

PUBLIC LAW BOARD NO 5850

Award No  
Case No. 11

PARTIES TO DISPUTE.  
(Brotherhood of Maintenance of Way Employees  
(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM.

1. That the Carrier's decision to issue a Level 5 Suspension for Central Region, Foreman F. Tso from service for thirty (30) days was unjust.
2. That the Carrier now rescind their decision and pay for all wage loss as a result of an Investigation held 10:00 a.m., May 7, 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 the Claimant violated the rules enumerated in the decision, suspension 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

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.

Claimant was charged with and found guilty of violating Rule 6.3 of the General Code of Operating Rules when, allegedly, he released the track protection for the gang that was his responsibility only to find that several Welders working in conjunction with the gang, for whom he was also responsible, were not clear of the area.

Claimant's un rebutted testimony was that the conversation he had with Welder Bekay, particularly when he (Claimant) stated "I'm ready to release" and Welder Bekay responded, "Yes. Go ahead and release..." meant to him (Claimant) that the Welders were in the clear

There is no question that there was a breach in the Operating Rules. The Welders were unprotected for about three minutes, and this Board understands the seriousness of having employees work on tracks without protection from train movements.

Once Carrier establishes that a breach occurred and that Claimant was responsible for that breach, the burden shifts to the Claimant to establish his version of what occurred and the mitigating circumstances that in some way may lessen the consequences of his actions.

Without the testimony of Welder Bekay, we have the un rebutted assertions of Claimant as to his conversation with him. There is no showing of gross negligence, nor studied indifference, but we do have a case of failure to communicate clearly. As an employee responsible for the protection of his crew, Claimant must exercise due diligence in being absolutely sure that everyone for whom he is responsible is off the track or tracks before releasing the protection.


It is noted that just six weeks prior to this incident, Claimant received a formal reprimand for another safety rule violation pertaining to the same gang. Under these circumstances, some discipline is necessary to impress upon Claimant the seriousness of his actions, but 30 days actual is excessive. It is reduced to ten days with Claimant being paid for all time lost in excess of ten.


#### AWARD


Claim sustained in accordance with the Findings

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 postmark date the Award is transmitted to the parties.

  
Robert L. Hicks  
Chairman and Neutral Member

  
C. F. Foose  
Labor Member

  
Greg Griffin  
Carrier Member

Dated 10/1/96