

**PUBLIC LAW BOARD NO. 4244**

**PARTIES ) ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.**  
**TO THE ) AND**  
**DISPUTE ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

- STATEMENT OF CLAIM:** 1. That the Carrier's decision to suspend Eastern Region, Trackman J. L. Avila from service for five (5) days starting this date and ending Friday, September 3, 1994, was unjust, as he will be penalized for the holiday, Labor Day Weekend which is more than what was indicated by the decision, a Level 3 Suspension of five (5) days.
2. That the Carrier now rescind their decision and pay for all wage loss as a result of Investigation held 9:00 a.m., July 28, 1994 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 Claimant violated the rules enumerated in the decision, suspended 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:** This Public Law Board No. 4244 (the "Board") finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and the subject matter involved.

In this dispute, Eastern Region Trackman J. L. Avila (the "Claimant") was notified to attend a formal investigation on June 28, 1994, concerning his alleged failure to wear appropriate hearing protection under circumstances that required hearing protection on May 25, 1994, in violation of a settlement agreement signed in April 1994, in possible violation of Rules A, B, I, 1000, 1007 1208 and 5904 of the Carrier's Safety and General Rules for All Employees. The investigation was postponed and held on July 28, 1994. Pursuant to the investigation the Carrier determined that the Claimant violated Rules A, B, 1000 and 1007, and he was issued

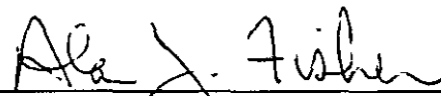
five days suspension beginning August 29, 1994.

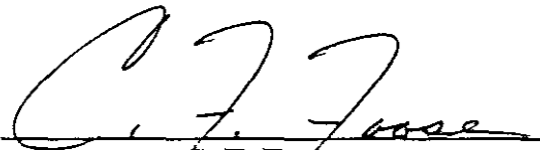
In summary, Manager - Safety (Corwith) Walter Simms testified at the formal investigation that on May 25, 1994, he traveled to the Willow Springs, Illinois work location to make a safety inspection. Upon his arrival he observed the gang working around a ballast tamper and an air compressor. He stated that only two employees were wearing the required hearing protection, A. A. Reyes and M. O. Torres. However, Simms acknowledged in his direct testimony and on cross examination that he could not confirm where the Claimant was performing his work responsibilities.

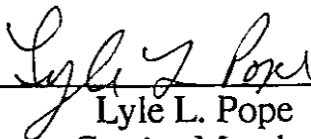
The Claimant testified that on May 25, 1994, he was not working near any machinery that required hearing protection. In fact, on that day, he did not have his hearing protection so his job assignment was to provide flag protection for the work crew. He further testified that the only time he was within ten feet of the crew and machinery was when he was called by the foreman to pick up the work tools after the machinery was off.

Based on a review of the record the Board finds that the Claimant's testimony was credible. The Board also finds that the Carrier did not conclusively establish that the Claimant violated the cited rules. Furthermore, the Carrier did not establish that the Claimant was performing job duties that required him to wear hearing protection. Accordingly, the record does not support the Carrier's determination that the Claimant violated the settlement agreement dated April 6, 1994.

**AWARD:** Claim sustained.

  
Alan J. Fisher  
Chairman and Neutral Member

  
C. F. Foose  
Organization Member

  
Lyle L. Pope  
Carrier Member

Dated: December 15, 1994  
Schaumburg, Illinois