

Award No. 148
Case No. 153

PUBLIC LAW BOARD NO. 4244

**ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.
AND
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

STATEMENT OF CLAIM: 1. That the Carrier's decision to suspend Central Region Section Foreman M. J. Nagro from service November 18 to December 18, 1994, was unjust.

2. That Public Law Board 4244 now reverse the Carrier's decision of a Level 3 Thirty (30) day suspension without pay beginning November 18, to December 18, 1994, and compensate him for all wage loss, account they failed to provide the burden of proof alleging the Claimant removed a Blue Flag from Track 0449 on September 6, 1994, or violated any rules enumerated in their decision of November 18, 1994. That the Carrier's actions were not reasonable and hostile in suspending the Claimant.

3. That the Carrier violated the Agreement particularly but not limited to Rule 13 and Appendix 11, because credible evidence was presented for the record by the Claimant's witnesses that the Claimant did not remove the Blue Flag or violate any rules.

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.

The record shows that Central Region Section Foreman M. J. Nagro (the "Claimant") was notified to attend a formal investigation on October 6, 1994, concerning his alleged removal of blue flag without permission on September 6, 1994, in CLIC 0449 at Clovis, New Mexico, in possible violation of Rules 1.1, 1.1.1, 1.2.7., 2.6, and 5.13, of the Carrier's Safety and General Code of Operating Rules. The investigation was postponed and eventually held on October 28, 1994, and reconvened on November 18, 1994. As a result of the investigation the Carrier determined that the Claimant violated the cited rules, and he was suspended from service for 30 days.

In summary, the Claimant and his crew were instructed to pick up scrap rail with the burro crane on September 6, 1994. To do the work it was necessary to pull a gondola car from one of the yard tracks. However, when the Burro Crane Operator A. Sena and Machine Operator C. Bradley arrived at the track, they discovered that the gondola was the third car in the track and there was a blue flag in the knuckle of the first car. Assistant Roadmaster V. J. Lopez testified that he was in the office when the Claimant radioed that he had removed the blue flag from the first car in order to switch out the gondola. Lopez then left the building to discuss the matter with the Claimant. As soon as he ended his conversation with the Claimant, Roadmaster K. Sumners called Lopez to say that he had overheard the conversation and wanted to discuss the matter with the Claimant, too.

Both Lopez and Sumners testified that they were informed by the Claimant that he had pulled a blue flag without permission in violation of the Carrier's rules. After the gondola was switched, the blue flag was put back on the lead car in the track. The Claimant did not implicate any other crew members, and he acknowledged that removing a blue flag without authority was a rule violation.

The record further shows that Lopez and Sumners spoke to no other crew members concerning this matter.

Trackman/Truck Driver R. R. Wicker testified that he was driving the Section truck on the day of the incident, and the Claimant was a passenger in the truck with him when the blue flag was removed. Wicker further testified that he heard the Claimant's radio conversations regarding the matter. Wicker declared that the Claimant informed Lopez and Sumners that "they have taken a blue flag off." He testified that Machine Operator C. Bradley had removed the flag. He also stated that the Claimant had called the tower and the mechanical department to ask if they had placed the blue flag on the track, and neither party were aware of the blue flag protection. Last, he testified that the Claimant was not at the track when the blue flag was pulled by the other crew members.

After hearing Wicker's testimony, the Organization requested a postponement until Sena and Bradley could be present. The request was granted, and the hearing was reconvened on November 18, 1994.

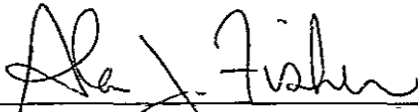
Machine Operator C. Bradley testified on November 18, 1994, that he was the employee who removed the blue flag from the 449 Track. He testified that the flag was in the knuckle of the first car in the track, and he did not get permission

to remove the flag. He stated that he and Sena looked around the cars in the track and could see that no one was working there. Sena then instructed him to pull the flag and get the gondola from the track. He declared that the Claimant wasn't physically present when the flag was pulled, but he was in the truck with Wicker.

The Claimant testified at the formal investigation that he and Wicker were in the truck over 300 feet from the burro crane when he observed Bradley with the blue flag. When he realized that Sena and Bradley were going to switch the gondola, he immediately had Wicker drive around the track to make sure that the track was clear. He further testified that is when he got on the radio to the other departments to make sure that no one was working in the track. Last, he maintained that Lopez and Sumners became upset with him because the Claimant had "announced" the situation over the radio. He testified that Lopez and Sumners were very upset with him when they approached him in the yard, and neither supervisor gave him the opportunity to state his observation of the matter.

Based on a review of the record, the Board finds that the Carrier failed to establish that the Claimant removed the blue flag protection from the track without permission in violation of Carrier's rules. Moreover, the Board finds the Claimant's testimony to be credible concerning the conduct of the Claimant's immediate supervisors during their investigation of the incident on September 6, 1994. Accordingly, it is the Board's opinion that the Claimant did not receive a fair and impartial investigation, and the discipline must be set aside.

AWARD: Claim sustained.

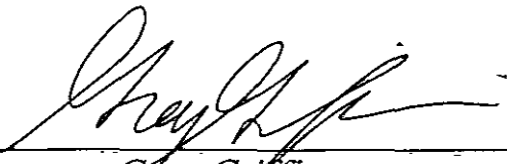


Alan J. Fisher

Chairman and Neutral Member



Clarence F. Foose
Organization Member



Greg Griffin
Carrier Member

Dated: 2/15/96
Schaumburg, Illinois