

**PUBLIC LAW BOARD NO. 4901**

AWARD NO. 202  
CASE NO. 202

PARTIES TO  
THE DISPUTE: United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company  
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained in accordance with the Findings

STATEMENT OF CLAIM:

“Request in behalf of Northern California Division Conductor S. M. Perocier for the removal of alleged violations of Rule 1.1.1, 1.1.2, 1.6, 2.4, 5.3.6, 5.2.7, 6.28, 7.1, 7.4 and 8.2 of the General Code of Operating rules Fourth Edition in effect April 2, 2000 from the personal record and for reinstatement to the service of the BNSF with seniority and all other rights unimpaired, with pay for all time lost including the payment of Health and Welfare Benefits beginning on May 17, 2001 until returned to service as a result of the Formal Investigation which started on May 17, 2001 and was postponed by Conducting Officer T. E. Carr and reconvened on May 22, 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 violations of ten rules arising out of his failure to properly line a switch for a switching movement on February 25, 2001 at Pittsburgh, California. He admitted he mistakenly lined the wrong switch that night. His error caused his engineer to collide with the cars on a siding track at approximately 6.8 miles per hour when he had been led to believe by Claimant that he still had some three cars lengths to go. The engineer was injured as a result of the collision. At the time of his dismissal, Claimant had nearly twenty-five years in Carrier's service. His work record for the five years prior to the incident in question contains six instances of discipline, the last of which was a Level S suspension for improper handling of cars less than five months previously.

Our review of the record reveals no procedural irregularities of significance. On the merits, we find substantial evidence to support seven of the rule violations. Although a claim of distraction by nearby trespassers was offered in mitigation for Claimant's error, substantial evidence in the record permitted the Carrier to reject this explanation. According to the testimony of a Carrier official who interviewed Claimant shortly after the incident, Claimant said the trespasser did not affect his work performance. The Carrier was permitted to accept this testimony as being more credible despite Claimant's contention that he did not make such a statement.

Notwithstanding the foregoing, however, our review of the record fails to disclose proper evidentiary support for three of the violations determined by the Carrier. They are Rules 2.4, 5.2.7, and 5.3.6, all of which relate to radio procedures. For example, Rule 2.4 requires the use of the words "Over" and "Out" during radio conversations. Moreover, by its explicit terms, it is not applicable to yard switching operations. This raises the question whether it was applicable at all to this switching movement. But if it was, the record contains no evidence whatsoever that Claimant


failed to comply with the procedure. The same is true of the other two radio rules. The record simply does not provide adequate support for the Carrier's determination that they were violated.

According to the Carrier's disciplinary letter, Claimant's discharge was predicated on the finding that Claimant violated all ten rules. The Carrier's determination did not find any of the violations to be more serious than any others; as a result, it provides us with no proper basis for distinguishing between them in terms of seriousness without indulging in an impermissible degree of speculation. Thus we are confronted with the situation that the discharge was premised on all ten violations and not some lesser number.

Given the state of this record, we have no choice but to set aside the dismissal penalty for lack of adequate proof; as noted, only seven of ten charges have been proven. Nonetheless, the seven violations proven do constitute significant safety violations and warrant commensurate discipline. Under the circumstances, we find that Claimant should be offered reinstatement to his previous employment without undue delay, with seniority and other rights of that status unimpaired, but without back pay. Claimant's time off payroll resulting from this dismissal, if any, shall be reflected as a Level S disciplinary suspension without pay including an appropriate corresponding probationary period.

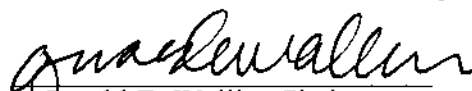
AWARD:

The Claim is sustained in accordance with the Findings.




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P. L. Patsouras,  
Organization Member



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Gerald E. Wallin, Chairman  
and Neutral Member



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Gene L. Shire,  
Carrier Member

DATE: 12-1-03