

PUBLIC LAW BOARD NO. 4901

AWARD NO. 209
CASE NO. 209

PARTIES TO
THE DISPUTE:

United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim denied

STATEMENT OF CLAIM:

“Request in behalf of Northern California Division Conductor T. W. Gamble for the removal of alleged violation of Rules 1.6, and 1.3, 1.4, and 1.13 of the General Code of Operating Rules Fourth Edition in effect April 2, 2000 and Northern California Division Superintendent’s Notice 16, Item 28, in effect April 23, 2000 from the Claimant’s personnel record and for his reinstatement to the service of the Burlington Northern and Santa Fe Railway Company, Coast Lines, with seniority and all other rights unimpaired and with pay for all time lost including the payment of Health and Welfare Benefits beginning on May 10, 2001, and continuing until returned to service as the result of the Formal Investigation conducted on June 12, 2001.”

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was dismissed for rule violations arising out of alleged insubordination occurring at the Carrier’s Stockton Intermodal Facility on May 10, 2001. At the time of his dismissal, Claimant had approximately two years of actual service with the Carrier. His total railroad experience, however, included approximately twenty years of service with the former Southern Pacific. His work record with the Carrier was clear of prior discipline.

The Organization raised several procedural objections at the investigation. Our review of the record, however, shows them to lack merit. The notice of investigation cited the rules charged and provided sufficient specifics to comply with the requirements of the Agreement. No improprieties by the conducting officer were evident from the record. Although Claimant was removed from service on the day of the incident pending the investigation, there was no violation of Article 13 of the Agreement. Such removal does not constitute discipline within the meaning of that Article. Finally, according to the testimony, it appears that all material witnesses were present at the investigation. Claimant was charged with failure to comply with the instructions of several Carrier officials. All of the people who participated in the key conversations leading to the charges were present.

The Carrier operates an intermodal facility at Stockton, California. It is also known as “ITS.”

The facility is staffed by exempt personnel under contract with the Carrier. These personnel perform all of the switching wholly within the facility. To expedite the safe delivery of cars by Carrier's road crews, the facility provides vehicular transportation for the road crewmembers who set out cars. This speeds their travel from one end of a cut to another and eliminates the need to ride the side of the point car for long distances.

Item 28 of Superintendent's Notice No. 16 instructs road crews to follow the instructions of ITS on channel 36 when delivering cars to the facility. Track 305 has a concrete pad adjacent to it at an area known as the "ramp," which provides off-loading equipment with a smooth work surface.

A controversy surrounds the precise instructions Claimant received from ITS personnel upon approaching the facility. At a minimum, he was told to pull through on track 201 and set out the cars that were to be left at the facility on track 305. During this activity, Claimant was informed about the transport vehicle that was being provided for him. It is undisputed that he declined the ride several times. He admits he specifically refused the transportation over the radio. There is also some question about where he was to spot the ten cars, of 923 feet in length, on track 305. Claimant left them just inside the switch point rather than spot them at the ramp area. He admits he told an unknown ITS official in words to the effect it was not his job to spot the cars at the ramp.

The vehicular refusal was overheard on the radio by Carrier officials who happened to be present at the facility at the time. Although there is some question about the nature of the initial instructions Claimant received from the ITS personnel over the radio, there is no doubt whatsoever about the instructions he was given by the Carrier officials shortly thereafter. He was instructed to re-couple onto the cars and shove them to the track 305 ramp area. He was also instructed to use the vehicle rather than ride the side of the point car. Claimant was given these instructions by no less than four Carrier officials who were present. They gave him multiple opportunities to comply and cure his previous non-compliance.

Claimant admitted that he did not want to comply with the officials' instructions. While he evaded saying "No" outright, he admitted that he "waffled" with his responses to avoid complying. He also admitted his actions implied he was giving the officials a "No" answer.

According to the record, why Claimant did not comply with the repeated instructions is a mystery. A post-incident test showed him to have been free of the influence of drugs or alcohol. He was properly rested before duty. He did not even claim the vehicle was unsafe for transport. According to his testimony, he had no knowledge one way or the other concerning safety. At no time did he request a delay in the conversations to enable him to secure Organization representation. His testimony shows he was comfortable talking with all four Carrier officials without even requesting his engineer to be present. The discussions were not heated; the record shows them to have been relatively cordial given the circumstances.

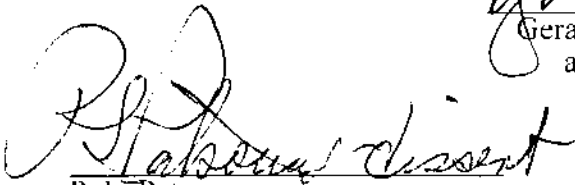
A time-honored and well-settled principle of labor relations referred to as the "comply now-grieve later" doctrine requires that an employee comply with the directives of supervision unless there is a recognized reason for refusal. Something that constitutes an unreasonable hazard to the safety of the employee is the reason commonly seen. Being in the nature of an affirmative defense, the employee and the Organization bear the burden of proof to establish a legitimate reason for non-compliance. No safety or similar reason has been established, or even claimed, on this record.

Accordingly, the record herein provides neither justification for Claimant's refusal to comply nor mitigation of his actions.

Award No. 1 of Public Law Board No. 5176, involving these same parties, recognized that discipline of dismissal is not inappropriate for the kind of conduct under review here. Our review of the evidence reveals no proper basis for disturbing the Carrier's action and imposing a different result here.

AWARD:

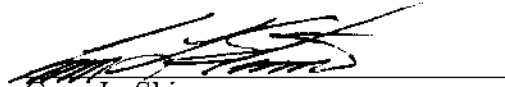
The Claim is denied.



P. L. Patsouras,
Organization Member



Gerald E. Wallin, Chairman
and Neutral Member



Gene L. Shire,
Carrier Member

DATE: 12-29-03