

**PUBLIC LAW BOARD NO. 4901**

AWARD NO. 207  
CASE NO. 207

PARTIES TO  
THE DISPUTE: United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company  
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained

STATEMENT OF CLAIM:

“Request in behalf of Northern California Division Conductor C. M. Douglas for reinstatement to the service of The BNSF Railway Company with seniority and all other rights unimpaired and with pay for all time lost including the payment of Health and Welfare Benefits beginning July 11, 2001 and continuing until he was returned to service as the result of the Formal Investigation which was held June 15, 2001 conducted by J. P. Herndon, Road Foreman of Engines, Fresno, California.”

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 initially dismissed for multiple rule violations occurring just after noon on April 30, 2001 near Milepost 1083 at Swanson, California. The alleged rule violations were allegedly observed by a safety audit team that undertook surveillance of the crew from a distance and also took video tape of the allegedly offending conduct. As will be discussed further, no member of the alleged audit team was present at the investigation to provide testimony about their activities or to subject themselves to cross-examination.

Approximately one year after his dismissal, Carrier offered Claimant reinstatement on a leniency basis without back pay. The offer was rejected. Carrier then offered Claimant immediate reinstatement with rights to fully pursue his claim for back pay. This offer was accepted. Therefore, for purposes of our review, Claimant was assessed Level S discipline consisting of a 385-day suspension without pay for the alleged rule violations.

The notice of charges cited Claimant, who was assigned as a brakeman at the time, as well as the conductor of his crew, and the locomotive engineer as follows: “... you were observed fouling main track circuit before authority granted; failing to display headlight to rear of light consist; crossing tracks within 25 feet of standing equipment; operating switch within 50 feet of equipment, and running on uneven surfaces; ...” in violation of Rules 1.6(1), 5.9.4, 8.14, and 10.3 of the effective General Code of Operating Rules. Claimant and his conductor, but not the engineer, were also charged with violating “... Rules S-13.1, S-13.1.3, S-13.7.1 and S-15.3 of the TY&E Safety

Supplement Version No. 1 in effect April 1, 1998 (with revisions up to October 10, 1999)..."

Numerous irregularities are seen in the Carrier's procedural handling of this dispute. First, upon reading the applicable rules into the record, the hearing officer said he could not find a Rule 8.14 and substituted Rule 8.4 instead despite not being cited in the notice of charges. Second, he included System General Order 101, dated April 1, 2001, in the scope of the investigation despite the Organization's objection that it, too, was not contained in the notice of charges. Third, the hearing officer also could not find a Rule 15.3 to read into the record. Fourth, it was undisputed that the Organization made a timely written request to the Carrier to produce the members of the surveillance team at the investigation for testimony. They did not appear and no explanation was given for their absence. Fifth, the Carrier permitted the video tape into the record without any proper evidentiary foundation being supplied by either the camera operator or a member of the surveillance team who witnessed the circumstances depicted thereon. According to the testimony of the Carrier official who was permitted to introduce the tape, he knew nothing about the circumstances shown on the tape; he was merely a viewer of it and could only make estimates of distances involved. Finally, although it was promised to the Organization, the Carrier did not provide a copy of the video tape to the Organization with the transcript; it is undisputed that the Carrier did not supply a copy until after the time limit for the Organization's appeal had expired. As a result, the Organization had to make its appeal without benefit of the one exhibit that ostensibly provided the basis for the Carrier's disciplinary action.

Review of the merits also reveals a number of significant shortcomings. Although Claimant was charged with fouling the main track circuit before authority was granted, Rule 10.3 does not prohibit such conduct - it pertains to unrelated matters. No other rule was cited. Indeed, on page 38 of the transcript, the Carrier's witness admitted there was no rule that prohibited the conduct cited. Moreover, repeated viewing of the video tape by the Board fails to reveal any evidence whatsoever that a main track circuit was fouled at any time.

