

PUBLIC LAW BOARD NO 5850

**Award No.
Case No. 143**

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

STATEMENT OF CLAIM:

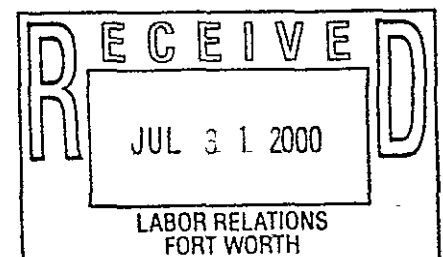
1. The Carrier violated the current Agreement when assessing Mr. C. W. Mize a five (5) day Level-S suspension from service and the removal of his rights to work as a Foreman and an Assistant Foreman for his alleged violation of Rule 6.3.1 and 10.3-B of the Maintenance of Way Rules in connection with his alleged failure to properly protect Rail Grinder, RG 10 at Wynnewood, Oklahoma on October 5, 1999.
2. As a consequence of the Carrier's violation referred to above, the discipline shall be removed from the Claimant's personal record, his right to work as a Foreman and Assistant Foreman restored, 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.

Adherence to Safety Rules is a must. It sounds melodramatic to refer to an old statement, "lives depend upon adherence to the Rules" but it is now, It has been, and will be in the future, a truism.

Claimant was the Foreman pilot for the railgrinding unit whose main responsibility was to secure and to release track and time authority, a must for the



protection of employees and equipment while doing track work.

On October 5, 1999, Claimant had authority to occupy the main line with the grinder from 1226 to 1315, but for some unexplained reason, Claimant released this authority at 1251, which left the grinder on the main line without protection.

A welder, part of the team working with the grinder, overheard Claimant releasing the track authority and knew instantly that the grinder was still on the main line without protection. The welder working with the grinder, went to the Assistant Roadmaster and convinced him the grinder was without protection. Track authority was finally secured at 1309, but the grinder occupied the main line for 17 minutes without any protection.

Of and by itself this is a serious breach in the protective shield leaving the grinder exposed, but in this instance, it was doubly perilous as a local freight was moving cars around the grinding unit.

The Representative during the investigation raised the spectrum that Claimant just may have received verbal protection and/or the grinding crew may have had protection jointly with the train crew in the area that protected them for the 17 minute gap in the track and time record prevalent in this dispute. They cited Rule 6.19.6 contending that Rule, if followed, would afford verbal protection, but a reading of the Rule coupled with the facts adduced at the investigation convinces this Board that that Rule, if at all applicable, was not complied with.

One other objection was raised and that was the lack of the transcript between

the Dispatcher and the Claimant regarding track and time, but the missing tape and/or Dispatcher witness is not such an egregious error that would have this Board nullify the investigation. When Claimant was queried, his only response concerning the lapse in protection was that he thought he was protected, but there is nothing in the record to offset Carrier's evidence to the contrary.

One other violation occurred, and that was Claimant's admitted violation of Rule 6.3.1 which obligates the employee who acquires track authority to have another employee within the group:

"...read, understand and initial as authority prior to equipment or employees fouling track...."

The Carrier assessed Claimant an actual 5 day suspension and terminated his rights as a Foreman and as an Assistant Foreman. The five day suspension is appropriate, but of some concern in the permanent termination of Claimant's rights as a Foreman and as an Assistant Foreman that he has had since 1976. Claimant's disciplinary record has seven entries (one entry has no detail so it is not considered), one for walking off the job after his request to leave early was denied, two entries for late reporting of injuries, one entry for negligence, one entry involving an unsafe act, and two of the most recent involving mishandling of track and time authorities. This makes the third such action since June, 1998. Obviously, the Carrier is of the opinion that Claimant can no longer protect the employees and equipment he had been responsible for and, by exterminating his rights as a Foreman and as an Assistant Foreman, he would not be in such a position.

However, if he still is working as a Machine Operator (as one record sheet shows), unless he is with a gang where the track and time authority would be done by someone else, he would be responsible for obtaining his own track protection.

Claimant's seniority as a Foreman and as an Assistant Foreman was terminated November 8, 1999. Claimant's seniority as a Foreman and as an Assistant Foreman are to be reinstated 30 days following the adoption of this Award providing he can successfully pass a rules examination heavily weighted regarding track protection under any and all conditions.

Should Claimant not ask to be tested within 15 days of receipt of such notice, or if he does not satisfactorily pass the special rules test, his Foreman's and Assistant Foreman's rights will remain terminated. There is no pay for any time lost in this case.


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. Wehrli, Labor Member
Dated: August 25, 2010


Thomas M. Rohling, Carrier Member