

## Public Law Board No. 6204

### Parties to Dispute

Brotherhood of Maintenance of Way  
Employees

vs

Burlington Northern Santa Fe

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Case 8/Award 8

### Statement of Claim

1. That the discipline of a fifteen (15) day suspension imposed on Foreman R. D. Sharp for allegedly violating Rule 6.3.1 of the Maintenance of Way Operating Rules was arbitrary, capricious and was assessed on basis of unproven charges.
2. That Foreman R. D. Sharp's record be cleared of the charged leveled against him and that he be compensated for all waged loss suffered.

### Background

The Claimant was advised, along with six (6) Operators, to attend an investigation in order to determine facts and place responsibility, if any, in connection with Region Gang SC-52 traveling outside Track and Time authority at or near Tamora, Nebraska on August 15, 1997. This happens <sup>TR</sup> at about 5:00 PM. An investigation into these matters was conducted on September 19, 1997. On October 17, 1997 the Claimant was advised that he had been found guilty of violating Rule 6.3.1 and he was assessed a thirty (30) day suspension by the Division Engineer. On October 21, 1997 the Claimant received notification by the Division Superintendent that the thirty (30) days suspension was being reduced to a fifteen (15) day suspension "...upon further review of the (transcript) of investigation...". This discipline assessed the Claimant was appealed by the Organization and conferenced on property. Absent settlement of the claim it was docketed before this Board for final adjudication. All of the Operators except one were also assessed

suspensions. On August 25, 1998, or a little more than a year after the incident involved in this case occurred, the Organization was advised that "...after careful review of the case..." by the Carrier all of the Operators involved would have their suspensions rescinded and would be paid for "...all lost time and have their record expunged of (the) incident...".<sup>1</sup> According to the Carrier, it had determined "...that Foreman R. D. Sharp (was) solely responsible for (the) incident..." that occurred on August 15, 1997.

### **Discussion and Findings**

The Claimant is a long-term employee with the Carrier with seniority date of May 30, 1975.<sup>2</sup> At the time of the incident which led up to the instant claim the Claimant worked in the Maintenance of Way and Structures Department of the Carrier, as a Track Sub-Department Foreman. He was working with a Resurfacing Crew which was called Gang SC 52. The crew was made up of the Claimant, as Foreman, and Operators running various pieces of equipment such as ballast and plasser regulators and tampers. The Claimant's job was to supervise the crew and to also obtain track and time authority. The latter is given by a Dispatcher within specific control points. On the day in question Gang SC 52 was working between Mile Posts 40.0 and 44.8 near Utica, Nebraska but at the end of the day had to return to their "tie up" point, or a snub track near the town of Tamora, Nebraska. This tie up point is located at Mile Post 35.9. At 4:30 PM the Dispatcher gave the Claimant track and time for 45 minutes for main track 2 from Mile Post 40.0 to the Tamora Switch after east bound train 9571 had passed through. The Claimant gave those instructions over the radio to the Operators. The Claimant states that he gave specific instructions

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<sup>1</sup>Carrier's Exhibit 9.

<sup>2</sup>Carrier's Exhibit 4.

for the Operators to follow train 9571 on track 2 to the Tamora switch. The Operators apparently thought they had authority to follow train 9571 on track 1 to the stub track switch into the town of Tamora. Five machines thereafter proceeded down track 1. When the Claimant arrived at the Tamora switch with his truck and discovered the machines on track 1 (the sixth was still on track 2) he radioed the Dispatcher and obtained authority for them to be there.

The instant case centers on the issue of whether the Foreman and the Operators in this case entered a portion of track to which they did not have authority on the date in question. They obviously did. The Claimant to this case testified at the investigation that he was sure of his instructions to the Operators that they were not to enter the track in question because they had no authority to do so. They only had authority to be on track 2 at the Tamora location.

Obviously the issue at bar involves communication.

