

PUBLIC LAW BOARD NO. 4901

AWARD NO. 238

CASE NO. 238

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 Los Angeles S. D. Carroll that the Level S Suspension of two hundred seventy (270) days and the alleged violations of Rules 1.1, 1.6, 1.47, 5.15, 9.4, 9.5, and 10.1, General Code of Operating Rules, April 2, 2000, and Rule 9.1.14 Signal Aspects and Indications, and the assigned probation period of three (3) years be removed from the Claimants personal record and that the Claimant be paid for all time lost beginning on August 13, 2002 and continuing until returned to service as a result of the Formal Investigation held on September 10, 2002.”

FINDINGS OF THE BOARD:

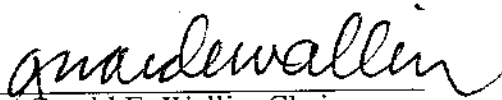
The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties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


Claimant was the conductor on a train crew that was disciplined for failing to stop for a dark signal at Milepost 8.2 on Carrier's main track No. 3 at approximately 11:50 p.m. on August 8, 2002. The Carrier's investigation included the engineer and the brakeman as well. In addition, the investigation served as the engineer's certification revocation hearing. The 270-day suspension originally imposed was reduced by the Carrier to a suspension of 180 days.

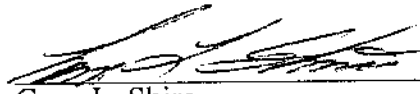
Award No. 237 of this Board deals with the brakeman's discipline. The procedural aspects of the investigation and the probity of the evidence on the merits of the discipline were discussed extensively and in great detail in that Award. The discussion and rationale expressed therein are incorporated here by reference. For the reasons stated in Award No. 237, we find that the Carrier's disciplinary action was 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: 05/11/2005

PUBLIC LAW BOARD NO. 4901

AWARD NO. 237

CASE NO. 237

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 Los Angeles Brakeman J. D. Denman that the Level S Suspension of two hundred seventy (270) days and the alleged violations of Rules 1.1, 1.6, 1.47, 5.15, 9.4, 9.5, and 10.1, General Code of Operating Rules, April 2, 2000, and Rule 9.1.14 Signal Aspects and Indications, and the assigned probation period of three (3) years be removed from the Claimants personal record and that the Claimant be paid for all time lost beginning on August 13, 2002 and continuing until returned to service as a result of the Formal Investigation held on September 10, 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 brakeman on a train crew that was disciplined for failing to stop for a dark signal at Milepost 8.2 on Carrier's main track No. 3 at approximately 11:50 p.m. on August 8, 2002. The Carrier's investigation included the engineer and the conductor as well. In addition, the investigation served as the engineer's certification revocation hearing. Case No. 238 deals with the conductor's discipline.

Claimant had approximately five and one-half years of service at the time of the incident. His work record was free of any operating rule violations for more than two years. Although the Claim Statement cites a 270-day suspension, it was actually reduced to 180 days with no change in the probation period.

There are several unusual facets of this dispute. A Carrier operations testing team set up a dark signal test for eastbound main track No. 1 and westbound main track No. 3 on the evening in question. They opened the respective signal circuits at the signal bungalow and then physically verified that the signals were dark. The testing crew then split up to go along the track in opposite directions to physically verify that the respective approach signals were yellow. The team was engaged in that verification when Claimant's train came through earlier than expected. This caught the test crew out of position to observe the train's action at the dark signal.

Claimant's train did stop, but the team could not see where the head end was in relation to

the dark signal. The team overheard Claimant's conductor report the dark signal to the dispatcher. The train then resumed its westbound movement at slow speed until it received a subsequent clear signal. The train then finished its trip into the Los Angeles area uneventfully.

The testing team assumed the train crew had properly reacted to the dark signal and planned to let the matter go at that point. They set themselves up to observe the next westbound train. This second westbound train failed to stop short of the dark signal. The testing team boarded the train and was in the midst of discussing the test result with the crew when the conductor received a cell phone call from Claimant's conductor who was calling to alert this second crew to the dark signal. Had the cell phone call never been placed, the testing team would not have again turned their attention to whether Claimant's crew had actually reacted to the dark signal properly.

The second crew was explaining how they had a yellow signal at Mile Post 8.2 and then it dropped to dark right before them. When the cell phone call came in, the substance of the conversation was that Claimant's crew also claimed they saw yellow before dark. The testing team knew this could be true because they had physically disabled the lighting circuits for the signal in question and physically verified that it was dark. With their suspicions thus alerted, the team requested that the locomotive event recorder data be downloaded from Claimant's train after it tied up in the Los Angeles area.

The recorder data was correlated with track maps to determine where the train stopped in relation to the dark signal. The testimony of Carrier's witness who did the examination was to the effect that Claimant's train stopped some 1,810 feet past the signal and thus committed a serious safety violation.

