

PUBLIC LAW BOARD NO. 5959

Case No. 39  
Award No. 39

Brotherhood of Locomotive Engineers	)	
vs	)	PARTIES TO
	)	DISPUTE
CSX Transportation, Inc.	)	

**STATEMENT OF CLAIM**

Claim on behalf of Engineer D.A. Darke, Jr., ID198366, for the reimbursement of all lost earnings, commencing September 10, 1996, expunge all charges and discipline from personnel record, and the recovery of all vacation rights and privileges, as well as all medical and dental benefits lost, if any, resulting from investigation held September 17, 1996, in the conference room, Garrett yard office, Garrett, Indiana, to determine responsibility, if any, in connection with Train J00809 passing a stop signal without proper authority and subsequently shoving through a power switch on September 10, 1996. Discipline assessed: Thirty (30) Days Actual Suspension.

**FINDINGS**

This Board finds the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the dispute involved herein. The parties to said dispute were given due and proper notice of hearing thereon.

On October 10, 1996 Claimant was suspended for 30 days as a result of an investigation held on September 17, 1996.

A review of the transcript reveals Claimant was engineer of Work Train J00809. The train with 47 cars was being shoved approximately six miles when it ran a red signal and went through a power switch. Claimant was found to have violated Rules 414 and 266. Claimant was removed from service pending the investigation.

The Organization first argues that Claimant was improperly held out of service pending the investigation. It argues that the incident did not warrant such severe action by the Carrier, and there was no evidence the Claimant was an endangerment to himself, his fellow employees or the general public. Nor was the alleged offense such that it would likely lead to permanent dismissal.

On November 1, 1995 the Carrier issued an "Employee Performance Policy" which was revised November 1, 1996. The policy indicates that some employee behavior warrants immediate removal from service. However, under paragraph 4 of "Policy Exceptions" the policy reads:

4. COLLECTIVE BARGAINING AGREEMENTS AND OTHER CONTROLLING PRACTICES:  
Nothing contained in this policy is intended to supersede provisions of collective bargaining agreements or other controlling practices, such as Federal Railroad Administration Regulations. For

example, B&O-BMWE agreement dated January 20, 1978, dealing with absence without permission, takes precedence over this policy.

The controlling collective bargaining agreement says engineers shall not be disciplined without a fair hearing. In cases of severe rule violations such as the use of drugs, alcohol, theft, gross insubordination, serious train accidents and criminal activities arbitration tribunals have held that employees may be withheld from service pending investigation. None of these circumstances apply in this case, nor was there any indication Claimant was endangering himself, the public or fellow employees.

The facts in this case show that while making the shoving movement the Claimant was given a restrictive signal notice by his conductor. Claimant continued to shove the train until it had run a red signal and went through a power switch. The fact was also brought out at the investigation that the conductor's radio failed. The Organization has cited a November 14, 1968 Agreement which reads in part:

Engineers will not be held responsible for accidents caused as a result of any malfunction or inoperative condition of such radios.

However, the facts also reveal that the Claimant continued to operate the train after he saw the conductor on the ground walking along side the train. Rule 414 reads:

When radios are used in connection with switching, backing or pushing a train or cars:

1. The employee directing the movement must:
  - (a) Keep in constant radio contact with; and
  - (b) Give clear and complete instructions to the employee receiving the instructions.
2. These instructions must specify;
  - (a) The distance of the movement to be made in car lengths;
  - (b) The position of any switches involved with the move; and
  - (c) That the employee directing the move is in the clear.
3. Unless additional instructions are received, the movement must be stopped in one-half the specified distance.

Operating Rule 266 reads:


Trains must not enter a signal track or a control siding except by control signal indication or by permission of the train dispatcher. Train dispatcher's permission must be obtained by the conductor or the engineer.

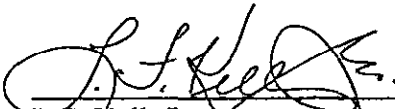
The train was being operating by signal in CTC territory. The conductor was governing the movement of the train. At no time did the conductor give the Claimant any information as to the car lengths to stop. This is understandable as the shove was almost six miles long.

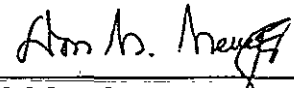
From the record it is clear that the cause of the incident was a faulty radio. The Carrier has failed in its burden to show the Claimant violated any rules.

AWARD

Claim sustained. Carrier is ordered to comply with this Award within 30 days of its date.

  
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R.G. Richter, Chairman  
Neutral Member

  
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L.F. Kell, Jr.  
Carrier Member  
  
Dated 5/27/98

  
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D.M. Menefee  
Employee Member