

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 216**

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE:

**(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)**

STATEMENT OF CLAIM:

1. That the Carrier's decision to issue Foreman D. L. Daniels a Level S Thirty (30) Day Record Suspension 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. January 8, 2003 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, suspension from service 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.

The Carrier wrote Claimant on November 25, 2002, establishing an investigation to determine his responsibility, if any:

"...for alleged negligent and dishonest behavior while you were a Foreman

on TP 14 from March 21, through August 12, 2002...."

Following the Investigation, Carrier on January 27, 2003, assessed Claimant:

"...a Level S thirty (30) day Record Suspension for violation of Engineering Instructions 23.1.2, Foreman's Responsibilities and Maintenance of Way Operating Rule 1.6, Conduct...."

The Carrier also disqualified Claimant as a Foreman.

Claimant's infraction seems to be improperly prepared payrolls, overpaying members of his 58 man crew during the period set forth in the notice of the Investigation, some \$70,000, but nothing has been established to show that Claimant did, in any way, profit individually. It was simply done in error or because of a misunderstanding, nor was any Supervisor reviewing the payrolls, particularly when the crew was relocating.

Claimant's representative at the outset of the Investigation raised a time limit issue, contending that the crew was working under the BN Schedule and the Disciplinary Rule, which reads as follows:

"An employees (sixty days) in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding (officers) of the Security Department) except as provided in Section B of this rule...."

was not followed.

Claimant's representative then cited Rule 40J, which reads:

"...If the investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed...."

Sometime in September of 2002, the Carrier witness was instructed to conduct an audit of Claimant's payroll for the gang for a year. Carrier's witness did not get started

on the audit until mid-October and concluded same in mid-November.

The apparent error or errors committed were over-paying the crew when it was moved from one location to the next, or paying someone on the crew for working overtime or a travel allowance when the individual was off with an excused absence. Claimant did not, evidently, claim straight time hours for the absent employee but did pay the overtime or the travel allowance.

It also developed that Claimant allowed others to use his password in accessing the payrolls or to input time. This is also contrary to instructions.

This Board finds that the time limit issue raised by Claimant's representative is valid and Rule 40J stipulates what is to occur if the time limits are not adhered to; i.e., "the charges against the employee shall be considered as having been dismissed."

Claimant's representative raised this issue when he found that the Carrier witness first commenced the audit in October, he immediately became aware of some of the discrepancies and should have set the investigation then, rather than waiting to complete the entire audit.

The Time Limit Rule requires a notice of an investigation to be held within 15 days from the date of occurrence, except in personal conduct cases, within 15 days from the date the information is obtained by a Carrier Official.

This Board will not rule on whether this was a personal conduct case that tolls the fifteen days to commence when knowledge is first obtained by an Officer of the Carrier or whether it is an occurrence. In either scenario, the investigation was not timely held.

Claimant's Foreman's date is reinstated and he is to be paid for any time lost because of the discipline assessed as provided for in the Agreement.

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: March 13, 2003