

## Public Law Board No. 6204

### **Parties to Dispute**

Brotherhood of Maintenance of Way  
Employees

vs

Burlington Northern Santa Fe

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Case **17/Award 17**

### **Statement of Claim**

1. That the discipline of a five (5) day suspension imposed on Mr. A. E. **Murphy** for alleged failure to report for duty on **7:30** A.M. on November 15, 1994 was arbitrary, capricious, excessive and in violation of the Agreement.

2. As a consequence of the violation the Claimant's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.

### **Background**

The Claimant was advised to attend an investigation in order to determine facts and place responsibility, if any, in connection with his failure to report for duty at the depot at Waterbury, Nebraska when he bumped Temporary Foreman D. S. Schuldt off Temporary Foreman Job 111445 16 1. After an investigation into this matter was held the Claimant was advised that he was being suspended **from** service of the Burlington Northern Railroad for five days for violation of Rule 1.15 of the Maintenance of Way Operating Rules. This discipline was appealed by the Vice General Chairman with the Division Superintendent. This appeal was denied. The claim was subsequently appealed up to and including the highest Carrier officer designated to hear such. Absent settlement of the claim on property it was docketed before this Board for **final** adjudication.

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### **Discussion and Findings**

**There** are a **number** of procedural issues raised by the Organization in this case which will be addressed by the Board.

First of all, the Organization argues that the Claimant's due process rights were violated because he was not advised of the time and locale of the investigation until after the investigation was held. In this respect the Organization cites Rule 40(c) of the operant Agreement which states the following in pertinent part.

#### **Rule 40(c)**

At least five (5) days advance written notice of investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of **his choice**.

According to the Carrier the letter of investigation was sent to the Claimant at his address of record with carbon copy to the Organization's Local Chairman. A review of the record by the Board shows that when an investigation was held on this case that neither the Claimant nor the Organization's representative were present. The Claimant's address on the notice of investigation was listed at a street address in **Bellevue**, Nebraska. The record shows that the letter of investigation went out by certified mail eleven days prior to the date of the investigation. According to the Carrier the Claimant had not picked up the letter containing the notice of investigation until after the latter took place but that such action by the Claimant did "...**not** put the Carrier at fault...". The Carrier states that it sent the letter to the Claimant's proper address. The Organization states that the Claimant had

only become aware of the investigation after "...picking up a Certified letter from the Carrier informing him of same...". The Board must conclude that the Claimant could not have picked up the certified letter if it had not been sent to his proper address. That he picked it up so late was an act over which the Carrier had no control. The Organization also argues that the Carrier could have simply given the Claimant a copy of the notice of investigation while he was at work. This is true. But the Board can **find** no Agreement mandate which required the Carrier to have done such. There was no violation of the Agreement Rule here by actions of the Carrier by the manner in which the Claimant was advised of the investigation.

Secondly, the Organization alleges that there was a second procedural violation by the Carrier because the appeal of the discipline by the Vice General Chairman was not answered within the window period of the time-lines set by the labor Agreement. Request here is that the claim be forfeited because of this alleged violation. This procedural objection is based on the following language from the labor Agreement.

Rule 42 (A)

Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whomever filed the claim or grievance (the employee or his representative) in writing of the reasons from such disallowance. If no so notified, the claim or grievance shall be allowed as presented...

A review of the record with respect to this objection shows the following. The

claim was filed on stationary showing four different addresses. The most prominent one was the letterhead of the Organization's System Division which is located in Denver, Colorado. On the right margin are located the names of the three Vice General Chairman, and in relatively small type, the addresses of these same three Vice General Chairmen. Their addresses are located in the states of Illinois, Wyoming and Iowa, respectively.\* The Vice General Chairman who filed the appeal in this case is the one who lives in Iowa. The Rule cited states that the declination must be sent to "...whoever filed the claim.. ." within the requisite window period. The Carrier argues that this was done because the declination letter was sent to the Vice General Chairman who filed the appeal. A review of the record shows that this was the case. But the declination letter was not addressed to this Vice General Chairman's Iowa address.' Rather, the declination letter was sent to the System Division address, as so stated on the stationary's letterhead in bold letters. Therein lay the Carrier's error, according to the Organization, which led to the alleged violation of Rule 42(A). The Board hesitates to get involved in procedural disputes of this nature where the arguments presented have technical merit on both sides. On the one hand the Carrier should have sent the declination not only to the correct Organization representative, which it did, but also to that representative's address. On the other hand, responses to correspondence, of any kind, have normally led reasonable minds, as a matter of long-established practice, to send responses to the address on the

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<sup>2</sup>The General Chairman's name, with the System Division address repeated, is also in the same format on the right margin of the **stationary**.

letterhead of the correspondence in receipt. The position of the Board in this case is that it is wisest to allow the parties themselves to resolve this type of procedural issue raised in this instance in order that they might avoid such problems in the future. The instant objection will be neither denied nor sustained. The objection is dismissed.

On merits, the Rule involved in this case is the following.

Rule 1.15

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employee must not leave their assignment, exchange duties, or allow others to till their assignment without proper authority.

According to testimony at the investigation by the Roadmaster the Claimant placed a bump notice under the schedule Agreement and then did not show up for work on the date he was supposed to and thus violated the above cited Rule.

The Organization argues that the Claimant had called in on the day in question and that he had left a message on voice mail for the Roadmaster. That message stated that the Claimant was having car trouble, and the Claimant also left a telephone number for the Roadmaster to call. According to the Organization and the Claimant, the problem lie in the fact that the Roadmaster never called back to tell the Claimant that there was any problem with him laying off.

In scrutinizing the record the Board fails to **find** any documentary evidence that the Claimant had actually left such a message beyond a letter which the Claimant himself sent to the Organization stating that he called in and left a message. The Board would be

more confident in the credibility of such letter if there were corroborating evidence to back it up. Secondly, there is abundant arbitral precedent in this industry to the effect that if an employee wishes to take off he or she must get permission to do so. Clearly, in this case, the Claimant had not done so. In a **shift** in logic which a Board such as this can but frown upon the Claimant appears to argue that it was the Roadmaster's duty to have called him, rather than the other way around, even assuming that the Claimant's version of the facts were the proper ones. Such argument implying a **shift** in responsibility related to work attendance cannot be accepted by the Board. On merits, the claim **cannot** be **sustained**.

Argument about the propriety of discipline imposed here has been examined by the Board. The Board observes that the Claimant to this case bumped into a foreman's position. The Agreement classifies such assignments as follows.

Rule 55 (B)

Foreman. An employee assigned to direct the work of men and reporting to **officials** of the railroad shall be classified as a foreman.

The Carrier argues that employees bumping to such positions carry a heavier burden of responsibility and their behavior should match this responsibility. The Board does not **find** such argument unreasonable. Secondly, the Carrier argues that this Claimant had been counseled in the past about absenteeism and that the instant case represented but yet another instance of his unacceptable pattern of behavior. In view of the full record in this case the Board is unable to conclude that the Carrier's


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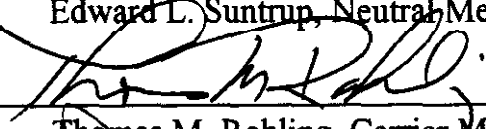
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determinations here were arbitrary or capricious.

Award

The claim is denied.

  
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Edward L. Suntrup, Neutral Member

  
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Thomas M. Rohling, Carrier Member

  
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Roy C. Robinson, Employee Member

Date: 7/30/01