

Public Law Board No. 4161

Parties to Dispute

Brotherhood of Maintenance of)	
Way Employees)	Case No. 37
)	
vs)	Award No. 26
)	
Burlington Northern Railroad)	

STATEMENT OF CLAIM

A claim is filed on behalf of David C. Lippert for eight (8) hours' straight time at B&B truck driver rate of pay for each regularly assigned work day and holiday beginning August 23, 1983. We are also claiming any overtime and expense payments which Mr. Lippert might have earned had he not been improperly dismissed. We are further claiming any and all fringe benefits, including but not limited to vacation credit, unemployment insurance contribution, medical and dental insurance and Railroad Retirement contribution which would have accrued to Mr. Lippert had he not been improperly dismissed. As a part of this claim we are asking that any reference to this investigation or discipline be expunged from Mr. Lippert's personal record. This is an open and continuing claim and will remain so until Mr. Lippert is restored to service and his record cleared.

FINDINGS

The Claimant was advised, with others, to attend an investigation to determine facts and place responsibility, if any, in connection with his alleged violation of various Rules of the Carrier. The Claimant was specifically charged with failure to provide flag protection to Carrier's unit Ex 6741 on July 18, 1983 at Anoka, Minnesota at approximately 12:45 PM, with failure to place torpedoes along with flag protection for the same train, with failure to comply with instructions with respect to the same incident and with failure to report that the train in question passed a red flag. The Claimant was also accused of failure to protect his crew. After the investigation into this matter was held on three

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successive days, and a full record of same kept, the Claimant was advised that he had been found guilty as charged and he was dismissed from service.

The Rules at bar applicable to this dispute are the following, in pertinent part.

Rule 14

If the track is to be obstructed or to be made impassable, or is found to be impassable, a red flag or a red light must be displayed in both directions to the right of the track as viewed from an approaching train, not less than 800 feet from the obstructed or impassable track. At a point two miles in advance of the red signal, a yellow-red flag must be displayed to the right of the track as viewed from an approaching train.

Note: When temporary conditions do not require that trains be stopped and track is safe for movement, if it is not practical to take up all flags, the red flags may be taken up and green flags placed to indicate the end of restricted track. This should only be done: When track is restored to service to permit train movements, Cleared for trains, Cleared of men and equipment to permit crews to eat.

Before the track is again obstructed or made impassable the red flags must be replaced and green flags taken up.

Torpedoes must be placed 800 feet in advance of the red signal; also 800 feet in advance of the yellow-red signal for each train, unless a train order has been issued covering the condition.

A train or engine finding a yellow-red flag displayed to the right of the track as viewed from an approaching train must be prepared to stop before any part of the train or engine passes a red flag or red light two miles beyond the yellow-red flag. In the absence of a red signal at that location a train or engine may proceed at a speed of not more than 10 MPH unless a different speed is specified by Form Y train order. Speed of train must not be increased until entire train has passed a green flag displayed to the right of track.

Exception on Branch Line Divisions yellow-red advance track flags and torpedoes as required by Rule 14 need not be displayed when line-up covering the entire work day states no trains will be operated. Red flags must be displayed between the rails in both directions, torpedoes not required, individual subdivisions special instructions or Superintendent's bulletins or notice must specify. Maintenance of Way Rule 14 Exception applies on this subdivision.

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Rule 14 (A)

Except when governed by Form Y Train Order, a train or engine finding a red flag or a red light displayed between the rails of the track or to the right of the track as viewed from an approaching train, must stop before any part of train or engine passes the red signal and must not proceed until a proceed signal given with a yellow flag or a yellow light is received or verbal permission is received.

Red signal must be replaced when found between the rails.

Rule 14 (B)

When a Form Y train order is to be placed, employee in charge of work must notify train dispatcher, furnishing time, date, location and limits where such protection is desired. Work limits requested should be as short as practicable, if necessary to accomplish this, a second order has been issued, employee in charge will be advised the order number, location and limits, speed, and time order is in effect, or be furnished a copy of the order.

Rule 500

Employees will not be retained in service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or other vicious, or who do not conduct themselves in such a manner that the Railroad will not be subject to criticism and loss of good will.

Rule 502 (B)

Employees must comply with instructions from proper authority.

Rule C

Any violation of Rules or special instructions must be reported promptly to the proper authority....

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After the discipline was issued by the Carrier this was appealed by the Organization up to and including the highest Carrier officer designated to hear such before this case was docketed before this Public Law Board for final adjudication.

