

Award No. 10  
Case No. 10

PUBLIC LAW BOARD NO. 5696

PARTIES Burlington Northern Railroad  
TO  
DISPUTE:

AND

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1) The Carrier violated the current Agreement when it assessed Mr. T. Berkey a 30-day suspension and rescinded his foreman seniority date for his alleged failure to comply with FRA Fall Protection Rules. Said action was without just cause.
- 2) As a result of this alleged violation, the Claimant should be reinstated to his foreman's position and compensated for all lost time, and the charges shall be removed from his service record.

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

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GENERAL CHAIRMAN'S OFFICE

The dispute herein arises out of work on a bridge on July 18, 1994 in the vicinity of Denison, Texas. The bridge is over 12 feet high and the crew were required to observe FRA regulations regarding the use of fall protection equipment when it was appropriate. The evidence reveals that the Claimant herein, the foreman of the crew, instructed the crew members on the necessary safety precautions to be taken in the course of the activities that day. The truck driver, Mr. Pyle, was instructed to stay on the truck, and for that reason, according to the testimony, he was not required to use the fall equipment which had been provided. The same was true of the crane operator. The testimony reveals that this matter was discussed with those members of the crew and they understood what their obligations were and the reason that they were not required to use fall equipment that day. Subsequently, as the record indicates, Mr. Pyle left the truck, contrary to the understanding reached earlier, and after assisting the Claimant here in work on the ground, on returning to the truck fell through a hole and was injured. The critical space involved was 14 feet from the ground and the FRA regulations require safety equipment to be in use for any height over 12 ft.

The Claimant, Mr. Berkey, had been a foreman on gangs such as the one involved here since 1979. He had no significant prior discipline on his record (one incident involving a different order of problem). The record reveals that

Mr. Berkey was well aware of his responsibilities with respect to both himself and his crew concerning safety, and in particular, was consciously attempting to conform to the FRA regulations. The record also indicates that he had received new equipment for purposes of fall protection shortly before the date of the incident here (within a couple of weeks). He had received no instruction or information concerning the rigging of this new fall equipment, and in particular, none whatever concerning the truck driver position. He indicated that in the past he had tried to figure these things out by himself, but had received no instruction with respect to this new equipment. He did receive training in general terms concerning safety and fall equipment approximately a year earlier.

In order to conform to FRA regulations, Mr. Berkey personally discussed the safety and the use of the equipment with each member of the crew, and in particular, with both the crane operator and the truck driver. In the instance of both of those employees, it was understood that they were to remain on the vehicle in order to remain in a safe posture and, in that position, were not required to use the fall equipment. The major infraction on the part of the Claimant here, as the record indicates, is that Mr. Pyle, the truck driver, came down off the truck without the use of the fall equipment and worked alongside the Claimant here on the ground, attempting to complete the task. He then went back to the truck, apparently for some additional material to use on the ground. It was at that juncture that he fell. Clearly, the Claimant should have been aware of his

presence without the safety equipment and should have taken measures to correct that situation, which he did not do. Further, he should have requested information and instruction with respect to use of the new equipment if he was unsure how it was to be rigged.

Through careful analysis of the facts reviewed in the record, the Board has concluded that the discipline accorded the Claimant here was harsh and arbitrary. While he must be disciplined for his failure to fully comply with his responsibilities for safety, removing his seniority as a foreman was unnecessarily harsh. The penalty in this instance is reduced to a 30-day suspension, together with the fact that although his foreman seniority will be reinstated without impairment, he will receive no pay for any losses sustained while being required to work at a lesser position than foreman.

AWARD

The penalties invoked by Carrier were harsh and unnecessary under the circumstances of this case. The forfeiture of foreman seniority shall be revoked and Claimant's seniority shall be returned without impairment. He must, however, bear the penalty of the 30-day suspension as well as any other losses sustained.

ORDER

Carrier will comply with the award herein within 30 days from the date hereof.




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I. M. Lieberman, Neutral-Chairman

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Carl J. Wexel  
Carrier Member



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E. R. Spears  
Employee Member

Fort Worth, Texas  
October , 1995