

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6798

PARTIES UNITED TRANSPORTATION UNION

TO and

DISPUTE THE BURLINGTON NORTHERN and SANTA FE RAILWAY CO.
COAST LINES

AWARD NO. 3

CASE NO. 3

Organization File No. EM-13-1559

Carrier File No. 61-03-0018D

STATEMENT OF CLAIM:

The United Transportation Union (the "Organization") hereby asserts as a Statement of the Claims, that:

We are appealing from the decision of Division General Manager Michael C. Shircliff, denying representative O'Connell's letter of appeal requesting the reinstatement of Conductor, C. J. O'Kelley to the service of the Burlington Northern and Santa Fe Railway Company, Coast Lines, with seniority and all other rights unimpaired and with pay for all time lost including the payment of health and welfare Benefits beginning on November 25, 2002 when Conductor O'Kelley was withheld from service pending investigation until returned to service as a result of the Formal investigation held on January 21, 2003.

STATEMENT OF FACTS:

C. J. O'Kelley ("Claimant" or "Conductor"), employed by the Carrier as a Trainman with a seniority date of January, 1998, was operating as a Conductor on Train G-BARSDB1-24 on November 24, 2002 when at 7 P. M., an Engineer Induced Emergency ("EIE") train stoppage occurred. This incident was detected by San Bernardino Road Foreman of Engines, J. De Paemelaere ("De Paemelaere") when reviewing the Autoscan events on or about November 29, 2002. In addition, De Paemelaere reviewed the event recorder tapes from the Claimant's lead locomotive on November 24, 2002. De Paemelaere conducted a preliminary investigation to determine the type of signal indication governing the train prior to the EIE. The investigation revealed that the train was governed "by a yellow signal indication at MP 38.21" indicating that the train's speed should have immediately been "slowed to thirty (30) m.p.h. and been prepared to stop at the next signal."

De Paemelaere concluded that the train was traveling "well in excess of the maximum authorized speed for an extended distance." He further concluded that the train was traveling between 38 m.p.h. and 47 m.p.h. or 8 to 17 m.p.h. over the authorized maximum speed. A Notice of Formal Investigation was issued on December 11, 2002 and the investigation was held after one postponement on January 21, 2003.

As a result of said investigation, Claimant was charged with violation of the General Code of Operating Rules ("GCOR"), as follows:

Rule 1.1 Safety:

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

Rule 1.1.1 Maintaining a Safe Course:

In case of doubt or uncertainty, take the safe course.

Rule 1.4 Carrying Out Rules and Reporting Violations:

Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad.

Rule 1.6:

Employees must not be (1) careless of the safety of others, [or] (2) negligent.

Rule 1.29 Avoiding Delays:

Crew members must operate trains and engines safely and efficiently. All employees must avoid unnecessary delays

Rule 5.82 Sounding Whistle:

When weather conditions impair visibility, sound the whistle frequently. When other employees are working in the immediate area, sound the required whistle signal before moving

In addition, Rule 5.8.2 provides that a succession of short sounds shall be made when an emergency exists or persons or livestock are on the track.

Rule 5.16 Observe and Call Signals:

Crew members in the engine control compartment must be alert for signals. As soon as signals become visible or audible, crew members must communicate clearly to each other the name or aspect of signals affecting their train. They must continue to observe signals and announce any change of aspect until the train passes the signal.

If the signal is not complied with promptly, other crew members must remind the engineer and/or conductor of the rule requirement. If the crew members receive no response or if the engineer is unable to respond, they must immediately take action to ensure safety, using the emergency brake valve to stop the train, if necessary.

Rule 6.22 Maintaining Control of Train or Engine:

Crew must consider train or engine speed, grade conditions, and air gauge indications to determine that the train or engine is being handled safely and is under control. If necessary, take immediate action to bring the train or engine under control.

Rule 6.31 Maximum Authorized Speed:

Conductors and engineers are jointly responsible for knowing and not exceeding the maximum authorized speed for their train. Passenger speed is applicable only to trains consisting entirely of passenger equipment. When possible, crew members must notify the train dispatcher promptly of any condition that will delay or prevent their train from making the usual speed.

Rule 9.1.8 Approach:

Proceed prepare to stop at next signal, trains exceeding 30 m.p.h. immediately reduce to that speed and

Air Brake and Train Handling Rules:

Rule 104.1 General Requirements:

Locomotive engineers must exercise judgment and plan ahead to operate their train safely and efficiently. The engineer is responsible for properly controlling the slack in the train.

Good train handling requires the proper combination of throttle modulation, dynamic braking, and air braking to:

1. Protect yourself and others from injury.
2. Prevent damage to the track structure and equipment.
3. Protect lading.
4. Use the most fuel-efficient method consistent with good train handling.

FINDINGS:

Based upon the record, the Board finds that the parties herein are the Carrier and the Employee Representative within the meaning of the Railway Labor Act, as amended. This Board is duly constituted by agreement of the parties and has jurisdiction over this dispute.

It is not contested that the train at issue herein was operated by the Engineer at a speed in excess of 38 to 47 m.p.h. or 8 to 17 m.p.h. in excess of "maximum" speed. As a result of the foregoing, the Conductor was issued a Level S – Ninety (90) Day Suspension based upon the Rules herein above set forth.

by the Conductor, using his own judgment and the Carrier relies upon “the operating professional to make the proper and timely decisions.”

