

PUBLIC LAW BOARD NO. 4244

**Award No. 228
Case No. 227**

Parties to Dispute:

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**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

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BURLINGTON NORTHERN SANTA FE RAILWAY

Statement of Claim:

1. That the Carrier's decision to remove Central Flagman Mario E. Vallejos from service was unjust.
2. That the Carrier now reinstate Claimant Vallejos with seniority, vacation, all benefit rights unimpaired and pay for all wage loss as a result of Investigation held 9:00 a.m. May 21, 1996 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, 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.

INTRODUCTION

This Board is duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Railway Labor Act ("Act"), 45 U.S.C. Section 153, Second. This matter came on for consideration before the Board pursuant to the expedited procedure for submission of disputes between the parties. The Board, after hearing and upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representative ("Organization") within the meaning of the Act, as amended.

FINDINGS

On April 23, 1996, the claimant, Mario E. Vallejos, was assigned as a flagman at MP 911.5 on the Glorieta Subdivision. The claimant was instructed to provide protection for a private contractor construction crew. At approximately 12:50 p.m., a backhoe belonging to the SP Construction Fiber Optics Project was permitted to occupy the main track without proper protection. As a result, Amtrak passenger train no. A-41-22 collided with the backhoe. The claimant was located at his truck, approximately 150 feet from the backhoe, at the time the accident occurred. Although there were no serious injuries, \$181,000 in damages was sustained by the Amtrak train.

The claimant was notified to attend a formal investigation to determine his responsibility, if any, in connection with the incident at issue. As a result of the formal

investigation held on May 21, 1996, the claimant was issued a Level 6 dismissal by the Carrier for violation of Rules 1.1, 1.1.2, 1.3, 1.4, 1.6, 6.3, and 10.3.2 of the General Code of Operating Rules (GCOR), Rule 20.1.2 of the Maintenance of Way Rules (MOWR), and Rule 50.1 of Safety and General Rules for All Employees. For the following reasons, the Board cannot sustain this decision.

The following rules are applicable to the Board's decision in this case. Rule 1.1- "Safety", of the GCOR provides: "Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment." Rule 1.1.2- "Alert and Attentive", of the GCOR provides: "Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury." Rule 1.4- "Carrying Out Rules and Reporting Violations", of the GCOR states:

Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad.

Rule 1.6- "Conduct", of the GCOR, provides:

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral

6. Quarrelsome
7. Discourteous

Rule 6.3- "Main Track Authorization", of the GCOR provides that a main track shall not be occupied unless authorized by a particular Rule of the GCOR, verbal authority from the control operator or a controlled signal that indicates proceed, or special instructions or general order. Rule 6.3 of the GCOR further provides that, "when unable to obtain authority and it is necessary to foul or occupy a main track, protection must be provided in both directions as outlined under Rule 6.19 (Flag Protection)." Rule 20.1.2- "Lookout Responsibilities", of the MOWR provides that an employee assigned as a lookout must not be involved in the work or distracted in any way. Safety Rule 50.1- "Job Safety Briefing", provides:

Employees must attend or conduct a job safety briefing before beginning work or when work or job conditions change. The briefing will include a discussion of the general procedure plan, existing or potential hazards, and ways to eliminate or protect against hazards. Outside parties or contractors involved in the work or who are in the work area also must be included in the job safety briefing.

The claimant testified at the investigation that he did not give the private contractor permission to be on the track at the time the accident occurred. (Tr. 20). The claimant stated that he informed the construction crew that a train would be passing through their work area between 12:45 and 1:00 p.m. (Tr. 21). The record reveals that the claimant was well aware that the Amtrak passenger train was in the vicinity and would soon be passing by his location. (Tr. 26).

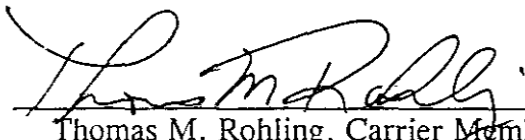
The construction crew offered testimony that the claimant gave permission for the backhoe to occupy the track and that the crew had authority to occupy the track from their starting time until 1:00 p.m. However, the Board cannot conclude that given the claimant's

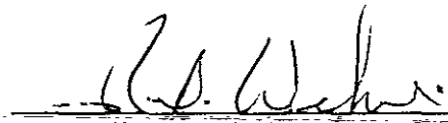
knowledge of the train schedule and location of the construction crew, that the claimant gave express permission for the construction crew to occupy the track at the time of the accident. This conclusion is supported by the fact that the claimant had instructed the construction crew not to occupy the track when a train passed by earlier in the day. The Board also finds that the Carrier was aware of difficulties the private contractor and its employees had following instructions given by Carrier employees. Moreover, the Board finds that the construction crew may have been disregarding instructions in an attempt to complete more work on account of the construction project being behind schedule.

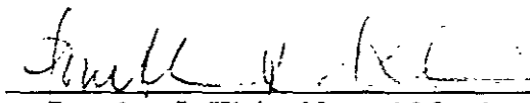
For these reasons, the Board finds that the claimant should be reinstated to the service of the Carrier. However, the Board's findings do not preclude the claimant from being held partially responsible for the accident which occurred. The Board finds that the accident may not have occurred if the claimant was attentive and providing the proper lookout protection. The Board further finds that the claimant should have been at the location of the construction crew instead of sitting in his truck in order to ensure that the crew was not occupying the track, even though the claimant previously instructed the crew that the Amtrak train would be passing by between 12:45 and 1:00 p.m. The length of the disciplinary suspension reflects the seriousness of the situation caused, in part, by claimant's violations of the rules as charged.

AWARD

The claim is sustained as follows. The claimant is reinstated to service without back pay or benefits, but with his seniority unimpaired. The Carrier is directed to comply with this Award within thirty (30) days of the date of issue.


Thomas M. Rohling, Carrier Member


R. B. Wehrli, Employee Member


Jonathan I. Klein, Neutral Member

This Award issued the 7th day of October, 1998.