

**PUBLIC LAW BOARD NO. 4244**

**Award No. 243**

**Case No. 250**

**Carrier File No. 1499-0068**

**Organization File No. 190-13M1-993.CLM**

**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. The Carrier violated the Agreement when on March 11, 1999, the Carrier issued a Level S suspension of thirty (30) days to Mr. M. V. Furtado, for alleged violation of Rule 5.4.3 (Display of Yellow-Red Flag) of the Maintenance of Way Operating Rules, effective January 31, 1999, in connection with failing to display flags while protecting a production tamping gang under Form B on February 9 and 10, 1999.

2. As a consequence of the Carrier's violation referred to above, Claimant shall be reinstated to his former position with seniority unimpaired, he shall be paid for all wages lost commencing February 9, 1999, continuing forward and/or otherwise made whole.

### **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 February 9 and 10, 1999, the claimant, foreman M. V. Furtado, was assigned by the Carrier to supervise a tamping gang at Gurnsey. On these particular dates, a Track Bulletin Form B was in effect on the Bakersfield Subdivision between mileposts 959.3 and 961.1. Accordingly, the claimant was responsible for ensuring that the yellow-red flags were properly displayed. On February 9, 1999, roadmaster John Palacios was high-railing from Fresno, California to Bakersfield, California. As he approached the claimant's crew, roadmaster Palacios noticed that the claimant's flags were not properly placed, as required by the Carrier's rules. Roadmaster Palacios also observed that the claimant was not making an attempt to place his flags.

At approximately 11:00 a.m. on February 10, 1999, roadmaster Palacios again noticed that the claimant's flags were not displayed. Upon arriving at the work site, roadmaster Palacios was informed by the crew that the claimant had departed due to an emergency. The roadmaster instructed the crew to have the claimant contact him.

The Carrier instructed the claimant to attend an investigation "... concerning report of your failure to display flags while protecting a production tamping gang under Form B on February 9 and 10, 1999, so as to determine facts and place responsibility, if any, involving possible violation of Rules 5.4.3 (Display of Yellow-Red Flag), 5.4.7 (Display of Red Flag or Red Light) and Rule 5.4.8 (Flag Location) of the Maintenance of Way Operating Rules, effective January 31, 1999." As a result of the formal investigation conducted on February 26, 1999, the Carrier issued the claimant a thirty-day Level S suspension. Additionally, the claimant was placed on probation by the Carrier for a period of three years. The Board finds that the discipline assessed the claimant must be modified for the following reasons.

Rule 5.4.3 of the MWOR, entitled "Display of Yellow-Red Flag," provides, in part, as follows:

A. Restrictions specified in writing.

Two miles ahead of restrictions area. Yellow-red flags warn a train to be prepared to stop because of men or equipment. To make sure the train is prepared to stop at the right location, employees must display yellow-red flag two miles before the restricted area.

Less than two miles ahead of restricted area. When the restricted area is close to terminal junction or another area, employees will

display the yellow-red flag less than two miles before the restricted area. This information will also be included in the track bulletin, track warrant, or general order.

On February 9 and 10, 1999, the claimant went on duty at 7:00 a.m. The record indicates that Track Bulletin Form B was in effect between mileposts 959.3 and 961.1 from 9:00 a.m. to 3:00 p.m. on February 9 and 10, 1999. Thus, the Board finds that the claimant, as foreman of his gang, was responsible for the proper and timely placement of yellow-red flags on these particular dates. At the investigation, roadmaster Palacios testified that he observed that the claimant's flags were not in place after 9:00 a.m. on February 9, 1999. Additionally, Palacios testified that during his observation and encounter with the claimant, the claimant did not make an attempt to place the flags. Further, the claimant stated at the investigation that he did not place his flags on February 9, 1999, until after 9:00 a.m. Based upon these facts, the Board determines that the claimant violated Rule 5.4.3 of the MWOR on February 9, 1999, because he failed to display the required yellow-red flags two miles before the restricted area in a timely manner.

On February 10, 1999, the claimant was called away from his duties due to a family emergency. However, the claimant testified at the investigation that he properly displayed his flags on this date. Roadmaster Palacios testified that the claimant's flags were not displayed at 11:00 a.m. on February 10, 1999. In contrast to the testimony of roadmaster Palacios, machine operator Oscar Escalante stated that he observed the claimant place a flag at Jackson (the west flag), and he observed the claimant depart to place the other flag (the east flag). Escalante further testified that he re-attached the flag at Jackson with wire and rope after it had fallen off the pole. This pole and flag were introduced by the Organization as evidence at the

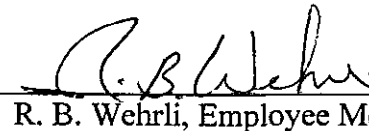
investigation. Finally, machine operator Joseph Moreno Jr. testified at the investigation that he took the flags down on the evening of February 10, 1999. Based upon the testimony of the witnesses, and the physical evidence presented at the investigation, the Board finds it more probable that the flag had fallen off the pole due to equipment failure, rather than due to any omission by the grievant.

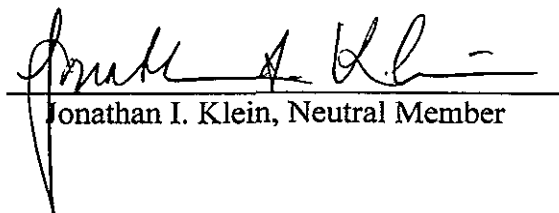
Based on the facts and circumstances presented, the Board determines that the Carrier has failed to satisfy its burden of proof that the claimant failed to place his flags on February 10, 1999. For this reason, the Board finds that the claimant's discipline shall be modified as set forth in the Award.

**AWARD**

The claim is sustained, in part, as follows. The claimant's thirty-day suspension is hereby reduced to a fifteen-day suspension. The Carrier shall comply with the terms of this Award within thirty (30) days from the date of issuance.

  
Thomas M. Rohling, Carrier Member

  
R. B. Wehrli, Employee Member

  
Jonathan I. Klein, Neutral Member

This Award issued the 9th day of June, 1999.