PUBLIC LAW BOARD NO 5850

Award No.
Case No. 29

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM.

1. That the Carrier's decision to Suspend Southern Region, Relief Section Foreman R. A. Monde from service for one-hundred and twenty (120) days was unjust.

2. That the Carrier now rescind their decision and pay for all wage loss as a result of an Investigation held 1:30 P.M., September 30, 1996 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 the Claimant violated the rules enumerated in the decision, suspension from service 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.

On September 5, 1996, Carrier wrote Claimant as follows:

"...Arrange to report to the Superintendent's Office Conference Room...at 10:00 AM, Thursday, September 19, 1996, with your representative and witness(es), if desired, for formal investigation to develop the facts and place responsibility, if any,

in connection with possible violation of Rules 1.2.7, 1.6 and 1.13, Safety Rules and General Responsibilities for All Employees effective January 31, 1996, concerning your alleged failure to remove red flag placed on the Old Orient Main Track at Sweetwater on August 27, 1996, and concerning your alleged dishonesty in connection with communicating the facts regarding this incident to Roadmaster...at approximately 0800 hours, August 29, 1996, at Snyder, Texas...."

Following the Investigation held on September 30, 1996, by mutual agreement, Claimant was assessed a 120 calendar day suspension from Carrier's service.

The events precipitating the Investigation and discipline involve the allegation that Claimant overlooked removing a red board (actually a red metal disc mounted on a sharpened steel rod to facilitate placement by shoving or driving it into the ground). Such boards, in addition to what else was in place, is intended to protect the employees and the equipment.

The work site was at a junction where another carrier entered Carrier's tracks. At about 4:40 PM on August 27, 1996, the Engineer (who was not the regular engineer) from the foreign Carrier, noticed a red board by Avenue D. He stopped the train to contact the Dispatcher concerning this restriction, and the Dispatcher confessed no knowledge of the restriction.

The Relief Engineer left a voice mail message for a Carrier officer other than the Roadmaster who was subsequently so notified.

When the Roadmaster investigated this matter, Claimant was adamant about removing the red board, stating he, himself, did the deed. He stated he removed the board about 2:20 PM, and placed it on a front-end loader that was parked close to the vicinity of where the red board was located because of a flat tire.

At this juncture, this Board is confronted with two stories: one relating an error of omission

by not retrieving the red board, the other of insistence that the red board was picked up about 2:20 PM.

The statements by Claimant's gang members are inconclusive as they simply state they did not see Claimant retrieve the red board. Yet according to Claimant, they all left the area passing the spot the red board was placed without mentioning whether the red board was or was not standing when they left.

These statements were objected to by the Organization, but they did introduce a statement from the repairman from the outside concern that repaired the flat on the loader on the day of the incident In that statement, the repairman refers to a red sign on the floor of the loader that was in his way when he wanted to move the loader.

The date on the repairman's statement threw suspicion upon the entire statement It is dated the day of the incident, yet Claimant contends he did not talk to the repairman to get the statement until after he received the notice of charges which was a week later. Why it is dated the day of the incident is an unknown that Claimant could not explain. Perhaps the reason for the date of August 27, 1996, on the statement reflects the date it was written. Another factor, and the main one, is why did the Relief Engineer on the foreign carrier call the Dispatcher about a red board? Why did he leave a message on a Carrier officer's voice mail concerning the red board and back it up with written confirmation if Claimant had retrieved the red board at 2:20 PM on the date of the incident? What possible reason could he have? Who retrieved the red board after the foreign Engineer left Carrier's Yards?

Granted, the evidence is all circumstantial as no one witnessed Claimant removing the red

board. However, discipline can be assessed based upon the circumstantial when it is substantial and when it points inescapably to the conclusion that Claimant did indeed fail to retrieve the red board when the employees concluded their work for the day.

Claimant's elaborate efforts to blame the unknown to exculpate himself from the charges did not convince the Carrier of his innocence, and it does not sway this Board.

Safety violations warrant discipline, but in this instance the 120 day suspension is excessive and is reduced to 30 calendar days with Claimant being paid the difference in accordance with the practice on the property.

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
Robert L. Hicks, Chairman & Neutral Member

C. F. Foose, Labor Member

Greg Griffin, Carrier Member

Dated 3/11/97