Consequently and based upon Strich’s testimony, the Board finds that the Carrier failed to produce sufficient evidence to warrant the conclusion that the Conductor violated the Rules and Regulations governing his actions or omissions.

Furthermore, the Board finds De Paemelaere erroneously concluded that the Engineer put the train in emergency stop to avoid going through a red signal. In fact, the EIE was put into action because the Conductor saw a person or persons with a bicycle on or near the track. Said observation was made at a time when the train was approximately three quarters of a mile from the signal. Inasmuch as the train was stopped approximately 1,200 to 1,300 feet from the signal, the Board concludes that the train was not stopped for the reasons claimed by De Paemelaere but for the reasons furnished by the Conductor.

On page 43 of the transcript herein, De Paemelaere, confirmed the foregoing, when he testified that it took one minute, 35 seconds to stop the train or a distance of 2, 712 feet, as recorded by an examination of the event recorder.

Claimant acknowledged being aware of the fact that his train traveled at a speed exceeding the maximum authorized speed. Claimant also testified that he immediately called a yellow signal to the Engineer’s attention. Later, he again reminded the Engineer that the signal was yellow. When the Engineer asked the Conductor what signal they were

that the signal was yellow. When the Engineer asked the Conductor what signal they were running on, he reminded the Engineer, for the third time, that they were running on yellow and the Conductor saw the Engineer make preparations to “bring the train under control to slow the train down . . . to 30 m.p.h.”

Furthermore, De Paemelaere confirmed that he was advised the train was put into emergency “because of somebody near the tracks with a bicycle.” Claimant testified that at that time, the speed of the train “was approximately 33 m.p.h.,” the train came to “an easy” stop and the Engineer “was in complete control of the train.”

Later, Claimant conceded that he may have been mistaken as to the speed because he was more concerned about a possible accident. However, he did not modify his testimony that the train came to an easy stop and De Paemelaere conceded that Claimant had “a few more feet to decide if he wanted to plug the train.”

The Board also reviewed the testimony of Ronald A. Girard, Road Foreman of Engines, San Bernardino, who described the duties of the Conductor concerning his operation of the train. Thus, the Conductor is required to make the Engineer aware of the speed, which he did, and to indicate the location of the next signal, which the Conductor also did. However, Girard’s testimony failed to include any act of wrongdoing committed by the Conductor in the instant matter, particularly, since the Conductor repeatedly advised the Engineer as to the speed of the train and the need to reduce the speed.

The Board concludes from the foregoing, that the Conductor complied with the Rules hereinabove discussed. Specifically, in his testimony, Girard omitted any criticism of the Conductor's conduct which permits the conclusion that the Conductor appropriately prompted the Engineer to reduce the speed of the train. Therefore, the Board concludes that discipline is unwarranted based on the fact that the Engineer slowed down the train.

The Board agrees with the Carrier's argument that the Conductor would be guilty of the charges now under consideration if he had not alerted the Engineer in a timely manner, that the speed of the train was excessive. However, where the Conductor timely warns the Engineer and causes him to reduce the speed, the Conductor performed his duties and should not be disciplined.

Nor should the Board overlook the fact that the Carrier's witnesses testified that no standard exists which triggers when it is appropriate to place a train into emergency status. That decision remains within the authority of the professionals operating the train.

The Board reviewed the cases submitted by the parties herein. The Carrier relied upon United Transportation Union and Chicago and North Western Transportation Co., PLB No. 4774, Award No. 21, dated November 30, 1997, where a Brakeman charged with operating "between 5 m.p.h. and 12 m.p.h. over the maximum authorized speed limit . . . when the car derailed."

The Board in the instant matter distinguishes the case now under review, noting that the Brakeman was operating the train at an excessive speed and not an Engineer. Moreover, the Brakeman made no effort to stop the train while the Engineer in the instant matter, made such effort and successfully caused the train to stop.

Similarly, in Brotherhood of Locomotive Engineers and Chicago and North Western Transportation Company, First Division, Award No. 23977, the Board affirmed the discipline imposed upon an Engineer when a recorder tape recorded, as follows: a) “. . . speeds of 19 m.p.h. in a 10 m.p.h. Timetable restriction,” and b) “. . . speeds of 43 m.p.h. in a 30 m.p.h. Train Order restriction.

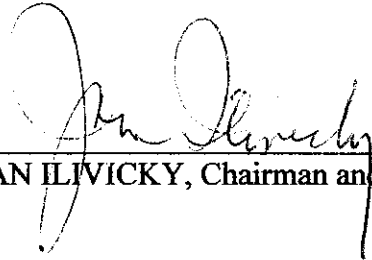
Thus, once again, the Carrier sites an example of wrongdoing by an Engineer and not by a Conductor and the Board indicated that it based its decision upon the Engineer's prior record (not specified) of wrongdoing.

AWARD:

The claim is sustained in accordance with the Findings herein.

Grievant shall be made whole for all monies and benefits lost due to his suspension less any income received during said period.

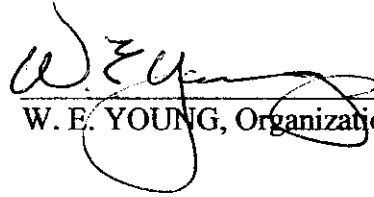
The Carrier shall comply with the Award within thirty (30) days from the date of issuance.



JOAN ILIVICKY, Chairman and Neutral Member



GENE L. SHIRE, Carrier Member



W. E. YOUNG, Organization Member

Dated:

April 26, 2006