule 40(c) when Carrier held an investigation for one purpose and disciplined him for a different purpose. Therefore, the Organization asks that the claim be sustained on procedural grounds alone.

As to the merits, the Organization asserts that Claimant attempted to contact the Dispatcher at 2:10 p.m. but that the Dispatcher was busy giving orders. It states that Claimant decided to wait until 2:30 p.m. when the Dispatcher had completed this task. It argues that Claimant proceeded with the completion of this paper work and lost track of time. The Organization further maintains that the suspension and demotion assessed by Carrier constitutes dual discipline which is clearly excessive under these particular circumstances. Accordingly, the Organization asks that the claim be sustained on its merits as well as for procedural reasons.

Carrier, on the other hand, asserts that it did not violate the Agreement here. It contends that it is not necessary to cite rules in the notice of investigation. It argues that Claimant was

fully aware of the charges against him and proceeded in the investigation without any objection.

As to the merits, Carrier points out that testimony of Carrier witnesses and Claimant clearly prove guilt of the charges. It states that testimony of Dispatcher J.D. Hansen reveals that Track and Time Permit No. 403 was not cleared until 39 minutes after the expiration of the time shown on the permit. It further relies on testimony of Roadmaster R.O. Hiam who spoke to the Claimant the day after the incident occurred. At that time, Claimant admitted he forgot to call back to clear the permit. Carrier argues that Claimant testified in the trial that he realized he made a mistake and therefore is guilty of the charge. It contends that Claimant's error caused a train delay. For the foregoing reasons, Carrier asks that the claim be denied.

After reviewing the record evidence, we are convinced that the procedural argument must fail. The record evidence indicates that the Claimant and his representative were aware of the accusations against him. Moreover, despite the Organization's assertion, there is no significant difference between the notice of charge and the discipline notice issued Claimant, in our judgement. Accordingly, the Organization's procedural argument is unfounded.

As to the merits of the claim, Claimant admitted that he did not release the track and time limits before the time specified. He explained that he attempted to contact the Dispatcher at a time when he was busy giving orders and decided to wait until a more appropriate time. Claimant then stated that he simply forgot to

call back the Dispatcher. The Carrier considered Claimant's explanation unpersuasive and this Board can find no compelling reason to question that determination. Carrier's conclusion that Claimant violated a significant rule is supported by evidence.

As to the discipline assessed, the Board concludes that the penalty was excessive. Under these circumstances, a thirty day suspension is justified. To the extent that his demotion as a Foreman was permanent, it should be modified. Accordingly, the restriction is removed from Claimant's record as of January 1, 1988. The discipline of suspension and demotion reminds Claimant of his obligation to adhere to all rules. For the foregoing reasons, the claim is sustained to the extent indicated in the Opinion.

FINDINGS: The Public Law Board No. 4104 upon the whole record and all of the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

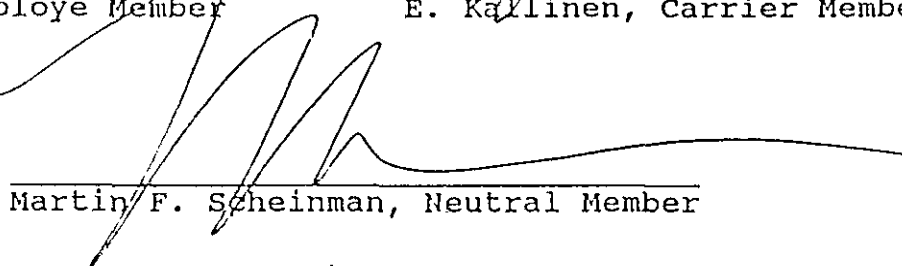
That the Public Law Board No. 4104 has the jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD: Claim sustained to the extent indicated in the Opinion.


P. Swanson, Employee Member


E. Kallinen, Carrier Member


Martin F. Scheinman, Neutral Member

1/20/90