File: MWB-83-1-4H
T-W-213C

Public Law Board No. 4161

Parties to Dispute

Brotherhood of Maintenance of Way Employees

vs

Burlington Northern Railroad

Case No. 23

Award No. 19

STATEMENT OF CLAIM

1. The thirty (30) days of suspension imposed upon Track Inspector R. B. Himmelberger for alleged violation of Rules 62 and 63 was unwarranted, on the basis of unproven charges and in violation of the Agreement.

2. The Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS

On June 23, 1982 the Claimant was advised to attend an investigation on July 1, 1982 to determine facts and place responsibility if any, in connection with his alleged responsibility for a collision between one of the Carrier's motorcars and an automobile at a grade crossing at Pine City,Minnesota at 11:30 AM, June 17, 1982. After the investigation was held as scheduled the Claimant was advised by letter dated July 16, 1982 that he had been found guilty as charged and he was suspended from service for thirty (30) days. After this discipline was appealed on property by the Organization in the normal manner up to and including the highest Carrier officer designated to hear such this case has been docketed before this Public Law Board for final adjudication.

First of all, a procedural point is raised by the Claimant at the hearing and this point is further underlined by the Organization

during its handling of the case on property. It is the position of the Claimant that the claim should be forfeited because the Carrier was in violation of Rule 40(c) of the operant Agreement. This Rule states, in pertinent part, the following:

> (a)t least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved.

The notice of investigation with the charges contained therein was sent to the Claimant by certified letter dated June 23, 1982. Since the Claimant did not pick up the letter from his local post office until June 28, 1982 he argues that the Carrier was in contravention of the five day time-limit provision of Rule 40(c) cited above. A review of the record shows that June 23, 1982 was a Wednesday. The investigation was scheduled nine (9) days later on July 1, 1982 which was Thursday of the following week. The argument of the Claimant basicly centers on difficulties he had in picking up his mail prior to June 28, 1982 because of his hours of employment. The main focus of the Claimant's argument is that the Carrier should have known that his hours of employment would have prevented him from receiving the certified letter before he actually did so. This, however, implies that the Carrier would also have had information at its disposal relative to the conditions under which the Claimant normally received his mail, whether anyone else besides himself was at his home to have collected his mail in his absence and so on. Evidently, the rule of reasonableness does not require employers to take such things into consideration, nor even to have such information, when notices such as the instant one are

sent to employees. Sending the notice some nine days prior to the scheduled hearing by certified letter fulfilled the Carrier's obligations under the Agreement and was a reasonable application of "...the agreement() as written" (Third Division 22748). The Board also notes that the Claimant refused, at the beginning of the investigation which was held on July 1, 1982, to exercise his rights at that point, or by means of a postponement which the Carrier officer was willing to grant, to have representation by the Organization. Such action was done at his own risk since he had representation rights under the contract which he refused, for his own reasons, to exercise. The procedural objection raised by the Claimant with respect to notice time-lines is dismissed.

When the incident at bar occured the Claimant held the position of track inspector between Hinckley and White Bear Lake with headquarters at Hinckley. According to report #0326, filed on the Wisconsin Division, Second Sub on June 18, 1982 motorcar 2296 of the Carrier, operated by the Claimant and going in a westerly direction at 11:30 AM on June 17, 1982 struck the right rear quarter panel of an automobile driven by one Pauline Sells of Pine City which was stopped at a crossing. According to the report the motorcar driven by the Claimant was traveling some three miles per hour. Damage to the automobile was estimated at $400. Damage to the motorcar was estimated at $100. In the wire report by the Claimant on June 17, 1982 the Claimant stated the following: "(the Sells' car) stopped on tracks then moved slowly away after being hit in right rear quarter panel. Motor car was unable to come to complete stop to avoid hitting stopped vehicle". During the investigation the Claimant refused to answer any direct questions put to him by the hearing officer relative to further specifics of what happened when his motor car hit the stopped vehicle on the grounds that he was not obliged to do so "...without a representative present". At the same time, he refused to request a postponement to contact a representative as he explicitly states in hearing at page 6 of the transcript. The Board must, therefore, conclude in view of the record before it that the

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Claimant is guilty, on merits, of violating Rule 62 which states that "...track cars and on-track equipment must (be)...prepared to stop" when approaching all road crossings. Evidently, the Claimant was not prepared to do such since he did not do so. Likewise, Rule 63 was violated by the Claimant. This Rule states, in pertinent part, that:

> (m)ovements over public crossings must be made in such a manner that there is absolutely no chance for an accident...

This Rule further states that operators must be in "...complete control" when approaching crossings. Absent evidence presented by the Claimant to the contrary the record shows that he was not in complete control otherwise there would have been no chance for an accident. There may have been extenuating circumstances present as cause for the accident. Since the Claimant would not present evidenc at the hearing, however, and since he would not permit his Organization to assist him in presenting such, the Board has no alternative but to conclude, on the basis of evidence of record before it, that the claim be denied.

AWARD

Claim denied.

Edward L. Suntrup, Neutral Member

B. W. Potter, Carrier Member

Karl P. Knutsen, Employee Member

Date: March 9, 1987