Our review of the record reveals a number of procedural exceptions taken by the Organization as well as a strong challenge to the adequacy of the evidence regarding the merits. For the most part, the procedural exceptions may be dismissed with minimal commentary. The fact that one or more Carrier officials played multiple roles in the discipline process is not, *per se*, a procedural flaw as long as their conduct is above reproach in the process. Our review of the record does not persuade us that any Carrier officials acted inappropriately. The notice of investigation also contained a single-letter typographical error in identifying the designation of Claimant's train. This was harmless error and no actual disadvantage to Claimant was shown in any respect. The Organization also objected that the Carrier failed to provide its evidence to the Organization in advance of the investigation. We note that nothing in Article 13 of the Agreement, which governs disciplinary investigations, explicitly requires the Carrier to provide evidence in advance of the investigation. Moreover, no past practice requiring advance production of evidence was established on this record. Nonetheless, the Carrier provided photocopies of the event recorder analysis to the Organization at a "pre-investigation" meeting some three weeks earlier on August 21, 2002. It is apparent from the Organization's introduction of locomotive maintenance records at the investigation that it was not surprised by the thrust of the event recorder analysis. Claimant was also withheld from service prior to the investigation. In this regard, we note that Article 13 does not prohibit such action in "aggravated" situations. Allegations of signal violations are among the most serious types of transgressions in that they pose significant risk to life and limb.

Finally, the Organization objected to the absence of witnesses. While these witnesses were not specifically identified during the appeal process, the record provides us with adequate guidance

to determine who they might be. If it was the second westbound train crew, the record shows they would have no meaningful information to provide about the actions of Claimant's crew. Thus, they were not necessary. The remaining individual would be the Carrier official who downloaded the event recorder information and forwarded it to the Carrier's readout witness for analysis. This individual also measured the diameter of the locomotive wheels and provided that measurement to Carrier's analyst. The accuracy of the wheel measurement was the subject of considerable controversy at the investigation.

While the event recorder tracings can accurately show criteria like throttle position, clock time, and the extent of brake application, the speed of the locomotive and distance traveled at any point in time is dependant upon wheel diameter. For example, a locomotive will move a slightly greater distance with each complete turn of a 41-inch diameter wheel than it will with a 39.25-inch diameter wheel. Because the event recorder only measures wheel rotations against time, the wheel diameter must be taken into account to translate wheel rotations into speed and distance.

Carrier's recorder analyst was provided with a 41-inch diameter measurement by the person who downloaded the recorder data. That figure resulting in showing that Claimant's crew stopped 1,810 feet past the dark signal. The accuracy of the wheel measurement was challenged by the Organization on cross-examination. The Organization introduced an exhibit at the investigation showing that the wheels on the particular locomotive were measured to be 39.25 inches on January 6, 2001 and the Carrier produced no evidence to show that the wheels had been replaced by larger wheels since that date. If anything, therefore, the wheel diameter would be somewhat smaller than 39.25 inches on the date in question due to grinding of flat spots as well as normal wear and tear.

On page 47 of the investigation transcript, the Organization requested the presence of the download official to explore the accuracy of the wheel measurement. The Carrier did not attempt to secure the testimony of this individual. Without more, the absence of this witness would likely have cast considerable doubt upon the credibility of the event recorder tracings and the related analysis of them.

But there is more. According to the testimony of the Carrier's analyst, the existence of a smaller wheel diameter would not have significantly changed the result. Basic arithmetic proves his testimony to be true. The circumference of a 39.25-inch diameter wheel is 123.3 inches, which is only 5.5 inches less than the 128.8-inch circumference of a 41-inch wheel. This is a difference of only some 4%. Even a 36-inch wheel, which was the smallest discussed in the transcript, produces a circumference of just over 113 inches, which produces a 12% difference. Neither of these differences is large enough to undermine the credibility of the Carrier's evidence that Claimant's train failed to stop short of the dark signal. Even with 36-inch wheels, the event recorder data would have shown the train to have stopped beyond the dark signal by more than 1,000 feet. On this basis alone, we must find that it was not necessary to have the testimony of the download official.

In addition to the foregoing, however, each member of Claimant's crew testified that they initially saw a yellow signal and confirmed that aspect observation among themselves. The inescapable conclusion is that the crew misread the westbound signal for main track No. 1 or 2 as their own. They could not have observed a yellow signal for their main track No. 3 because the record conclusively establishes that it was dark. Thus, it is evident that the crew would have delayed

the implementation of braking action for some time instead of slowing to stop immediately. This makes it more likely they would not have been able to stop before reaching the dark signal. The Claimant's own testimony, at page 86 of the transcript, shows that he initially reported to Carrier officials, when questioned about the incident, that he thought they had gotten by the signal. It was only after talking with the rest of the crew that he changed his recollection. Also telling is the testimony of the engineer. His testimony vividly describes his adrenaline rush upon realizing the signal was not yellow but dark. He was very concerned about colliding with something on the track ahead. His degree of upset was so advanced that he could not calm down for some time after they resumed their train movement. This is inconsistent with being able to bring his train to a controlled stop before reaching the dark signal.

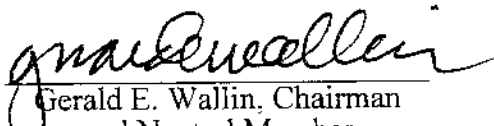
The Organization also asserted that the train did not proceed directly to Los Angeles but traveled additional distance via Long Beach. Thus, the Organization questioned whether the Carrier's analyst examined the correct portion of the recorder tracings. However, the record shows that the Carrier's analysis corresponds favorably with the actual time and position reports noted by Claimant's crew.

Given the foregoing discussion, we find that the record contains substantial evidence that Claimant's crew was guilty of the signal and other rule violations alleged. This finding is not altered by the results of the Locomotive Engineer Review Board that considered the engineer's certification revocation. Such review tribunals are governed by different standards. Their decision flowed from the fact that the operations test involved did not conform to the established protocols that call for actual visual observation of the train crew's actions. The LERB standards do not supersede the collectively bargained discipline process established by the parties' Agreement.


In light of the serious nature of the violations involved, we do not find the discipline imposed to be 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