

PUBLIC LAW BOARD NO 5850

Award No.
Case No. 89

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE:

(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. That the Carrier's decision to issue a Level 1 Formal Reprimand and a probationary period of one year for violating Rule 20.3 of the Maintenance of Way Operating Rules, effective August 1, 1996, 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 10:00 A.M. July 29, 1998 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 Formal Reprimand is extreme and harsh discipline under the circumstances.
3. That the Carrier violated the Agreement particularly but not limited to B.N. Rule 40, 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.

Two machines bumped. No damage to either machine, no injury to anyone, yet, because one machine rolled into another, charges were leveled and an investigation was set and held in Claimant's absence. Following the investigation, Claimant was assessed a formal reprimand.

Routinely, this Board has held that the charged employee, in almost all cases, is not

required to attend the investigation. It is an option he has, but if he does not attend it is at his peril as no one is there to rebut the evidence furnished by the Carrier.

In this instance, Claimant was working at Gillette, Wyoming, about a nine to ten hour drive from Pueblo, Colorado, where the investigation was held, and it would seem unreasonable to hold the investigation so far from the work site, yet there is no evidence that a postponement was requested by the Claimant. In fact, the transcript reads as though his representative expected Claimant to be present.

Under these circumstances, the Board finds nothing improper in holding the investigation in Claimant's absence.

Regarding the merits, the main Carrier witness did not witness the incident. He only "surmised" what occurred based upon his years of experience. The operator of the machine that was bumped did not know what actually happened other than he heard the horn and jumped away from the tie plugger.

Even if the Claimant is not in attendance to rebut Carrier's evidence, the testimony has to be credible. The Carrier still has to furnish substantial evidence of Claimant's culpability for the charges assessed.

When the Carrier's main witness testimony is based upon surmisal and nothing else, the evidence presented does not meet the substantial evidence criteria so necessary to sustain the charges.


AWARD

Claim sustained.

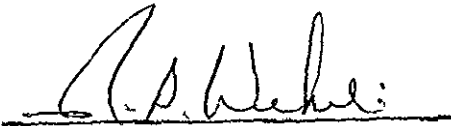
ORDER

This Board, after consideration of the dispute identified above, hereby orders that an

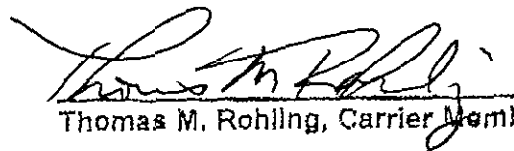
award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.



Robert L. Hicks, Chairman & Neutral Member



Rick B. Wehrli, Labor Member



Thomas M. Rohling, Carrier Member

Dated: November 3, 1998