

PUBLIC LAW BOARD NO 5850

Award No.

Case No. 134

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employees

(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. That the Carrier's decision to issue a Level 1 Formal Reprimand and three year probation to J. L. Friar 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 9:00 a.m. on October 20, 1999 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, Formal Reprimand 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.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

On September 1, 1999, the Carrier issued Claimant a notice of an investigation to be held on September 17, 1999, to:

"...develop all facts and place responsibility, if any, concerning your alleged being argumentative and quarrelsome, on August 20, 1999, at MP 601.8, near Hereford Texas, while working as backhole operator on construction gang 23616."

The investigation was postponed by mutual consent from its first scheduled date of September 17, to October 8, to October 20, 1999. In the meantime, Claimant through his representative requested a number of witnesses. As of the final date of the investigation, every one of the witnesses requested were present except Claimant.

Apparently at 9:00 AM, the scheduled starting time, Claimant was not present. His representative located him at the point where he was working. Claimant apparently advised his representative that he was unaware that the investigation was scheduled for October 20, 1999, but that he could be there in 60 to 90 minutes. His representative did then request a postponement, which was denied by the Carrier. The Conducting Officer proceeded to hold the investigation over the protests of his representative.

The evidence adduced from the investigation was overwhelming against Claimant. His peers testified he went off on the Foreman for no reason that anyone who witnessed the tirade could discern. The Foreman was not harassing Claimant, nor was he demeaning. The Foreman simply called out to Claimant and one other to join in a job safety discussion, a prerequisite before commencement of any daily work or assignment.

For reasons only known to Claimant, he took exception to being called or to the manner in which he was called to join the job safety discussion.

The investigation clearly reflects that Claimant had worked for and had earned the discipline he was assessed, and this Board would have upheld the assessment had it not been for one glitch in the proceedings, and that was for not holding up the investigation for the 60 to 90 minutes it would have taken Claimant to travel from the work site to the site of the investigation.

The Board understands that the Carrier's obligation is to notify Claimant of the charges and pursuant to the Agreement language, this is done by certified mail, return receipt. The notice of the October 20 rescheduled date was sent in ample time to Claimant's last recorded address (as had the previous notices), but for whatever reason, he professed non-receipt thereof. The right to attend belongs to the Claimant. He has the choice and failure to attend is done usually at the peril of the accused. In this instance, Claimant indicated he wanted to be there. What he could have attested to that would have negated the testimony of all the other witnesses is beyond guessing at, but nevertheless, the hearing could have been delayed the 60 to 90 minutes it would have taken Claimant to be present.

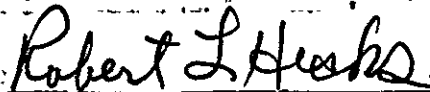
For this reason, the record mark is to be removed from his disciplinary file, and said assessment is to be considered as a letter of caution.

AWARD

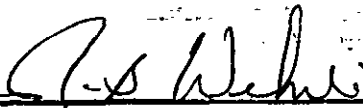
Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.



Robert L. Hicks, Chairman & Neutral Member



Rick B. Wehri, Labor Member



Thomas M. Rohling, Carrier Member

Dated: 1/27/00