PUBLIC LAW BOARD NO 5850

Award No.
Case No. 131

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when on April 6, 1999, the Carrier issued a dismissal from employment to Mr. L. Hannah for the alleged violation of Rule 6.3.2, Protection on Other Than Main Track, of the Maintenance of Way Operating Rules, effective January 31, 1999. The dismissal is in connection with Mr. Hannah's alleged failure to properly protect men and equipment on a tie-up track at Dolan, Texas on March 3, 1999.

2. As a consequence of the Carrier's violation referred to above, Claimant shall be reinstated with seniority, vacation all rights unimpaired and pay for all wage loss commencing March 3, 1999, continuing forward and/or otherwise made whole.

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.

On March 2, 1999, Gang RB23, at the end of the workday, stored the machinery it was using on a siding that was out of service to all train traffic.

On the morning of March 3, 1999, on a sunny day, Claimant, in his capacity as Assistant Foreman, was charged with overseeing the movement of the machines off

the siding, through a cross over, then moving the equipment ahead a short distance so that the two spikers could be resupplied. Finally, he was responsible for spacing the units and moving them five miles beyond the siding to the current work site. The entire movement on the main line was protected by a Form B (which included the switch).

During the machinery movement, two Roadmasters were present and Claimant soon discovered one was also directing the machinery movement which caused some concern to the operators as they had to watch for Claimant's and the Supervisor's signals.

According to the Claimant, the Roadmaster told him to go on ahead, do whatever he had to do.

Claimant, before leaving the siding, did talk with the Machinist who was repairing the tamper that was left on the siding. The Machinist advised the repairs would be completed shortly and an Operator would have to be furnished to move the tamper off the siding.

Claimant proceeded ahead to the work site, unloaded some company material, was advised by the Assistant Roadmaster at the work site to be sure he tagged and spiked the switch when the tamper was moved.

Meanwhile, back at the siding, the two Roadmasters were the last to leave the area, but found the switch was not tagged, nor was it spiked.

The Roadmasters believed that leaving the switch to an out of service track without tagging and spiking was a serious violation, particularly so when a machine and an employee were occupying the out of service siding. Neither Roadmaster had a red tag, but they did insert the spike in the hole left when it was pulled. They said they called ahead to the gang to have someone return to red tag the switch, then they left.

They reported the incident to the Superintendent who then, after checking Claimant's record, ordered him withheld from service pending the results of the investigation.

After the investigation, the Carrier believed it had established sufficient evidence of Claimant's culpability for the charges assessed, and on April 6, 1999, they wrote Claimant advising him that he was dismissed from service.

The Board does not agree. The Carrier has not furnished sufficient evidence that would support Claimant's culpability for the charges assessed and this is so for the following reasons:

1 - The job briefing did not include references to the out-of-service track and Claimant's responsibility to tag, lock or spike the switch after all but the tamper was moved out, and then again after the tamper was repaired and moved off the siding.

2 - The Roadmaster signifying that Claimant was to go ahead and do whatever he had to do, which to Claimant was an indication that the Roadmaster would handle everything left behind, including tending the switch.

3 - The unusual setting of the entire scene. An out-of-service track to all train service, a sunny day with the tamper in plain sight, 25 feet from the switch, a Form B, protecting the main line work to be done with a six hour window with the switch to the siding being well within the Form B parameters, and a 30 to 40 minute period the switch to the siding was untagged and not properly spiked.

4 - The Roadmaster's abandoning the switch after it was discovered it was not spiked nor tagged, leaving the machine and the mechanic unprotected, the same charge levied against Claimant.

5 - A locked derail protecting the machine and the mechanic.

6 - A Safety Rule that without a grammatical explanation from management, a reasonable person could easily misinterpret.

7 - Pursuing evidence only to establish culpability, not to develop all the facts.

Regarding the job briefing, it was attended by two Roadmasters, one Assistant Roadmaster, one Foreman and two Assistant Foreman, yet no one referenced the out-of-service track, nor did anyone caution Claimant about Rule 6.3.2, the Rule Carrier insisted had to be complied with to protect the mechanic and the machine despite the switch being well within the Form B protection, that the day was sunny, that the tamper was only 25 feet from the switch in plain sight, that it was protected by a locked derail.

The obvious mix up with the Roadmaster telling Claimant that he had it, indicating he was in control during the staging of the equipment and that Claimant was to go and do whatever he had to do.

Claimant contends that the Roadmaster was by the switch when he told

Claimant to go ahead. The Roadmaster says he was not by the switch, but 200 yards beyond when he told Claimant, who the Roadmaster contends, was by the switch to go on and do whatever he had to do. This is an obvious conflict in testimony, but the witness credibility is not an issue as the party who issued the discipline was not a witness to the testimony of either party.

It is understood that witnesses requested by the charged employee are not compensated for lost time or travel expense as those who are requested to be witnesses for the Carrier, and since those requested by Claimant were some distance (some 1500 to 1800 miles from the site of the investigation) it is readily apparent that since several hundred dollars in travel expense and lost time would be incurred why those notified of Claimant's request would not be there, but the Carrier should have promptly notified Claimant that the Carrier was not ordering the witnesses to appear but would not oppose their being off to attend the investigation. This was not done and since there was an obvious contrast in testimony, another witness' testimony may have clarified this issue.

The Board does not intend to lessen the importance of safety and the need to enforce compliance, but that enforcement has to be equal, regardless of status. It cannot be selective with the bottom rung of the Supervisors being singled out for discipline to spare others on up the chain of command who had just as much obligation to comply with the Rules.

The Carrier has not only failed to establish Claimant's culpability for the charges assessed, it did not afford Claimant a fair and impartial investigation. All the facts and details relating to this matter were not clearly established.

