

PUBLIC LAW BOARD NO. 4244

Award No. 222

Case No. 236

File No. 180-1313-988.EXP

Parties to Dispute:

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**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES**

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BURLINGTON NORTHERN SANTA FE RAILWAY

Statement of Claim:

1. That the Carrier's decision to issue a Level 2 deferred suspension from service of 2 days, deferred for six months for Western Region, S. E. Dulmage was unjust.
2. That the Carrier now rescind their decision and expunge all discipline, and transcripts and pay for all wage loss as a result of an investigation held 11:00 a.m., March 25, 1998 continuing forward and/or otherwise made whole, because the Carrier did not introduce substantial, credible evidence that proved that the Claimant violated the rules enumerated in their decision, and even if the Claimant violated the rules enumerated in the decision, suspension from service is extreme and harsh discipline under the circumstances.
3. That the Carrier violated the Agreement particularly but not limited to Rule 13 and Appendix 11, because the Carrier did not introduce substantial, credible evidence that proved the Claimant violated the rules enumerated in their decision.

INTRODUCTION

This Board is duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Railway Labor Act ("Act"), 45 U.S.C. Section 153, Second. This matter came on for consideration before the Board pursuant to the expedited procedure for submission of disputes between the parties. The Board, after hearing and upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representative ("Organization") within the meaning of the Act, as amended.

FINDINGS

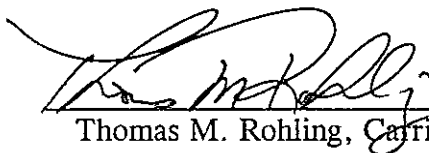
On March 2, 1998, the claimant, S. E. Dulmage, was notified to attend a formal investigation concerning his alleged tampering with timber tongs that were involved in an incident resulting in personal injury March 14, 1996. As a result of the investigation, the claimant was issued a Level 2 deferred suspension of two days for violating Rules 1.2.7, 1.1.4, 1.6, and 1.4 of the Maintenance of Way Operating Rules (MWOR) and Rule S-28.2.5 of Safety Rules and General Responsibilities for All Employees. The Board cannot sustain this discipline for the following reason.

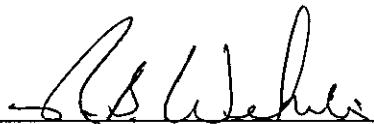
The rules of the MWOR which the claimant is alleged to have violated became effective on August 1, 1996 and the Safety Rule which the claimant is alleged to have violated was effective as of March 1, 1997. The incident at issue occurred on March 14, 1996. It is a


fundamental and basic principle of labor relations that an employee can only be charged and found to have violated rules that were in effect at the time of the incident. An employee cannot be charged and found to have violated rules that became effective after the alleged misconduct. The record reveals that the Carrier has charged the claimant with violating rules that were not in effect at the time of the incident at issue. The record also reveals that the Organization made a timely objection to the claimant being charged with violating rules that were not in effect at the time of the incident. Therefore, the Board need not reach the merits of this case because the Carrier failed to charge and find the claimant in violation of rules that were in effect on March 14, 1996, the date of the incident. The claim is sustained.

AWARD

The claim is sustained.


Thomas M. Rohling, Carrier Member


R. B. Wehrli, Employee Member


Jonathan I. Klein, Neutral Member

This Award issued the 26th day of August, 1998.