

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 238**

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE:

**(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)**

STATEMENT OF CLAIM:

1. That the Carrier's decision to issue a Level S thirty (30) Day Record Suspension and review period of one (1) year for G. Silva from was unjust.
2. That the Carrier now expunge Claimant G. Silva's record and reinstate seniority, vacation, all benefit rights unimpaired and pay for all wage loss as a result of investigation held 10:00 a.m. June 10, 2003 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, the discipline is extreme and harsh 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.

On May 14, 2003, the Carrier wrote Claimant an investigation was being

scheduled,

"...concerning your alleged misrepresentation of facts surrounding an injury reported (on)...April 23, 2003, while working as a Foreman on Surfacing Gang in the Boise Subdivision...."

Claimant was driving a fuel truck that had been earmarked for retirement over a rutted access road. He alleged on April 23, while driving the fuel truck, he ran into a hole that resulted in Claimant bouncing up, hitting his head on the roof of the truck. The medical evaluation of his injury was listed as cervical contusion.

Following a standard procedure, Claimant's Supervisors conducted a reenactment of the incident. Claimant pointed out the rut he hit, then the Supervisors drove the fuel truck over the same terrain, hitting the pothole while driving at 5 MPH (the speed Claimant contends he was driving), then at 8 MPH, then at 12 MPH.

They never bounced their heads against the roof of the truck. Under these circumstances, they issued the notice of an investigation charging Claimant with misrepresentation of the facts contributing to his injury.

It would appear logical that tests after the reported injury were negative thus the conclusion of misrepresentation, but this is not sufficient evidence of misrepresentation of the facts. There were dents on the inside roof possibly caused by the hard hats when bounced, and secondly, try as they might, this Board is not convinced that the Supervisors' efforts to reconstruct the injury were actually duplicative of Claimant's. The Supervisors admitted they did not know if the seat was adjusted properly, and finally, they were prepared for a jolt whereas Claimant was not.

The road where the incident occurred was badly rutted as testified by others who had driven thereon, and the Supervisors presented evidence of ruts 7 and 8 inches deep.

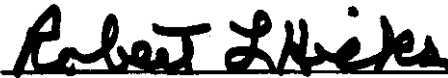
It is, therefore, this Board's opinion that Claimant did not misrepresent the facts leading to his injury. The claim is therefore sustained. If Claimant has lost any time, he is to be reimbursed for his loss, and all traces of this matter are to be removed from his record.

AWARD

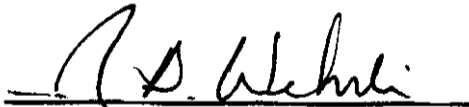
Claim sustained.

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

Dated: Sept. 4, 2003



Thomas M. Rohling, Carrier Member

William L. Yeck
as of August 21, 2003