The instant case contains a voluminous record dealing with both procedural objections, and objections to the actions taken by the Carrier on merits. After study of this record the Board must conclude as follows. It will rule first of all on the procedural objections raised by the Organization.

The Vice Chairman and Secretary Treasurer of the Organization argues first of all that the investigation itself was flawed because not all principals were notified. It is true that one of the employees was not notified. But it is unclear how this would have materially affected the quality of evidence developed at the investigation with respect to the specific charge brought against the Claimant. This objection must be dismissed. Secondly, the Vice Chairman argues that the transcript of the investigation is incomplete because a number of comments made by a Carrier officer were not properly recorded. While such is also true, such lacune in the record does not also materially alter the quality of the evidence under consideration and on those grounds such objections must be dismissed. Thirdly, it is argued that a procedural defect lies in the fact that the Carrier did not call all necessary witnesses in order that the investigation be complete. The evidence developed by the Carrier in this case is the result of the witnesses it did call, not those it could have called. If the Carrier loses its case on insufficiency with respect to this issue, this is a question more properly to be dealt with by the Board under title of merits, not procedural flaw. On the other hand, if witnesses were not present in sufficient number for the Organization to have properly made its case, that is the result of its own actions and not those of the Carrier. The third objection must also be dismissed. Fourthly, the Organization argues that the seating arrangement at the

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investigation was intimidating to the Claimant. To the Board such ecological argument is novel: it cannot determine the logic between such argument and investigation outcome and must dismiss such objection on those grounds. Fifthly, the Vice Chairman argues that Rule 40(C) requires that the investigation be held at headquarters of the Claimant under investigation. The investigation was held at Minneapolis rather than Anoka, Minnesota. Given the proximity of those two points, the Board fails to see how there was a violation of the Rule at bar which states, in pertinent part, that "...investigations shall be held as far as practicable at the headquarters of the employee involved". There is no mandatory requirement that all investigations be absolutely held at the headquarters' point. Lastly, the Organization argues that the use of more than one hearing officer in this case presented prejudice against the Claimant. Absent clear rationale of how this result would have come about the Board must also dismiss this last procedural objection.

At the time of the incident(s) the Claimant held assignment of Foreman, B&B Crew, Anoka, Minnesota. On the date in question the Claimant and his crew was driving piling at Bridge No. 27 at that location. About quarter till one PM on the date in question Carrier's extra train 6741 which was going eastbound ran past a red flag located at milepost 27.5 without securing authority to do so. After going over the bridge, the train stopped and backed up to milepost 27.5. The engineer of this unit then secured permission from the Claimant to cross the flagged track and he proceeded to do so. This incident was not reported. Several days later the Carrier's officers discovered what allegedly happened, and filed charges which are subject to this case.

According to testimony at the investigation the B&B Supervisor had instructed the Claimant to set torpedoes for trains which would be approaching Bridge No. 27 because it would become impassable or be obstructed as outlined in Rule 14. There is indisputable evidence


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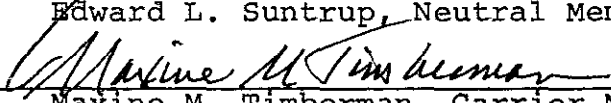
that the Claimant failed to provide this protection and that he was insubordinate with respect to the instructions he received. He was thus in violation of Rule 14 and 502(B). Because he failed to protect his crew he was also in violation of Rule 500. He was also in violation of Rule C since he failed to report that the Extra unit had passed a red flag. There can be no doubt that the negligence exercised by the Claimant could have had very serious repercussions and that members of his crew could have been seriously injured by the incident when the Extra train passed its red flag. No injuries occurred because of luck. Violation of a Rule such as Rule 500 is, under all circumstances, serious. The potential repercussions of such violation proportionately increases when this is the result of actions by a Foreman who is directly responsible for the safety of others. On merits, the claim cannot be sustained.

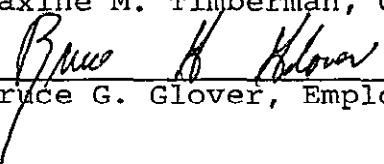
Did the Carrier act reasonably when it assessed the Claimant discipline of dismissal? The combination of the seriousness of the Rule infractions, in tandem with the Claimant's past record, which includes three prior suspensions, including one for thirty (30) days which is before this Board under title of Case 27-Award 24, warrants the conclusion that the determination by the Carrier in this instance was neither arbitrary nor capricious.

AWARD

The claim is denied.


Edward L. Suntrup, Neutral Member


Maxine M. Timberman, Carrier Member


Bruce G. Glover, Employee Member

Date: _____