PUBLIC LAW BOARD NO. 6540

AWARD NO. 25

CASE NO. 25
Organization File: D020401.1
Carrier File: 71-02-0342

PARTIES TO
THE DISPUTE: Brotherhood of Locomotive Engineers

vs.

The Burlington Northern Santa Fe Railway Company

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained in accordance with the Findings.

STATEMENT OF CLAIM:

> "It is hereby requested that Engineer Drake's discipline be reversed, that she be made whole for all lost time and benefits, including vacation, personal leave, insurance and railroad retirement credits, resultant from this incident and investigation, and that the notation on her personal record be removed."

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 dishonesty in connection with failing to report a red signal violation at approximately 1529 on April 17, 2002 while operating the hump engine at Carrier's Northtown Yard in Minneapolis, Minnesota. At the time of the event, Claimant had not quite twenty-three years of service with the Carrier. Her work record contained three prior rules violations relating to the movement of locomotives since August of 1999.

Except as noted hereafter, our review of the record does not disclose any procedural irregularities of significance.

A new agreement between the parties played a role in the handling of this matter. Indeed, the "Alternative Handling" agreement became effective April 16, 2002, which was one day prior to the event in question. For that reason alone, the proper application of the new agreement may not have been fully understood. The agreement provided for handling many disciplinary matters via an alternative method outside of the traditional disciplinary process. One feature of the agreement, in Part I, VI, B, provided for granting each employee a clean slate with which to begin the new program; only events occurring after the effective date of the new agreement would be considered in determining eligibility for alternative handling. Thus, Claimant's prior disciplinary record effectively became a non-factor for purposes of applying the new agreement to her.

It is undisputed that Claimant failed to stop short of a red aspect at Signal 14.9 and proceeded a short distance into the block of track just beyond it. One of her other crew members was immediately aware of the signal violation because he was on the ground giving her radio instructions. The two other crew members were located elsewhere at the time but became aware of

the violation shortly thereafter when it was discussed during their coffee break. It is also undisputed that the dispatcher who had authority for the section of track improperly occupied became aware of something that caused his Digicon display to reflect the violation.

After discussing how to report the signal violation with one of her crew members, Claimant contacted the dispatcher. The transcript of the conversation clearly shows the dispatcher was aware of the signal violation; he informed Claimant that it "Looks like you are already past the signal." After giving Claimant further instructions to move her locomotive, the dispatcher informed Claimant that he needed to leave his post for about five minutes. Claimant assumed this meant he had to leave to report the violation to his supervisor. She responded, "I understand." Oddly, her response was inexplicably left out of the transcript of the conversation that was prepared by the Carrier for the investigation. It was only after the Organization protested the omission that the actual audio tapes were played and the Claimant's response was verified.

All of the witnesses, including the Carrier's terminal manager, testified that the normal method of reporting such a signal violation is to inform the dispatcher who, in turn, relays the information to Carrier management. One of Claimant's crew members was present with her during the conversation with the dispatcher and heard both sides of the conversation. According to the testimony of this switchman, he also thought that the violation had been properly reported to the dispatcher at that point.

It is clear from the record that Claimant and the switchman both were identically aware of the signal violation and were also identically situated insofar as knowing the precise content of the conversation between Claimant and the dispatcher. It is also undisputed that both Claimant and the switchman had an identical obligation under Carrier rules to report the violation and not withhold information. The other two crew members who later became aware of the violation also had an identical responsibility with respect to reporting the violation.

All four crew members were issued notices of investigation with identical content regarding the two charges: the signal violation and failure to properly report it. All four requested to be treated under the new alternative handling procedure. The other three crew members were all allowed alternative handling for both charges at the Class III level, which is considered fairly minor. Claimant, however, was allowed alternative handling only on the signal violation charge. She was denied alternative handling for the reporting charge on the ground that her misconduct included dishonesty for which alternative handling is not available. In addition, although Claimant was allowed alternative handling on the signal violation, it was deemed to be Class I, which is the most serious.

Our review of the merits of this dispute discloses fatal flaws in the Carrier's handling of the matter. First, we do not find the record to contain substantial evidence in support of the Carrier's determination that Claimant failed to properly report the signal violation. The record is clear that the dispatcher is the normal reporting point and that crew members do not normally report such violations to other management officials. It is clear that the dispatcher was aware of the violation. It was not unreasonable for Claimant and her switchman to expect, at that point, that their reporting obligation was satisfied. Indeed, Claimant's verified comment, "I understand" corroborates her expectation that the dispatcher was briefly leaving his post because he had no choice but to report the violation through his chain of command. The switchman's testimony establishes that he had the same impression. Accordingly, he did nothing further to report the matter.

While it is true that the Carrier interpreted the transcript comments differently, the mere fact that comments are equivocal and are equally susceptible of conflicting interpretations does not make them substantial evidence in support of one interpretation or the other. Moreover, the Carrier's decision-maker did not provide any explanation to justify ignoring the interpretation that wholly exculpates Claimant. Thus, on this record, we must find that the charge of dishonesty and failure to report has not been supported by substantial evidence in the record.

Second, the record establishes that Carrier engaged in impermissibly disparate treatment. The evidence shows no significant difference between the alleged culpability of the switchman who was present during the conversation between Claimant and the dispatcher and that of Claimant. If either was culpable, they were identically culpable. Yet the switchman was accorded startling light-handed treatment while Claimant was determined to have been dishonest. The evidence simply does not support such disparate treatment. It is offensive to the concept of just cause and must be set aside.

Finally, the Carrier's decision letter reveals two concerns: First, Claimant is again cited for the signal violation although it was entirely resolved via the alternative handling process. Second, the letter notes that consideration was given to Claimant's prior record "... in accessing *{sic}* the discipline." Per the alternative handling agreement, Claimant had no prior record for matters for which alternative handling was available. For the alleged charge of dishonesty, which would fall outside of the scope of alternative handling, her prior disciplinary record is entirely unrelated. For that reason, the relevance to the Carrier's disciplinary decision is absent.

Given the foregoing discussion, we must sustain the Claim.

AWARD:

Claim sustained.

Gerald E. Wallin, Chairman
and Neutral Member

Stephen D. Speagle,
Organization Member

Nick Markos,
Carrier Member

Date: 6-1-04