

PUBLIC LAW BOARD NO. 4901

AWARD NO. 226

CASE NO. 226

**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 of Northern California Division Conductor S. M. Brassfield for the removal of the Level S Suspension of six (6) months and one (1) year probation period, and exoneration of the alleged violation of Rule 1.1.1, 1.6 Items 1 and 2, 6.5, and 9.5 of the General Code of Operating rules, Fourth Edition, effective April 2, 2000 and Item 43 of the System Special Instructions, No. 7, effective January 20, 2002 from Claimant’s personal record, and pay for all time lost as a result of the formal investigation conducted on April 17, 2002.”

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 the conductor on a train that failed to stop short of a red signal. After stopping some 18 feet past the signal and fouling the control circuit there, the dispatcher was notified of the situation. However, although they knew movements at that location were under the control of the dispatcher, the crew backed up the head end of their 3,534 foot train some 36 feet to clear the circuit and signal without any direction or authorization to do so from the dispatcher. No protection was provided on the rear end of the train during this movement. Claimant assumed that the rear end would not move during the backing of the head end due to accumulation of slack that would be taken up. The record does not establish how much slack was present or whether the rear car remained stationary during the backing movement.

At the time of Claimant’s discipline, he had slightly less than four years of service. His work record did not contain any related discipline of consequence.

Our review of the record does not reveal that any procedural irregularities of significance were advanced to this Board. Given the nature of the major rule violation involved, it was not improper to withhold Claimant from service pending the investigation, which was timely held. Nothing in Rule 13, which governs investigations, explicitly requires the Carrier to provide evidence to the Organization in advance of the investigation. Moreover, no past practice requiring the

advance production of evidence was sufficiently proven on this record. The record also fails to establish that the Carrier failed to produce necessary witnesses at the investigation. It is undisputed that the Claimant did not receive any backing directions or authorization from the dispatcher; he admitted this during his testimony. Given this fact, the record fails to give any sufficient indication why the dispatcher should have been present. The other alleged missing witness was never identified in the record without having to indulge in an unacceptable degree of speculation about his identity. Moreover, it is undisputed that whoever he was, he did not have the authority to give the crew backing directions; this was the province of the dispatcher only. Finally, we do not find the use of telephone testimony, on this record, to be offensive to the requirement that the Carrier provide a fair and impartial investigation. As has been said before, Boards of adjustment reserve the right to review the propriety of using telephone testimony on a case-by-case basis. See First Division Award 24522. Because Claimant essentially corroborated the telephone testimony, we do not find that he was unduly prejudiced by its use in this case.


Turning to the merits, we find the record to contain substantial evidence in support of the Carrier's culpability decision. The failure to stop short of the red signal was not disputed. And although the record does not establish whether the rear end of the train moved at all during the backing operation, the contention that there was no movement is in the nature of an affirmative defense to exonerate Claimant for failing to protect the point of a shove. Thus, the burden of proof to establish that the rear end car did not move was upon the Organization and Claimant. That burden of proof has not been satisfied on this record. Thus, we must find that Claimant violated, at least technically, Rule 6.5 which requires such protection during shoving moves.

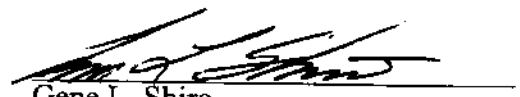
Given the nature of the rule violations involved, we do not find the Carrier's disciplinary decision to have been unreasonable.

AWARD:

The Claim is denied.


Gerald E. Wallin, Chairman
and Neutral Member


Rick Marceau,
Organization Member


Gene L. Shire,
Carrier Member

DATE: 05/11/2005