

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 358**

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 when Claimants F.E. Amaro and E.D. Smith were given a Level S Thirty (30) Day Record Suspension and review period of Three (3) Years, when the Carrier found the Claimants in violation of Rules 1.1.2 and 6.50 and Engineering Instruction Rule 1.1.9, when the Claimants machine did not stop and collided with another machine. The Carrier pre-judged the Claimants, due to reenactment. The Claimants should be paid any loss of pay commencing April 24, 2007 forward and or otherwise made whole, and the discipline should be removed from his record.
2. As a consequence of the violation referred to in part 1 the Carrier shall immediately correct the Claimants discipline records and make Claimants whole for all time lost.

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 dispute is as outlined in Item 1 of the Statement of Claim as is the discipline.

The two Claimants were operating spiking machines that collided. The Carrier, as it usually does, created a simulated incident in an effort to determine how the incident may have occurred. There were actually four spikers. Each of the four

operators were called in to testify.

The Carrier witness testified the brakes on the two units that collided were in working order. The tail lights worked as did the radios. This Carrier witness also testified that the rail was grease-free and dry.

Claimants' Representative attempted to rebut Carrier's witness as to the dry, grease-free rails but without success.

When it came time for each operator to set forth what each knew or witnessed regarding the incident, Claimants' Representative would not let each Claimant testify. He obviously believed that without their testimony, the Carrier had no case.

This is a fallacy. With each Employee witness refusing to testify, it is akin to holding an investigation without a Claimant in attendance. Nothing has been introduced to counter the Carrier's presentation of its case. Claimants do not have a right to refuse to testify. The Constitutional Fifth Amendment is not in play.

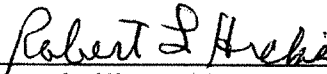
Carrier's version of the incident stands as is. Claim will be denied.

AWARD

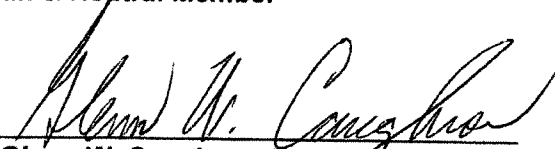
Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.


Robert L. Hicks, Chairman & Neutral Member


David D. Tanner, For the Employees


Glenn W. Caughron, For the Carrier

Dated:

10/01/09