Rule 5.9.4 requires that the rear headlight of the power consist be turned on during locomotive operations. The undisputed testimony of the locomotive engineer established that the light was operating when he inspected it that morning and that the light switch remained in the ON position thereafter. Even the testimony of the unqualified Carrier witness did not suggest the light was off. The only testimony he gave in this regard is, "That's the headlight, rear trailer headlight." Repeated viewing of the video tape by the Board established that the sun was shining into the light from an overhead angle with such intensity that it could not be determined whether or not the light was on. Finally, in this regard, the Carrier did not introduce any evidence that a burned-out light bulb had been replaced after the events in question. Therefore, on this record, the evidence establishes three material facts: First, the light was on and working earlier during the engineer's inspection. Second, the power switch remained in the ON position throughout the time the surveillance team made its observations. Third, there is no evidence that the light was found to have been burned out at any time after the engineer's inspection. Given these facts, there is no proper basis for a conclusion that the light was not lighted during the time frame in question.

Interestingly, the engineer was charged with the same headlight rule violation as Claimant. However, the engineer was exonerated of all charges and was not disciplined. The Carrier provided

no rationale whatsoever to explain how the Claimant was found guilty of the headlight rule violation when the engineer was not.

Claimant was also found guilty of crossing tracks within 25 feet of standing equipment. Rule S-13.1.3A prohibits this conduct. However, this rule relies on affected employees to make judgment calls when crossing tracks; they are not expected to take out a tape and actually measure the distance to ascertain the actual distance. The surveillance team did not make any measurements at the scene. The only evidence about the distance comes from viewing the video tape, which was taken from quite a distance away from the scene. The fact that the video was taken using the maximum telephoto range of the camera is quite apparent from the uncontrolled shaking of the video; that shaking is the telltale sign of video taken by a hand-held camera at maximum telephoto. It is also well known that the use of extreme telephoto distorts the depth-of-field by noticeably flattening the image – it makes distances appear much smaller than they actually are. The Carrier's witness, after only viewing the video tape, could not estimate what the crossing distance actually was. He just thought it looked like the distance was less than 25 feet. Claimant and his conductor thought the distance was at least 25 feet, but they admitted they did not actually measure it. Our repeated viewing of the video tape leaves the evidence inconclusive. Given the state of the record on this point, we find the Carrier has failed to satisfy its burden of proof to support its decision with substantial evidence. Consequently, the Carrier's determination that Claimant was in violation of Rule S-13.1.3 must be rejected.

Claimant was also found guilty of operating a switch within 50 feet of equipment in violation of Rule S-13.7.1. The one fact that is indubitably clear from the video tape is that Claimant was not the employee that operated the switch. There is no dispute but that the switch operator was the conductor of Claimant's crew. Accordingly, the Carrier's finding of guilt, in this regard, must also be rejected.

Finally, Claimant was found guilty of running on uneven surfaces. The only video footage showing the Claimant and his conductor to be moving faster than a slow walk is approximately one second in duration. They walk across the track and then pick up speed as they come down off the ballast and turn to their left and reduce speed. At this point, something blocks the video as the camera is panned to the right. When the Claimant comes back into view, he is clearly walking again. Under the circumstances, the Board does not find the brief video to constitute substantial evidence that Claimant was running. On this point, the taping is, at best, inconclusive. Of more importance, however, are two other matters. First, the tape does not show the condition of the surface over which Claimant was moving when he was allegedly running. Thus, there is no sufficient proof the surface was uneven. Secondly, however, none of the rules cited in the notice of charges explicitly prohibits running on uneven surfaces. Accordingly, the Carrier's finding of guilt, in this regard, must be rejected as well.

Given the foregoing discussion, we are compelled to find that the Carrier failed to prove that Claimant was guilty of any prohibited conduct. His Claim, therefore, must be sustained in its entirety. The Carrier is directed to make Claimant whole for all losses of compensation and economic benefits resulting from the Carrier's unwarranted discipline. Any back pay due Claimant may be offset by the amount of earnings from other employment that Claimant could not have earned if he had remained

continuously in Carrier's service. The Board retains jurisdiction to resolve any disputes over the implementation of this remedy.

AWARD:

The Claim is sustained.



P. L. Patsouras,  
Organization Member



Gerald E. Wallin, Chairman  
and Neutral Member



Gene L. Shire,  
Carrier Member

DATE: 12-1-03