

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 173**

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 Eastern Region Foreman D. G. Stevens a Record Suspension for ten (10) days from service was unjust.
2. That the Carrier now rescinds their decision and expunge all discipline, and transcripts and pay for all wage loss as a result of an investigation held at 10:00 a.m., on June 15, 2001 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, a record suspension 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.

Claimant was the Foreman assigned to work with the ballast cleaner. Specifically, he was responsible for securing train order protection for the ballast cleaner.

On April 25, 2001, a train entered the Form B protected territory without receiving authorization from the Foreman. Fortunately, Claimant heard the whistles of the approaching train and made sure the ballast machine adjunct was not fouling the track on which the rogue train was traveling.

An investigation was established, Claimant was found culpable for the charges assessed and was disciplined accordingly.

During the investigation, it was established that even though the train crew had received a train order concerning the track warrant, they nevertheless violated the Form B territory without receiving authority to do so. It also developed, however, that the Red-Yellow Board was placed only on one end of the Form B territory. There was no Red-Yellow Board placed on the side from which the train approached the work area. Testimony was to the effect that there existed another Form B track protection warrant and the appropriate Warning Boards were used for that protected territory leaving Claimant only half the Boards he required. The track warrant became effective at 10:00 am. The rogue train entered the Form B territory about 11:42 am, without permission of Claimant.

Fortunately, no one was injured, nor was any machinery damaged or destroyed.

The letter of charges stated Claimant allegedly failed to furnish information concerning the westbound train entering the Form B limits without authority and failed to display the flags for Form B limits. The discipline letter alluded only to failure to display flags for Form B limits.

On Page 5, near the bottom and continuing on the top of page 6 of the investigation, the question by the Presiding Officer of the Roadmaster went, as follows:

"Q. by Mr. Heille, A. by Mr. Smutzer

30. Q. So Mr. Smutzer, I have just a couple more questions. When working with a Form B limit is it, is it proper to foul the adjacent track without having your yellow and red boards in place?

A. We have yes, on previous occasions before we have had red flags and yellow red flags up went ahead and fouled the opposing track. And I'm sure in other instances the LORAM people have worked without securing the, making sure that the flags were up. In fact they were working that day before the flags were placed."

To this Board then, it is clear that utilizing track protected by Form B before positioning the protective Red-Yellow Board has been sanctioned by the Carrier in prior instances and was sanctioned in this instance.

This practice should have been halted by a bulletin or notice to all concerned, rather than using the discipline process as a way to halt the practice.

Since Claimant was not disciplined for failure to notify anyone immediately of such flagrant violation that occurred when the train entered Form B territory without authority, but only for his failure to place the Red-Yellow Board, this Board finds that the charges have not been established, particularly when such occurrences in the past have been sanctioned by management.

If Claimant has lost any time because of this matter, he is to be compensated therefore in accordance with the procedures on the property.

AWARD

Claim sustained.

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


Thomas M. Rohling, Carrier Member

Dated: August 6, 2001