

The Second Division consisted of the regular members and in addition Referee Paul C. Carter when award was rendered.

Parties to Dispute: { International Brotherhood of Firemen & Oilers
 { Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. Under the current Controlling Agreement, Mr. Dennis Daniel, Hostler Helper, Havre, Montana, was unjustly dealt with when an entry of censure was placed on his personal file effective May 24, 1979.
2. That, accordingly, the Burlington Northern, Inc. be ordered to remove the entry of censure from Mr. Daniel's personal file.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The claimant was assigned as a hostler helper at Carrier's Diesel Shop, Havre, Montana. On May 3, 1979, at approximately 9:30 A.M. he was working with a hostler in moving Amtrak Unit 243 eastward on No. 7 track prior to bringing the unit into Havre Diesel Shop. The back-up movement was made with the hostler at the controls. The record shows that approximately thirty feet from the Diesel Shop door, claimant gave the hostler a slow signal and got off the unit. Seeing that the unit was not slowing down, the claimant then gave a "wash-out" or stop signal, but the movement was not stopped before Unit 243 crashed through the overhead door to Stall No. 7 on the west end of the Diesel Shop.

As result of the accident, the claimant and the hostler were cited for investigation "for the purpose of ascertaining the facts and determining your responsibility in connection with damage to seven (7) stall door west end of Diesel Shop seven (7) track about 9:30 A.M., May 3, 1979, at the Havre Diesel Shop, Havre, Montana". Following the investigation, an entry of censure was placed on claimant's personal record. The claim seeks the removal of the entry of censure.

The Organization contends that the investigation was improper because the same officer cited the claimant, conducted the investigation, and assessed the discipline. Such procedure has been upheld by so many awards of the Board as to not require citation. Further, it is well settled that if objections to the

charge or the manner in which the investigation is conducted are to be raised, such objections must be raised prior to or during the course of the investigation; otherwise they are deemed waived. The contentions of the Organization in this respect are rejected.

It is also well settled that in discipline cases the burden of proving the charge by substantial evidence is upon the Carrier. This aspect of the case gives us concern. The hostler was in charge of the movement of the unit. He testified in the investigation that claimant gave him a proper slow signal and a proper stop signal, but he was not certain as to the distance at which the stop signal was given. In the investigation the General Foreman testified in answers to questions by the conducting officer:

- "Q. Mr. Zachau, in Mr. Daniel's statement he said that the alertor was missing from Amtrak 243 and no doubt the reason that the automatic brake was not functioning. Do you have any knowledge or reason for the alertor missing from Amtrak 243?
- A. Yes. We are out of alertors and the alertor was removed to use in another locomotive that was due to run out on one of the Amtrak trains.
- Q. In other words, you required the alertor to be put on another locomotive for use?
- A. That is right.
- Q. Mr. Zachau, is it normal procedure for a mechanic at the Havre Diesel Shop to remove an alertor and leave a locomotive in the condition where it is not operable, does this happen?
- A. Well, I imagine an electrician removed the alertor and it would just be his job to remove the alertor.
- Q. He probably didn't tell anyone?
- A. No, I'm sure that could have happened.
- Q. It was, in other words, a sort of a trap for a hostler to walk into?
- A. Yes, it could be."

The record shows that later in the day, after the accident, tests were made with the same unit, under about the same conditions and the unit was able to stop short of striking the door. In the investigation some contention was made about the track being in a different condition when the accident occurred than it was at the time the tests were made.

Based upon our study of the investigation, particularly the testimony of the hostler as to the signals given by the claimant, we would have to speculate that the stop signal was not timely given to support discipline against the claimant. We cannot support discipline based on speculation or conjecture. While it is unfortunate that the accident occurred as it did, at the same time we find that the Carrier did not present the substantial evidence required to support discipline against the claimant.

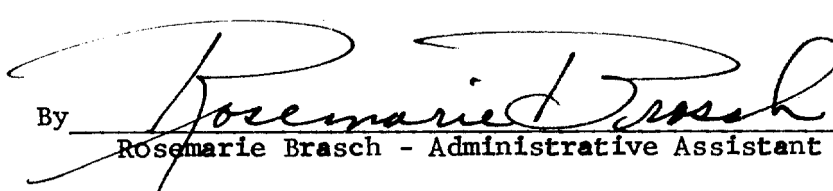
A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 9th day of December, 1981.