AWARD

Claim sustained.

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 date the award is adopted.

Robert L. Hicks, Chairman & Neutral Member

Rick B. Wehrli, Labor Member
(Please see dissent)

Thomas M. Rohling, Carrier Member

Dated: June 28, 2000

LABOR MEMBER'S DISSENT

TO

CASE NO. 131 OF PUBLIC LAW BOARD 5850
(Referee R. L. Hicks)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is not based on the on-property handling. Such is the case here.

Initially, one may think that the Organization should leave well enough alone since the majority ruled in this case that the Organization's claim must be sustained because *"The Carrier has not only failed to establish Claimant's culpability for the charges assessed, it did not afford Claimant a fair and impartial investigation."* However, this Labor Member feels compelled to provide a dissent due to the fact that, while the Employes agree completely with the above quote of the Award, we cannot agree, in total, with the following excerpt taken from page 5 of the Award:

> "It is understood that witnesses requested by the charged employee are not compensated for lost time or travel expense as those who are requested to be witnesses for the Carrier, and since those requested by Claimant were some distance (some 1500 to 1800 miles from the site of the investigation) it is readily apparent that since several hundred dollars in travel expense and lost time would be incurred why those notified of Claimant's request would not be there, but the Carrier should have promptly notified Claimant that the Carrier was not ordering the witnesses to appear but would not oppose their being off to attend the investigation. This was not done and since there was an obvious contrast in testimony, another witness' testimony may have clarified this issue."

It is apparent that the above quote may support a theory of;

(1) always separating the witnesses *"requested by the charged employee"* from those "for *the Carrier"*; and

(2) that those *"requested by the charged employee are not compensated for time lost or travel expense as those who are requested to be witnesses for the Carrier."*

Putting it simply, this Labor Member cannot agree with such a theory.

First, the Brotherhood's General Chairman did not request witnesses to be present *"in behalf of"* or *"for"* the Claimant as the quoted excerpt infers. Instead, in his letter of March 9, 1999 to the Carrier (Exhibit 3), General Chairman Hemphill requested *". . . that the Carrier arrange for the following employees be notified to be witnesses and attend the formal investigation . . . as they have pertinent information so all facts of the investigation can be developed."*

The General Chairman's request was based on the well-established premise that, as part of its responsibility to provide a fair and impartial investigation, it is the obligation of the Carrier to seek out the truth by ensuring that all facts material to the charges, both for as well as against the employee, are fully developed. This obligation requires the Carrier to take the initiative in obtaining witnesses and evidence without regard to whether the witnesses are anticipated to have information in support of the charges or not. As stated in First Division Award 21058;

> *"[i]t is the duty of the Carrier to produce all employes as witnesses the Carrier knows to have knowledge of the circumstances being investigated."*

See also First Division Award 20094, which indicates in part;

> *"While the course of the disciplinary proceedings is under the control and direction of the carrier, nevertheless it is not permitted to cull or select data for presentation which only tends to demonstrate or prove the fault or wrongdoing of the employe being tried."*

Based on the advice of General Chairman Hemphill, the Carrier was aware of the fact that the witnesses requested had *"pertinent information so all the facts of this investigation [could] be developed,"* therefore, it should have taken the initiative to have them present for examination at the investigation.

As for the second point, i.e., the question concerning the compensation for the witnesses' lost time or travel expense, again, this Labor Member believes it is completely inappropriate to compensate the witnesses *"for"* the Carrier while denying the same consideration for the witnesses requested *"in behalf of the Claimant," "for the Claimant "* or, as in this case, for those who simply *"have pertinent information."*

It must be recognized that situations of this nature, i.e., the Carrier preferring charges and proposing discipline, are Carrier initiatives. Absent the Carrier's contemplated action, no charges or discipline would be preferred or assessed, respectively. Hence, it is clear the expense of the Carrier following through with its initiative must logically be the responsibility of the Carrier.

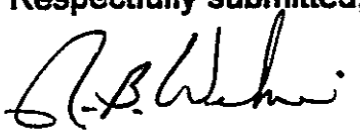
In this same regard, one must obviously recognize that even though it is a Carrier initiative, the language of this Award suggests that the charged employee must compensate the witnesses in question regardless of the fact the charges may be without any foundation whatsoever. That is, as in this case, had the Carrier made arrangements

to have the witnesses present at the investigation as requested and they would have presented further testimony/evidence that the charges were without valid foundation, the Carrier would not have had to compensate them for lost time and travel expense because they would have been incorrectly and inappropriately categorized as witnesses "*in behalf of,*" "*for*" or "*requested by*" the charged employee. Hence, even though the entire matter was a Carrier initiative and there was no valid basis for the charges, the Claimant would have been required to compensate the witnesses for lost time and travel expense to help prove his innocence. Obviously, this makes no sense and is in direct conflict with established railroad arbitration principles that dictate the Carrier has the burden of proving its charges.

Notwithstanding these obvious facts, the scales of justice are, without a doubt, unfairly tilted in favor of sustaining the Carrier's charges if the Carrier is allowed to offer compensation to witnesses for lost time and travel expense if they provide support for the Carrier's charges, and deny the same offer to others if they do not. To confront witnesses who have evidence that does not support the charges with such an inequity can only serve to suppress evidence pertinent to the charges which obviously taints the Carrier's obligatory objective to provide a charged employee with a fair and impartial investigation.

For these reasons, I must dissent concerning the Award's inference that witnesses should be categorized as "*for*" or "*against*" the charged employee, and that witnesses will be compensated by the Carrier for lost time and travel expense if they are only "*. . . witnesses for the Carrier.*"

Respectfully submitted,



R. B. Wehrli
Labor Member