

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 270**

PARTIES TO DISPUTE:
**(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)**

STATEMENT OF CLAIM:

- 1. The Carrier violated the Agreement on January 19, 2005, when it first withheld, the Claimant, Mr. J. R. Browning, from service, telling him he was withheld with pay, then terminating him on March 7, 2005, for allegedly violating Rule 6.3.2 Maintenance of Way Operating Rules, and Rule 1.1.3 of the Engineering Instructions, for failing to protect men and equipment on other than main tracks and failing to conduct a proper job briefing; and then trying to recollect the money he was paid from January 19 to March 7, 2005.**
- 2. As a consequence of the violation referred to in part (1), the Carrier shall immediately return the Claimant to service with seniority and benefits intact, pay him for lost wages that it owes for the time period he was withheld from service with pay, (January 19-March 7, 2005); make him whole for all time lost account of this incident, beginning January 19, 2005 and continuing; and remove any mention of this incident from his personal 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 January 19, 2005, the Carrier wrote Claimant establishing an Investigation:

"...to determine all facts and place responsibility, if any, in your alleged failure to properly protect men and equipment and to provide a proper job briefing on Friday, January 14, 2005, at west end Riverbank yard, in possible violation of Rules 6.3.2 (Protection on Other Than Main Track) of the Maintenance of Way Operating Rules in effect October 31, 2004, and Rule 1.1.3 (Job Briefings) of the Engineering Instructions with revisions through November 1, 2004."

On March 7, 2005, the Carrier advised Claimant that he was dismissed from all service as this was his second serious violation within a 36 month period.

To this Board, the handling and disciplining of Claimant in this instance has been unusual.

This entire episode started on January 14, 2005, when an audit team of four Supervisors arrived at the work site to determine if the crew was adequately protected while doing track work. This is not an unusual event. The FRA demands such checks and said checks are for the welfare of everyone.

After the audit, Claimant continued working until January 21, 2005, then he was suspended with pay. The reason for the late suspension was never directly responded to, but it was established that as of the date of the investigation, Claimant was still being paid straight time hours. However, that fact does not of itself resolve this issue.

The audit team was not familiar with the territory they were in. They stressed that the crew was not protected when they fouled the adjacent track. The track they were concerned about turned out to be out of service. The switch to the track was tagged, locked and spiked to stop anyone from entering. As it turned out, the crew did not need protection under the Rule. When this was clarified, the audit team then blamed Claimant for not telling the audit team that the track was out of service.

Regarding lack of briefing, not one of the four Supervisors were at the briefing. What they testified to was that some of the crew responded to specific questions as to what they were briefed on, but no one asked if they were or were not at a briefing. This matter of a briefing could have been adequately resolved by calling in any one of Claimant's crew, but the Carrier turned on the Claimant and asked why he never brought any one of the crew. In fact, they offered to postpone the case until Claimant could call in any one of the crew. This was declined by the Representative that they could not

order anyone to come to the hearing, particularly when no witness for the defense would be paid for his time. If the Carrier called in a witness, the witness would be paid.

From the investigation, it is this Board's opinion that the Carrier failed to establish evidence to support the charge of failure to hold a briefing.

Regarding the lack of protection for the crew from an adjacent track, it was determined that because of the out of service track that was properly tagged, locked and spiked, protection was not required.

The burden of proof in disciplinary cases rests solely upon the shoulders of the Carrier. The criteria is sufficient evidence to support the charges. This is a burden the Carrier failed to satisfy.

Claimant is to be returned to service with pay for all time lost as provided for in the Agreement and all his seniority intact. All traces of this episode are to be deleted from Claimant's file.

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


William L. Yeck, Carrier Member

Dated: May 2, 2005