

PUBLIC LAW BOARD NO 5850

Award No.
Case No. 83

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE:

(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. That the Carrier's decision to assessed (sic) an entry of censure onto the record for Southern Region, E. J. Morgan was unjust.
2. That the Carrier now rescind their decision and expunge all discipline, and transcripts and pay for all wage loss as a result of an investigation held 11:40 a.m. June 2, 1998 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, 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.

Claimant is an experienced veteran Foreman who, as of the date of the Incident, was the Foreman on a rail laying gang.

On the day of the incident, a track warrant was secured by the Roadmaster assigned to work with the gang, although the name on the warrant was Claimant's. Apparently this is a frequent occurrence with this gang. In fact, Claimant testified that he sometimes secures the track warrant but only when he has a track profile in hand and can communicate

intelligently with the Dispatcher.

Claimant was charged with failure to place a red flag at a point where a foreign train would enter the track protected by the warrant. Red boards, however, are required in Form B territory only when employees and machinery are fouling the track, or when the track is out of service because of changing rail or ties.

To this Board, after reviewing the transcript, the entire subject is confusing and not clear. The only thing established was that there was no red flag at the point the foreign train would enter Carrier's tracks, but then the Claimant testified that such foreign train entering the Form B protected territory would see the red board protecting the crew. This was never denied by the Carrier.

A review of the Rules cited by the Carrier alleged to have been violated by Claimant, does not reflect that Claimant was in violation of either Rule. The Carrier witness stated Claimant violated the Rule "because he didn't have an effective route flag." There is no reference to intersecting tracks, nor an "effective route flag" in either Rule other than that portion of 5.4.8 referencing an intersecting track within the two mile zone of the red-yellow board and the warrant's parameters.

Furthermore, Claimant was in territory new to him. The Roadmaster who set the disciplinary machinery in motion, in whose territory Claimant's crew was working, attended the morning safety briefing conducted by Claimant. This Roadmaster knew the parameters of the track warrant. Rather than waiting for Claimant to ask questions about the territory, he could have cautioned Claimant about the intersecting track, or at least furnished Claimant a track profile.

The Carrier failed to furnish substantial evidence of the Claimant's culpability for the

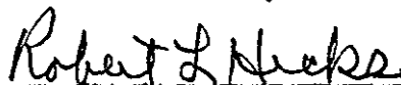
charges assessed. The record mark is to be removed from his work record, and if he lost any time because of this Incident, he is to be paid in accordance with the practice on the property.


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


Thomas M. Rohling, Carrier Member

Dated: 10/7/98