

**PUBLIC LAW BOARD NO. 5850**

**Award No.  
Case No. 268**

**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 June 2, 2004, when it issued the Claimant, Mr. B. S. Cruz, a Level-S, 30-day record suspension and 3-year probation for alleged violation of rules 1.6, and 1.13 of the Maintenance of Way Operating Rules, and the removal of his Group 3 Class 1 Foreman rights for a period of one year from June 4, 2004 to June 4, 2005.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove any mention of this incident from his personal record, Restore his seniority rights, and make him whole for all lost wages, including any difference in pay while his seniority has been wrongfully suspended.

**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.

In an undated letter, the Carrier wrote Claimant advising of an investigation being established on December 11, 2003:

"...for the purpose of ascertaining the facts and determining your responsibility if any, in connection with your possible violation of Rules 1.6, 1.13 and 1.15 of the Maintenance of Way Operating Rules, in effect January 31, 1999 as supplemented or amended, concerning your alleged falsification of an employee's time on November 7, 2003, when employee was released early due to personal emergency and paid for the full shift in addition to your alleged failure to comply with instructions concerning your releasing of BNSF employees under your supervision without proper authority prior to the end of their shift on November 22, 2003, while working

**as Foreman on Surfacing gang, on the Panhandle Subdivision, Kansas Division."**

**The investigation was postponed to be held on March 5, 2004. On March 5, 2004, the investigation went through the opening usually found in all investigations. After identifying all participants, the investigation was again postponed until March 19, 2004, account illness of the officer scheduled to hold the investigation.**

**The investigation was finally held on May 6, 2004. The Carrier at that opening introduced what they term a correction letter referring to the original notice of an investigation indicating the second alleged violation occurred on November 21, 2003, not November 22, 2003, as contained in the original notice.**

**Following the investigation, the Carrier in the belief it had furnished sufficient evidence of Claimant's culpability for the charges, assessed Claimant a 30 day record suspension and a one year's suspension of his G3C1 Foreman's rights effective at the close of shift on June 4, 2004.**

**The Organization challenged Carrier's right to discipline setting forth various reasons. First, they complained about the location as train traffic did create sounds that drowned out some responses in the tape that was recorded as inaudible. This can be, and has been in the past, a problem, but the several inaudibles found had no significant bearing on the investigation.**

**The second challenge was Carrier combining two incidents in one notice. To this Board, that is not a challenge. If anything it is an effort to conserve time and money. Besides, both charges were similar in nature.**

**The Organization also challenged the notice contending that it was vague, but this Board had no trouble determining what the charges were based upon the Rule cited.**

**The fourth challenge was the date the second violation allegedly occurred. Right**

from the first, the date was listed as November 22, 2003, and was not corrected until Carrier's letter of March 9, 2004, to read November 21, 2003.

Had the Carrier not corrected the notice and opened the investigation with the date of November 22, 2003, and then discovered it should have been November 21, this Board would have dismissed the second charge, but because the investigation was not held until May 6, 2004, the Claimant and his representative had adequate notice of the correct date. They were not blindsided.

The Carrier did provide sufficient evidence of Claimant's culpability for the charges assessed. Specifically, for November 21, 2003, he did release the crew early without the OK of the Construction Roadmaster, then paid them all a full day's pay.

On November 7, 2003, an employee came to the Foreman with a family emergency problem and was excused early, yet the Claimant paid him a full day's pay.

A Foreman has definite responsibilities and is paid accordingly. One responsibility is making out the payroll. The Carrier expects the payroll to be correct. The Foreman has no authority to claim hours for his crew that they did not work. Even if it is on a Friday and there was no possibility of that crew to get track and time prior to their regular quitting time.

Every employee on the Carrier has a Supervisor he reports to and each is expected to react as directed. Claimant cannot, particularly after receiving instructions not to authorize early quits without his Supervisor agreeing thereto. This is Claimant's second event of not complying with instructions. Under the circumstances, this Board will not disturb the discipline.

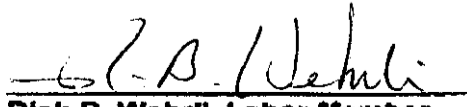
**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

  
Robert L. Hicks, Chairman & Neutral Member

  
Rick B. Wehrli, Labor Member

  
William L. Yeck, Carrier Member

Dated: May 2, 2005