

PUBLIC LAW BOARD NO 5850

**Award No.
Case No. 157**

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

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when on August 11, 2000, Mr. W. L. McWhinney was issued a Level-S 130 day suspension and was disqualified as Foreman for allegedly violating Maintenance of Way Operating Rules 6.3.2, 6.3.4, 15.2, 1.13, effective January 31, 1999, as amended; and Maintenance of Way Safety Rules S-1.4.2, S-7.8.1, S-7.8.2, and S-7.8.5, effective January 31, 1999, as amended when he allegedly failed to provide proper protection for his crew and allowed an employee to use an improper tool on April 4, 2000.

2. As a consequence of the Carrier's violation referred to above, Mr. McWhinney shall have the discipline removed from the his personal record, he shall be compensated for all wage and other benefits lost, in accordance with the Agreement. And, the disqualification shall be removed from his record.

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 April 18, 2000, the Carrier wrote Claimant, setting up an investigation for April 27, 2000, to determine his responsibility, if any, in connection with:

"...not having proper protection for your crew and allowing an employee to use wrong tools to perform a task at 51st Avenue on April 4, 2000, possible violation of Rules 6.3.2, 6.3.4, 15.2, 5.4.3, 1.13

Maintenance of Way Operating Rules, effective January 31, 1999, including revisions effective April 2, 2000; and Rules S-1.4, S-1.4.2, S-7.2, S-7.8.1, S-7.8.2 and S-7.8.5 Maintenance of Way Safety Rules effective January 31, 1999, including revisions effective October 10, 1999."

The Investigation, after a number of postponements, was finally held on July 12, 2000. It was scheduled for a 2:30 PM start, but Claimant, for some unknown reason, did not arrive until 3:35 PM.

Claimant had been withheld from service as of the date of the incident pending the outcome of an Investigation. Following the Investigation, the Carrier readily believed it had furnished sufficient information to establish Claimant's culpability for the charges assessed, and assessed Claimant a suspension of 130 days plus terminated his rights as a Foreman.

The transcript clearly reflects that Claimant was lax in discharging his responsibilities insofar as ensuring that the section crew, for whom he was responsible, was properly protected from train movements while working.

The Rule clearly provides for yellow-red flags placed appropriately governing train movement when approaching and/or entering territory protected by Form B, and when using derails, they must be locked.

Claimant did not have these flags in place as of the time Form B took effect, i.e., 8:00 AM. It was not until the Roadmaster brought this to Claimant's attention that the flags were placed. Furthermore, when Claimant chose to place derails at both ends of the track to protect the crew from any train movement, he did so

without locking them.

Claimant, in his defense, stated he was short of locks (a fact he never advised the Roadmaster about) and when sufficient locks were found in a work truck, he professed no knowledge before hand and he was rather vague as to why there were no flags appropriately placed.

In this instance, Claimant was the Foreman for the crew working in the Phoenix Yards. A crossing gang was working in the yards along with Claimant's crew. The argument has been advanced that he was responsible only for his own crew, but facts adduced at the investigation do not support this argument. Claimant was responsible for the entire working force, including a Signalman. He was the one who secured the Form B, and he should have overseen the complete and proper implementation of Form B, together with all protection set out in the Rule.

The Carrier did fulfill its obligation in establishing Claimant's culpability for the charges assessed.

Regarding the assessed discipline of a 130 day suspension plus termination of his Foreman's rights, the Board finds it somewhat unusual, yet it is not an arbitrary suspension under the facts prevalent in this case. Regarding the termination of Claimant's Foreman's rights, Claimant's disciplinary record reflects that once in 1995, and twice in 1997, Claimant was disciplined for "not placing derail."

Of these three prior disciplinary procedures, Claimant was suspended a total

of 40 days.

Claimant should have learned with the 40 day suspension that the Rules in effect regarding the protection and safety of those he is responsible for, as well as himself, are to be followed to the letter.

On the other hand, Claimant hired out March 16, 1973, and on February 4, 1974, was promoted to a Foreman. He, obviously, has gained a wealth of experience that should be of benefit to the Carrier. In this regard, the Board finds that a permanent loss of Foreman's rights is too severe. Rather than an permanent loss, the Board holds the Foreman's rights are to be a suspension of one year (from the date of the disciplinary letter) and then, if Claimant successfully passes the appropriate Rules exam to be a Foreman, that suspension should be lifted. However, if Claimant fails the examination, the suspension of Foreman's rights will become permanent.

It is up to the Claimant to start the process to regain his Foreman's rights.

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

Robert L. Hicks, Chairman & Neutral Member

Rick B. Wehrli

Rick B. Wehrli, Labor Member

Thomas M. Rohling

Thomas M. Rohling, Carrier Member

Dated: Feb, 27, 2001