The Organization argues that one of the problems involved in this case is that some of the radios carried by the Operators, which is how the Foreman communicated with the Operators, were malfunctioning. This is, of course, a serious issue. The Carrier states that if this were so the Foreman should have had them repaired. A review of the record shows that the Foreman testified that when he realized there was a problem with the radios after the August 15, 1997 incident he immediately took action and arrangements were made for a radio technician to make repairs in order to have his radios "...looked at as soon as possible...". The Carrier's radio technician did not arrive until the following day because the shop was "busy". But the radios were repaired by August 17, 1997. Since neither the Claimant nor the Operators were charged with any rule infractions until August 20, 1997 the Board can but reasonably conclude that the Foreman did take action as soon as possible, prior to any charges being filed, in order to have the radios in

proper order as soon as he realized there was a problem. On the other hand, if there were problems with the radios before this time the Foreman obviously could not have known about the problems if the Operators had not informed him of such. The evidence shows that the Foreman took action when he knew there are problems with the equipment. If there is blame with respect to faulty radios, it more reasonably rests with the one using them, and with the one who is in a better position to know if they are working or not, rather than the one with authority to have them repaired.

The Board also notes that even if the radios had all been functioning (and they were not) the argument by the Organization that the Road master at this location had issued orders restricting Operators from listening to conversations between the Foreman and the Dispatcher is not disputed by the Carrier. Nor is it disputed that after this incident happened, those orders were rescinded. The record shows, through testimony, that the Operators had been concerned in the past with their inability to know what was being communicated to the Foreman by the Dispatcher. Obviously this was a problem affecting communication between the Foreman and the Operators otherwise steps would not have been taken by the Road master, after the incident, to correct it.

The lead machine that ended up on the wrong track on August 15, 1997 was operated by Operator Raines. According to his testimony at the investigation the Claimant radioed to him to follow train 9571 on "...main 2...".<sup>3</sup> A review of the full record warrants conclusion that the source of the problem may well have centered on the subsequent actions by the lead Operator who simply, and somewhat inexplicably, changed from line 2 to line 1 and that four of the other Operators just followed him.

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<sup>3</sup>See Trans. @ p. 115 seq.

The Organization also notes that there was some confusion between the Station sign and the town sign in the area in which the incident took place. This was also corrected at a later point after the incident occurred<sup>4</sup> and some new signs were erected. At the time the incident took place there were, in fact, two railroad locations named Tamora in Nebraska. It is difficult to say if this had any bearing on the issues at stake in this case but it certainly did not help matters to have two locations with the same name.

The Carrier is moving party in this case and it bears the burden of proving the charges filed against the Claimant. There is variable evidence in the record of this case on why communications broke down between the Foreman and the Operators on August 15, 1997 near Tamora, Nebraska.

The Board is well aware of the seriousness of the matters under scrutiny in this case. The Board cannot reasonably conclude, however, that the breakdown of communications between the Foreman and the Operators was the result of negligence by the Foreman. At least one of the Operators admitted he understood the track orders and he was, arguably, the most strategically located of the Operators on the day in question. There were many other factors beyond the Foreman's control which, as far as can be determined, were corrected quickly by the Carrier so that an incident such as one under scrutiny in this case might not occur again. On basis of foregoing considerations the Board does not believe that it would be reasonably remiss in concluding that the discipline assessed the Foreman was improper and it will conclude

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<sup>4</sup>In testimony at the investigation the Road master appeared to admit that the markings in the area were confusing. When asked if he agreed that it was "...a little confusing there between the control point Tamora and where you guys refer to as typing up at Tamora..."? the Road master responded that "...I guess I could see where that would be confusing..." (Trans. @ p. 60).

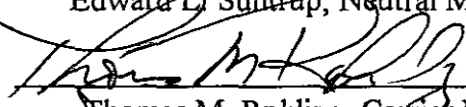
accordingly.


The fifteen (15) day suspension shall be removed from the Claimant's record and he shall be paid by the Carrier for all time held out of service as a result of the suspension he received on October 21, 1997.

**Award**

The claim is sustained in accordance with the Findings. All compensation due to the Claimant shall be paid to him within thirty (30) days of the date of this Award.

  
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Edward L. Suntrup, Neutral Member

  
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Thomas M. Rohling, Carrier Member

  
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Roy C. Robinson, Employee Member

Date: December 15, 1999