PUBLIC LAW BOARD NO 5850

Award No.
Case No. 61

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. That the Carrier's decision to remove Eastern Track Foeman Mario C. Lopez from service was unjust.

2. That the Carrier now reinstate Claimant Lopez with seniority, vacation, all benefit rights unimpaired and pay for all wage loss as a result of Investigation held 10:00 a.m. November 11, 1997 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, removal 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.

On October 23, 1997, the Carrier wrote Claimant as follows.

"...Arrange to attend investigation...on Tuesday, November 4, 1997, for the purpose of ascertaining the facts and determining responsibility, if any, in connection with your alleged violation of Rule 1.6 of the Maintenance of Way Operating Rules, Effective August 1, 1996, by your alleged attempt to solicit another employee to kill Signal Supervisor Lee Clary

You are being withheld from service pending results of this investigation...."

After the Investigation, Claimant was dismissed from Carrier's service.

A review of the transcript clearly supports Carrier in its decision to dismiss Claimant. Substantial evidence was adduced thereat to establish Claimant's responsibility for the charges

assessed.

Attempting to classify Claimant's question of a fellow employee as to how much it would take to kill--as idle talk, that no one was sure the threat was real, fails.

Violence, threatened violence, real or otherwise, cannot be condoned and no employee is required to live with the nagging thought of whether the threat was simply idle chit-chat with no intent, or was it serious in nature.

The Organization has done what it could in an attempt to thwart the disciplinary process or at least to mitigate the seriousness thereof, even questioning whether Rule 1.6 is the Rule Claimant violated

Rule 1.6 stipulates in Item 5 that employees must not be immoral. Certainly, the act of soliciting another to commit murder cannot be considered anything other than an immoral act.

The claim will be denied. The Carrier's decision to dismiss is upheld.

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

"See Attached Dissent"
Rick B. Wehrli, Labor Member

Thomas M. Rohling, Carrier Member

Dated: March 12, 1998

## ORGANIZATION MEMBER'S DISSENT

## TO

## AWARD 61 OF PUBLIC LAW BOARD NO. 5850

(Referee R. L. Hicks)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the on-property handling. Such is the case here.

It is this member's view that this Board has failed to recognize the obvious. That is, while the Claimant's question of the other employee was clearly meant to illustrate his disgust for the supervisor and may raise the concern of *some* regarding the literal interpretation of same, it is clear the employee who was asked the question did not categorize it as serious or a clear threat on the supervisor's life. If the employee truly recognized it as such, why did he not immediately contact the Carrier's security personnel to ensure no action was taken by the Claimant? The reason he did not is obvious. The employee heard the question of the Claimant, recognized the tone of his voice when asking the question, seen the expression on the Claimant's face, and quickly concluded the Claimant was not seriously considering the early demise of the supervisor as the literal interpretation of the question might suggest. The record indicates that the employee did not report the incident until sixty (60) days after the question was asked and, then, only at the involved supervisor's insistence that he do so in writing.

This Board should remember that while it could obviously be better, the Maintenance of Way work place is not a tea-room atmosphere. To illustrate the point here, as it relates to this case, I am able to give an example that involved myself as a Local Chairman working as a Sectionman. Thoroughly fed up with my references to the collective bargaining agreement which dictates how matters should be handled, a supervisor told me "*I'll make you eat that god damned Agreement book!*" Now, while the literal application of his comment did not sound that appealing to me and I did not believe he would actually try to make me eat the Agreement book, I quickly grabbed my Agreement book, a salt shaker, placed it on his desk in from of him and told him "*If you think you can, I'm ready.*" Obviously, the literal application of his comment did not occur and, once the level of silliness in our testosterone quickly subsided, we continued the day performing our respective tasks side by side and with no problems whatsoever.

The point is all people make comments, when disgusted, with which they have no real plan to follow through. It is what most people call *"blowing off steam."* Clearly , that is what happened here and the Board has mistakenly categorized the Claimant's question as a serious threat. In light of my opinion on this point, I believe this award is palpably erroneous, of no precedential value and I, therefore, dissent.

Respectfully submitted

R. B. Wehrli
Organization Member