

**PUBLIC LAW BOARD NO. 4901**

AWARD NO. 233

CASE NO. 233

**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 on behalf of Southern California Division Conductor D. E. Tacoronte to be returned to service of the BNSF Railway Company with seniority and all other rights unimpaired and with pay for time lost including payment of Health & Welfare Benefits beginning on April 24, 2002 and continuing until returned to service, with no deduction of outside earnings. Also removal of the alleged violations of Rules 1.1, 1.6, 1.47, 6.3, 9.5, and 10.1 of the General Code of Operating Rules, Fourth Edition, effective April 2, 2000, and Rule 9.1.15, Signal Aspects and Indications from his personal record.”

**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 violation of Carrier rules requiring stopping short of a red signal. Unfortunately, on April 23, 2002, Claimant's train, although placed in emergency braking, ran eastbound on Main Track No. 2 through the control signal at Atwood, California and collided head-on with Metrolink Train 809 shortly thereafter. The collision caused three deaths, injuries to one hundred sixty other passengers, and more than two million dollars of damage to the Metrolink. Claimant and his engineer were also injured after jumping from their lead locomotive prior to the collision. At the time of his dismissal, Claimant had less than four years of service with the Carrier. His prior work record had no related discipline.

Although the Organization raised several procedural objections during and after the investigation, our review of the record does not show them to have merit. Three, however, warrant comment. First, nothing in the parties' Agreement requires the Carrier to provide the Organization with a witness list and all evidentiary documents that might be relevant to the incident prior to the investigation hearing. In this same regard, the record fails to establish that the parties have agreed to provide such discovery by means of a consistent past practice. Moreover, all of the documentary evidence introduced by the Carrier was provided to the Organization during the investigation with reasonable time for examination. Indeed, a number of recesses were granted for that purposes,

including one from June 20, 2002, when the investigation began, until July 9, 2002 when it was concluded. Second, the Organization objected that the Carrier failed to produce several essential witnesses. The record fails to establish what relevant information the missing witnesses would have added to the record. Such a specific indication is indispensable to the success of a missing witness objection. Finally, the failure of the Carrier to include Exhibit No. 11 with the investigation transcript was harmless clerical error. In addition, the record shows that the Organization already had the exhibit. The transcript shows that it received a copy of the exhibit during the investigation.

It is undisputed that the Atwood signal aspect was red for Main Track 2 eastbound. The switch there was lined against Claimant's train to permit the westbound Metrolink train to exit Main Track No. 2 and diverge onto the Old Olive Subdivision. It is also undisputed that the first eastbound intermediate signal at Mile Post 44.03 leading to Atwood was green or clear for Claimant's train. The focus of the investigation, therefore, was the signal aspect of the second intermediate eastbound signal at Mile Post 42.31, which was located some 1.6 miles prior to the Atwood control signal.

Both Claimant and the engineer adamantly contend that the second intermediate signal was clear (green) for them and that they called it out as such and confirmed with one another that it was clear. Thus they were shocked to come upon the Atwood signal and see that it was red.

Not surprisingly, the Carrier's evidence was diametrically in opposition to the crew's account. Because of the scale of the incident and its fallout, the Federal Railroad Administration ("FRA") and the National Transportation Safety Board ("NTSB") were intimately involved in the investigation along with Carrier officials. A re-enactment of the movement was conducted with a different crew to determine the sight distances from which the human eye could detect and ascertain the signal aspect of the three relevant signals. It consisted of three runs over the track during a two-hour time frame that spanned the time of the incident under similar weather conditions. In addition, the signals in question were tested to determine whether they functioned properly. The FRA and NTSB took no exception to the re-enactment or signal tests. This evidence showed that the signals did function as designed. The thrust of this evidence was that the second intermediate signal was yellow, not green as Claimant and his engineer contended, and that it could be seen from a minimum of 2,993 away, or more than one-half mile. Thus, if the crew had properly observed it, they should have slowed the train to not more than 30 miles per hour in preparation to stop short of the Atwood signal. Contrary to what should have happened, the event recorder data from the lead locomotive showed the train passed this signal at 42 mph and accelerated to 50 mph before the engineer reduced the throttle setting sometime later to stay below the 50 mph maximum speed permitted over the relevant section of track. The locomotive was still at full throttle as it passed this signal. However, there was nothing improper about this speed and throttle setting if, indeed, the signal aspect was green.

The record contains three important considerations that bear on this incident. The first is the testimony of a Carrier trainmaster who was telephoned by the engineer minutes after the collision. Among other things, the supervisor asked the engineer about the successive signal aspects leading up to the Atwood signal. The engineer responded lucidly to all questions up to the aspect of the second intermediate signal. When asked about this signal, the engineer responded, "We f----- up." The supervisor asked what he meant by this. According to the engineer's reply, he and Claimant

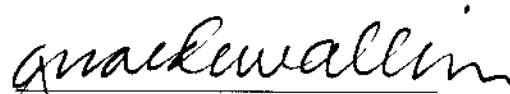
were engaged in a conversation about their prior employment at the same refinery and how coincidental it was that they were now employed with the same railroad. The supervisor took this to mean that the crew had missed seeing the yellow signal. Second, Claimant's Signal Awareness Form was not properly completed, as it should have been, after passing the second intermediate signal. Indeed, the mark for passing the first intermediate signal as well as several other facets of the form are inconsistent with Claimant's practice. His last complete notation was at the Fullerton control signal. Claimant maintains that the "X" mark for the first intermediate signal was not his and was placed by a person unknown. The form shows no entry whatsoever for the second intermediate signal aspect. Finally, the record shows that the red signal that was actually present at Atwood could be seen from at least 2,080 feet away, or nearly one-half mile. Nonetheless, the train was not placed into emergency braking until the lead locomotive was only some 317 feet away.

The foregoing three considerations constitute substantial evidence in support of the Carrier's determination that Claimant and his engineer were inattentive and engaged in a conversation that distracted them from properly observing the yellow second intermediate signal at Mile Post 42.31.


Given the record before us, we find that the Carrier's disciplinary action is supported by substantial evidence in the record.

AWARD:

The Claim is denied.

  
Gerald E. Wallin, Chairman  
and Neutral Member

  
Rick Marceau,  
Organization Member

  
Gene L. Shire,  
Carrier Member

DATE: 4-6-04