

PUBLIC LAW BOARD NO 5850

**Award No.
Case No. 137**

PARTIES TO DISPUTE:
(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. The Carrier violated the current Agreement when dismissing Mr. A. Alaniz from service for his alleged violation of Rules 1.1 and 1.6 of the Maintenance of Way Operating Rules when he allegedly failed to work safely and was allegedly unsubordinate (sic) and quarrelsome on July 22, 1999 while employed as a Trackman on Gang 27702.
2. As a consequence of the Carrier's violation referred to above, Mr. Alaniz shall be returned to service, the discipline shall be removed from the Claimant's personal record, and he shall be compensated for all wages lost in accordance with the Agreement.

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 July 27, 1999, the Carrier directed the following notice:

"Attend investigation in the Burlington Northern Santa Fe Depot, 500 Main Street, Lubbock, Texas, August 3, 1999 at 10:00 AM, with your representatives and witness(es), if desired, for formal investigation to develop all facts and place responsibility, if any, concerning your alleged unsafe working practices and inappropriate conduct, on or about July 22, 1999 while employed as trackman on Gang 27702."

The Investigation was held as scheduled, following which, the Carrier,

believing it had furnished sufficient evidence of Claimant's culpability for the charges assessed, dismissed Claimant from its service.

From the record, Claimant was using an adz on a tie to widen the area a tie plate rests as they were replacing the existing rail with heavier rail that required a larger tie plate. The Foreman testified he noticed Claimant standing beside the tie taking overhead swings with the adz. The Foreman went to Claimant, indicated he was to use short chopping motions and not overhead swings, and he was to straddle the tie.

Claimant responded that he had been working here for 15 years and knew how to use every tool the Carrier had. Claimant then again executed an overhead swing, striking the middle of the tie and nearly hitting his foot. The Foreman also testified that as of that moment he heard Claimant make a statement that he hoped he would hurt himself as he could file a big claim against the company.

After reporting the incident to the Roadmaster, the Roadmaster, after questioning both Claimant and the Foreman, suspended Claimant from service pending the outcome of the investigation.

There is no question as to Claimant's improper use of the adz. Several of his peers supported the Foreman's report of Claimant's use of the adz, but no one other than the Foreman overheard Claimant say that he hoped he would get injured so he could file a big claim against the company. Claimant denies the statement.

On the credibility of witness issue, the Board finds the Foreman's testimony credible. There is no indication that it was other than the truth as no other reason has been advanced that the Foreman had an ax to grind and was out to scuttle Claimant's career with the Carrier.

The Board does, therefore, agree with the Carrier that substantial evidence was adduced at the investigation to establish Claimant's culpability for the charges assessed.

In reviewing Claimant's record, it reflects that in 1996, he was out of service for approximately seven months for threatening to file a personal injury as a retaliation for pending discipline.

He evidently has not learned that such remarks are not taken lightly by the Carrier. Individuals who work with that thought in mind are a liability to themselves and to others.

Although Claimant was discharged for unsafe work habits and being insubordinate and quarrelsome (facts clearly established in the investigation), Claimant's remark clearly had an impact on Carrier's decision, particularly when his past record was taken in consideration.

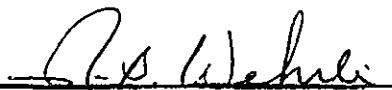
AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member


Thomas M. Rohling, Carrier Member

Dated: June 28, 2000