

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 266**

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employees

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

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on July 14, 2004, when it withheld the Claimant, Mr. D. E. Palmgren, from Service and subsequently dismissed him for alleged conduct unbecoming an employee and quarrelsome and threatening behavior toward a foreman, on July 12, 2004. In violation of Maintenance of Way Operating Rules 1.6, and 1.7, Maintenance of Way Safety Rule S-1.2.9, and the BNSF Harassment Policy.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately return the Claimant to service, remove any mention of this incident from his personal record, and make him whole for any wages lost account of this violation.

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 July 19, 2004, the Carrier wrote Claimant advising an investigation was being scheduled to determine his responsibility, if any,

"....for events that took place on July 10 and July 12, 2004, at Lopez, CA; so as to determine the facts and place responsibility, if any, involving Rules 1.6 (Conduct) and 1.7 (Altercations) of the Maintenance of Way Operating Rules in effect January 31, 1999 (including amendments through April 2, 2000) and Rule S-1.2.9 (Horseplay) of the Maintenance of Way Safety Rules

in effect January 31, 1999 (including revisions up to October 10, 1999)."

The Carrier in the belief it furnished sufficient evidence that found Claimant culpable for the charges, assessed and dismissed Claimant from service.

Claimant's Representative charged Carrier with failure to provide Claimant with a fair and impartial hearing when they removed him from service pending the results of the investigation.

This Board believes under certain circumstances, individuals can be removed from service pending the results of the hearing if the Carrier believes the individual poses a threat to his fellow employees, to himself or to the Carrier.

When someone is accused of quarrelsome behavior with his Foreman and with the Roadmaster, it is the safest thing the Carrier could have done. If Claimant was exonerated, he would be paid for all time lost which clearly covers wages lost while being withheld prior to the date that the Carrier believe it established proof of the charges and issued discipline.

The entire crew was called as witnesses, but the strongest testimony was that of the Foreman and the Roadmaster.

When the Foreman told Claimant to pull some lags out of the mainline, he said he had to ask three times before Claimant complied and then he only did half the job. The Foreman had to assign another employee to finish doing the work Claimant was instructed to do.

Claimant, according to the Foreman, yelled at him and used foul language before even doing only half the job.

At another point, Claimant was told to spike up two l-bonds, he argued about that,

then again only did half of the job, decided that was it for the day, got in his truck and left the worksite.

The Foreman contacted the Roadmaster and sought his assistance. The Roadmaster on the 12th came to the worksite to talk to Claimant.

The Roadmaster found a discussion of what had transpired was impossible. Claimant started off by referring to things that did not pertain to the situation, nor did he wait for the Roadmaster's question.

When asked about doing what the Foreman asked, the Roadmaster had to ask three times, then all Claimant said was, "I was doing my job."

When the Roadmaster responded saying that was not what he asked, Claimant simply stared at the Roadmaster, then got out of the truck, walked to the truck he was assigned to and got a cold drink.

The Roadmaster had enough and told Claimant to get his gear, he was taken out of service and the Roadmaster drove Claimant to the starting point.

Claimant established seniority in April, 1994. His disciplinary record is clear until June, 2004, when he waived an investigation and accepted a 30 day suspension for cursing a Track Supervisor. Shortly after his return to service, Claimant once again has displayed conduct paralleling his June, 2004, 30 day suspension.

Usually progressive discipline is used to impress an individual that the Carrier will not and can not tolerate such behavior.

Claimant has been out of service since July, 2004. By now he should realize that such behavior is not and will not be tolerated. There always has been, and there always will be, a Supervisor who is paid to supervise to insure all the work required is completed

and completed properly.

Claimant's behavior between the June, 2004, 30 day suspension and his dismissal in this case reflects a sudden intolerance of being supervised causing an angry response as a pattern of actions reflecting his objection to what he is being told to do.

Under the circumstances, Claimant is to be given one last chance to change his attitude. Claimant is to be reinstated to service but without pay for time lost. He must also contact the Carrier's EAP Department and follow whatever program they recommend which must include an anger management program.

The EAP contact must be made prior to his reinstatement. Claimant must then follow through and complete the EAP's recommendations. Failure to do so can result in another disciplinary action that very well may result in a permanent dismissal. This is Claimant's last chance to regain and resume his career with the Carrier.

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


William L. Yeck, Carrier Member

Dated: 4-18-05