

PUBLIC LAW BOARD NO. 2699

PARTIES
TO
DISPUTE: Brotherhood of Maintenance of Way Employees
and
Union Pacific Railroad Company

STATEMENT
OF CLAIM: Claim that Track Inspector Ronald Bird, Idaho Division, was discharged without just and sufficient cause in connection with his failure to protect a wide gauge condition which caused the derailment of X-3084-E on January 26, 1979.

FINDINGS: By reason of the Agreement entered into by and between the parties on August 31, 1978, and upon all the evidence and the whole record, the Board finds that the parties are employees and carrier respectively as defined in the Railway Labor Act, as amended, and that it has jurisdiction.

Claimant was taken out of service on January 29, 1979, and on the same day he was formally charged as follows:

On Friday, January 26, 1979, between 11:00 A.M. and 12 Noon you reportedly found 1-3/4" wide gauge at West end Bridge, M.P. 36.99, and failed to properly protect with a slow order or take track out of service. This resulted in a subsequent derailment of ten (10) cars and a caboose on Extra 3084 East.

An investigation was held on February 1, 1979, and he was dismissed from service on February 12, 1979.

The record shows that when Claimant discovered the defective rail he tried twice to reach Roadmaster T. D. Allen, to report the incident and to ask for instructions. He was unsuccessful. At approximately 11:45 A.M. he contacted the

Kemmerer Depot by radio, spoke to the first trick operator, and asked for Section Foreman L. Lowder or Roadmaster T. Allen. Claimant told the first trick operator, Kirt W. Christiansen to contact Lowder or Allen. Christiansen contacted Allen and reported his conversation with the Claimant that the track was out of alignment at M.P. 36.99 by about $3/4$ of an inch. Christiansen contacted Allen again a few minutes later and told him that there was about 1 and $3/4$ inch wide gauge on the track not $3/4$ of an inch. While Allen denied having the second conversation with Christiansen, it is apparent from all of the evidence in the record that there is a strong presumption that Allen knew that the defective track was 1 and $3/4$ inches wide and not just $3/4$ inches.

Claimant was charged with violating the following Maintenance of Way Signal Rules and C. E. Bulletin:

GENERAL NOTICE - Safety is one of the first importance in the discharge of duty ...
Obedience to the rule is essential to safety

1903 - Gage on curves, including widening due to wear, shall never be permitted to exceed four feet nine and one-half inches ($4'9\frac{1}{2}"$).

4000 - In case of doubt or uncertainty the safe course must be taken; in all cases, the safest available methods must be followed.

C. E. 70-30-T - Any defective or unsafe conditions found shall be corrected at the time of inspection or train operations properly protected by placing slow orders or taking the track out of service if necessary.

It is Claimant's position that he did report the rail condition to Mr. Allen through Mr. Christiansen and that he thus complied with Rule 4000. He quotes Rules E and F and states that he complied with the intent of both by reporting to

the proper authority. But he did not go far enough to comply with Rule 4000 and with C. E. 70-30-T. The safest available course Claimant should have followed was to issue a slow order or to take the track out of service before attempting to contact Allen.

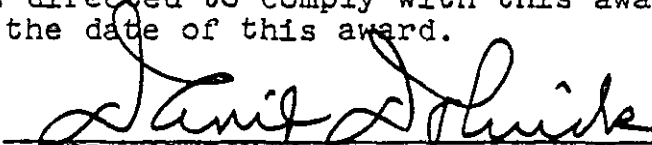
And, to be absolutely safe, he should also have contacted the dispatcher, at least until he could reach Mr. Allen. In this respect a serious violation of the rules and instructions were "apparent" under Rule 48(0). Claimant was properly held out of service.

Upon this record, the Board finds that Mr. Allen, who was Claimant's supervisor, failed to take any action whatsoever after he learned of the defective rail. There is a strong probability that had he immediately issued a slow order or a stop order to Extra 3084East, the derailment might have been avoided. The Board also finds that under these circumstances, the dismissal of the Claimant from service is too severe a penalty, that the Claimant, Ronald Bird, should be reinstated as an employee of the Carrier with full seniority and other contractual rights preserved and unimpaired in the positions of Track Inspector, Section Foreman and Sectionman with such seniority dates as they existed on January 26, 1979.

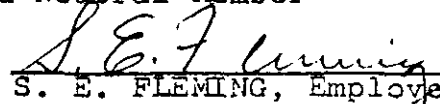
Because the said Claimant, Ronald Bird, did not exercise the safest care and caution to protect trains moving along the track he discovered as defective, the Board finds that he is entitled to no compensation whatsoever for lost earnings or for any contractual benefits from January 29, 1979 to the date of his reinstatement.

AWARD

Claim is sustained in accordance with the findings. Carrier is directed to comply with this award within thirty (30) days from the date of this award.


DAVID DOLNICK, Chairman and Neutral Member


E. R. MYERS, Carrier Member


S. E. FLEMING, Employee Member

DATED: November 5, 1980