

PUBLIC LAW BOARD NO. 6850

**Award No. 161
Case No. 161**

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

STATEMENT OF CLAIM:

1. That the Carrier violated the Agreement when on May 3, 2000, Mr. B. J. Tom was dismissed from the Carrier's service for his alleged violation of Rules 1.1.3, 1.1 and 1.1.1 of the Engineering Instructions; Rules 8.3 and 1.20 of the Maintenance of Way Operating Rules Effective January 31, 1999 as revised; and violations of Rules S-1.1.1 and S-1.8 of the Maintenance of Way Safety Rules as revised; in conjunction with an on-track collision between backhoe X-3200593 and Amtrak No. 4 on March 21, 2000.
2. As a consequence of the Carrier's violation referred to above, the Claimants shall be reinstated to service with seniority, vacation, and all other employment rights unimpaired and paid for all wage loss commencing April 11, 2000 [the date the Claimant was withheld from service] and continuing forward.

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, working as a Foreman, secured Form B protection for his crew which included the operator of a backhoe, yet the backhoe was struck and destroyed by an Amtrak train that had Claimant's permission to advance through Form B territory. No one was hurt.

An investigation was scheduled, following which the Carrier on May 3, 2000, wrote Claimant advising him that he was dismissed from Carrier's service for his violation of certain Rules.

Amtrak struck the backhoe when the operator, who had been instructed to proceed on an adjoining right away to a crossover then move to the far side of the track, found his way blocked and knowing the tracks were under Form B protection, tried to cross the tracks. Because the tracks were wet he could not get out of the track once he got in. Fortunately, he noticed other gang members waving frantically, saw the approaching train and ran for cover.

Claimant did not have a complete job briefing as he left out the potential of the Amtrak train arriving on the scene and, most importantly, overlooked advising the backhoe operator that he had given permission to Amtrak to proceed on a track protected by Form B.

There exists no controversy concerning Claimant's culpability for the charges assessed. He admitted he neglected to advise the backhoe operator of his action of allowing Amtrak to proceed through the territory and this was fully supported by the backhoe operator who testified he was never told about the Amtrak train.

The merits of the dispute are sustained.

Concerning the discipline, however, the Board believes the assessment of dismissal to a veteran employee who, when he was discharged, was just five months shy of 29 years with only one minor disciplinary action on his record was done without consideration of this record.

The Board understands the severity of the incident and the potential of costing

the life of fellow employees, yet no one was hurt in this instance. It is further evident that this was just a lapse in memory and not a result of a deliberate act.

The Organization on the property protested the severity of the discipline and furnished evidence of another employee who waived an investigation and received a 20 day deferred suspension when he put his vehicle on the wrong track only to have it destroyed by a train. The Carrier argued, and correctly so, that there is no basis upon which to compare the two disciplines - i.e., dismissal verses 20 day deferred, as each incident and resulting discipline must be determined individually. However, Claimant's near 29 years of relatively discipline-free service has to be given consideration just as a bad record would be considered.

Under these circumstances, Claimant is to be returned to service with all his seniority rights intact, without any pay for time lost.


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 date the Award is adopted.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member
Dated: October 29, 2001


Thomas M. Rohling, Carrier Member



PLB5850-162

PUBLIC LAW BOARD NO. 5850

Award No. 162
Case No. 162

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 disqualify Central Truck/Driver Garnet Morgan from working in a Truck Driver's position was unjust.
2. That the Carrier now reinstate Claimant Morgan with seniority, vacation, all benefit rights unimpaired and pay for all wage loss as a result of investigation held at 9:00 a.m. on February 20, 2001 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, disqualification from being a Truck Driver 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 disqualified as a Truck Driver. He testified that he had been a Truck Driver, Trackman and Machine Operator since April, 1979.

The disqualification occurred at the close of business on January 12, 2001. The disqualification letter had one line relative to his disqualification and that read, as follows:

"It has been determined that you did not possess the ability, fitness and skills to handle the position in a safe and efficient manner."

The Organization, during the hearing, protested the vagueness of the disqualification letter, and this Board has to agree. What were the specifics?

The only two instances that were brought forth were an alleged jack rabbit start and a one-time incident of rolling through a stop sign. The Carrier did not call as a witness anyone who rode with Claimant, but solicited testimony solely from a Roadmaster who had never ridden with Claimant, but kept referring to Claimant's unsafe driving, the uneasiness of his Foreman (who was no longer employed by the Carrier as of the date of the investigation) with Claimant's driving skills.

Contrarily, Claimant stated that since he commenced driving for the Carrier, he has driven a dump truck, more than one super size crew truck and others, all with but one incident and that was when he went to drive through some water which was deeper than was thought. For this he received a 30 day suspension, but he was not disqualified. This act was handled to a conclusion by the Carrier and should have no bearing on his disqualification.

Besides the water incident which was brought out in the investigation, the Carrier also related to the time apparently occurring shortly before the disqualification wherein the truck was struck by a yard engine. This incident was thoroughly investigated and no charges were filed. Evidently, no fault in operations were found.

There was absolutely no scintilla of evidence of Claimant's alleged unsafe,

unskilled inefficient manner in driving the truck.

The claim will be sustained.

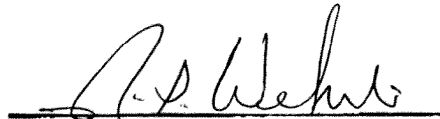
AWARD


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 date the Award is adopted.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member


Thomas M. Rohling, Carrier Member

Dated: June 1, 2001