

PUBLIC LAW BOARD NO. 4901

AWARD NO. 203
CASE NO. 203

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 S. M. Perocier for removal of alleged violations of Rule 1.1, 1.1.1, 1.1.2, 1.3.1, 1.6, 9.4, 9.5, 9.11, and 9.16 of the General Code of Operating rules in effect April 2, 2000 from the personal record and for his 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 3, 2001 until returned to service as a result of the Formal Investigation which was held May 18, 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 nine rules arising out of his the failure of him and his crew to stop short of a dark signal on May 2, 2001 on the Stockton Subdivision. The dark signal was part of an operations test administered by a team of Carrier officials. 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 seven instances of discipline, which included a Level S suspension for improper handling of cars some eight months previously as well as a dismissal resulting from his failure to line the proper switch on February 25th. The February incident, which was reviewed in Case No. 202 before this Board, caused injuries to the engineer, who was surprised by the unexpected collision when Claimant's error lined him into cars standing on the wrong track.

Award No. 202 modified Claimant's prior dismissal due to proof problems with three of the ten violations involved. Nonetheless, the misconduct that was proven was significant and warranted Level S discipline with an accompanying probation period. Thus, at the time of the instant disciplinary action, Claimant must be viewed as on probation for two Level S infractions in the year preceding the instant dispute.

Our review of the record reveals no procedural irregularities of significance. We do not agree there was a problem with a missing witness for three reasons. First, the failure to stop short of the dark signal was admitted by all of the crew members; there was no controversy about that fact

whatsoever. Second, the record suggests that the testimony of the potential witness would have been repetitive with that of other Carrier officials who were present and who did testify. Finally, the Organization did not proffer any explanation to suggest how or in what manner the testimony of the potential witness would have provided material information not already in the record. Such an offer of proof is indispensable to our ability to judge whether a missing witness has anything of value to add. If the Organization does not provide us such a clue about the materiality of a potential witness' testimony, we ordinarily must reject the objection. We do so here.

Given the circumstances of the conduct involved as well as his recent prior safety infractions, we do find that the incident was sufficiently aggravated to warrant withholding Claimant from service pending the investigation. Accordingly, we find no violation of the Agreement in this regard.

Finally, the Organization contends that the Carrier did not comply with its own disciplinary policy in refusing to accept Claimant's offer to waive investigation and accept a suspension. Given Claimant's probationary status, due to the other recent safety violations, the Carrier was not required to accept his waiver offer. The waiver process is not a negotiated right under the circumstances of Claimant's situation. No other contentions in the nature of affirmative defenses to the Carrier's action have been established by the record.

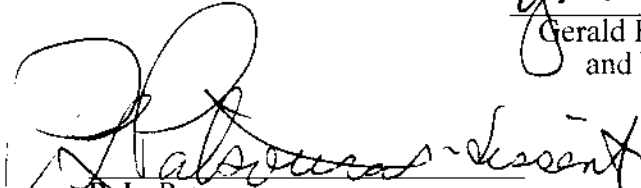
On the merits, we find substantial evidence to support all but one of the rule violations with which Claimant was charged. Careful review of the hearing transcript and exhibits does not support the finding that Claimant and his crew did not reduce speed to the restricted speed of 40 miles per hour or less after passing the preceding yellow approach signal. At most, the record shows the dark signal was passed at approximately 37 mph.

Our review of the evidence finds substantial evidence to support all of the other rule violations charged. Although there was considerable testimony about the lighting conditions present just after sundown as the train proceeded westbound on a straight stretch of track, we do not find this to mitigate the failure to stop short of the dark signal. The Claimant and crew acknowledged their familiarity with the location. Claimant had traversed it every other day for quite some time and knew that the two parallel main tracks had adjacent signal masts at the same location. As they approached the dark signal, they saw only one lighted signal when they should have seen two. This should have automatically alerted them to the presence of a dark signal. There is no question but that the rules required them to stop short of the dark signal. They should have slowed, if even to a crawl, until they could verify the condition of their signal notwithstanding the difficulties associated with looking into the post-sundown twilight. Their responsibilities required them to be vigilant in their signal awareness. Reduced visibility does not reduce their responsibility to see and respond to a dark signal. Rather, reduced visibility heightens their responsibility to detect the signal condition and respond accordingly.


On this record, we do not find that Claimant was disparately disciplined. The record does not substantiate that the other crewmembers had the prior disciplinary record of serious recent safety violations that Claimant had. Given the nature of the misconduct involved, when taken together with that prior record, we do not find the discipline of dismissal to be harsh or unreasonable. Accordingly, there is no proper basis to disturb the Carrier's action.

AWARD:

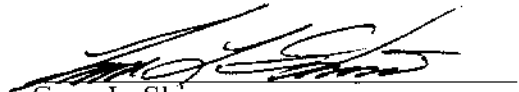
The Claim is denied.



P. L. Patsouras,
Organization Member



Gerald E. Wallin, Chairman
and Neutral Member



Gene L. Shire,
Carrier Member

DATE: 12-1-03