

PUBLIC LAW BOARD NO. 6540

AWARD NO. 5

CASE NO. 5

Organization File: D010301.1

Carrier File: 71-01-0455

PARTIES TO
THE DISPUTE:

Brotherhood of Locomotive Engineers

vs.

The Burlington Northern Santa Fe Railway Company

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained

STATEMENT OF CLAIM:

"Claim on behalf of Engineer R. C. Tarleton that discipline be reversed with seniority unimpaired, requesting pay for all time lost including the day(s) for investigation with restoration of full benefits and that the notation of dismissal be removed from his personal record, resulting from investigation held on October 16, 2000, recessed and reconvened on November 21, 2000."

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.

According to Carrier's decision letter, Claimant was found in violation of Operating Rules 5.3.3 and 5.3.7 and was dismissed from service for "... failure to perform switching in a safe and efficient manner, resulting in [a fatal] injury to an employee ..." at Keokuk, Iowa at approximately 11:20 a.m. on September 9, 2000.

The Organization challenged the discipline on procedural grounds as well as on the merits. Among the procedural contentions are that Claimant's guilt was prejudged; the Carrier failed to produce all required witnesses; the documentary evidence was not provided in advance of the investigation; and no complete transcript of the investigation was provided until after the Organization's appeal to the Carrier's highest designated officer.

The record of handling on the property requires that we must base our decision on both the prejudgement issue and the merits. It unequivocally establishes that Claimant was prejudged in violation of the Carrier's Agreement obligation to provide a fair and impartial investigation before pursuing disciplinary action. Moreover, the fact of prejudgment is corroborated by a limited review of the evidence on the merits of the Carrier's action; it does not provide the requisite support for the disciplinary action in question.

The following important facts are undisputed in the on-property handling. The fatality occurred on September 9, 2000. The investigation into Claimant's involvement was not begun until

October 16, 2000 and was not concluded until November 21, 2000. Nevertheless, on the same day as the fatality, the Division Superintendent sent a voice mail message to all Carrier officers and Local Chairmen on the Illinois Division regarding the accident. Pertinent portions of the voice mail are as follows:

* * *

... The full details are not known, but some of the things I'd like to share with you that are known are that there were some obvious problems and concerns with compliance with the rules.

* * *

... [Decedent] had lined the switch and in the process of lining the switch had given the engineer a hand signal to come ahead. The engineer started the movement, [Decedent] was walking ahead of it. He walked across in front of the movement to the other side, the opposite side of the locomotive engineer. There was no stop made by the engineer at that time, which is one obviously major concern in the fatal rule violation.

* * *

... The other thing is rules compliance. There was one car length given before the joint and the engineer kept shoving to the joint after that until the joint was made and never did hear from [Decedent] again.

The obvious problem here is if the engineer would have stopped in half the distance, [Decedent] may have been able to go home to his family. Or if he would have stopped when [Decedent] walked across in front of moving equipment it may have changed the whole circumstances there. It's obvious to me that we need strict compliance with rules.

* * *

It is clear from the superintendent's voice mail message that he determined Claimant to have committed fatal rule violations and he so informed all subordinate Carrier officials of this determination.

Prejudgment of guilt is entirely repugnant to the Carrier's obligation to provide a fair and impartial investigation before culpability is ascertained. Where, as here, the prejudgment is communicated, repeatedly, to the same subordinate officials who will be involved in the investigative process, the process is irreparably tainted. This is so even when the later investigation appears to develop evidence in support of discipline. Because of the prejudgment by higher authority, this later obtained evidence is suspect as possibly being a product of improper influence.

As noted previously, the results of the investigation in this dispute do not provide support for the discipline imposed. Accordingly, the record provides strong evidence that Claimant's discipline was pre-ordained. The basic facts of the fatality are undisputed. After coupling onto a tank car, the Decedent directed Claimant to pull back over a switch. The Decedent then threw the switch and signaled Claimant to come forward by hand signal to couple onto another car less than four car lengths away. Decedent was out in front of the shove and walked in the same direction. The tracks curved to Claimant's left as the Decedent walked ahead in Claimant's sight. The Decedent began to cross the track from Claimant's right to left. Safety Supplement Rule 13.1.3 permitted the Decedent to cross the track in front of the movement if he was sufficiently ahead of the equipment to do so safely. This was Decedent's judgment call. Before Decedent left Claimant's view, which is a key point, he transitioned from the use of hand signals to the use of his radio to give Claimant further directions. Decedent said, over the radio, "Crossing clear." Decedent was later heard to say, over the radio again, "One car length." The one car length directive was heard by the third member of the crew who was out of sight but coming within radio range to hear it. There were no further radio communications from Decedent. Claimant continued to shove until he felt the joint. At this point, Claimant was informed by another person that Decedent's body was being dragged under the tank car.

There were no witnesses who saw how or precisely where Decedent came to be under the tank car. There were no markings found that were conclusively felt to establish the answers to these two questions. Later investigative efforts by the FRA and Carrier officials could not determine the cause.

There is, however, significant circumstantial evidence regarding the location. The Decedent's radio equipment was found lying between the rails some 15 feet 5 inches from a gate in a chain-link fence. It was assumed that the leading end of the tank car was in the vicinity of the gate when Decedent issued his "one car length" directive. Although the radio belt was intact, the microphone was severed from the radio and the radio had been run over and flattened. Decedent's amputated right leg was measured to be 36 feet 6 inches from the gate. His body came to rest some 58 feet down the track from the gate. A car length was typically 55 to 60 feet long.

The first rule allegedly violated by Claimant was Rule 5.3.3 (Signal Disappearance). Testimony heard at the investigation, however, clearly established that Rule 5.3.3 is a visual signal rule and does not apply where a radio is used to give directions. The testimony of Carrier's Superintendent of Operations clearly confirmed that Claimant was within his rights to go by the radio directions when the Decedent began using his radio to direct the Claimant before leaving his view. Thus, the record does not support a finding that Claimant violated Rule 5.3.3.

The remaining rule allegedly violated by Claimant was Rule 5.3.7 (Radio Response). The rule states in part, "Movement must stop within half of the distance specified unless additional instructions are received." The testimony establishes that the shove distance involved in this dispute was one car length. The testimony of various witnesses described that it was the practice at Keokuk to continue to shove to a joint even in the absence of further radio directions for distances of one car length and less. The practice was discussed with Carrier management at Keokuk on May 19, 2000, some four months prior to the fatality. The discussion was part of a Safety Incident Analysis Process meeting


involving the then Illinois Division Superintendent, the Division Safety Coordinator, and the Superintendent of Operations. Carrier management at Keokuk did not object to the practice nor was any discipline issued to Decedent, Claimant, or the third member of their crew. The record also establishes that Claimant and Decedent had switched in this manner many, many times before. Accordingly, it appears that Rule 5.3.7 was not strictly followed as written with the concurrence of Carrier management at Keokuk.

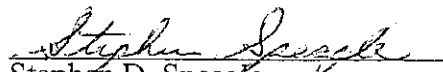
Even if Rule 5.3.7 was strictly applied as written, the presence of the damaged radio equipment only some 15 feet from the start of the shove strongly suggests that Decedent fell under the tank car at that point. That point was well within the shove distance that Claimant was permitted to move under the rule without any further radio directions. In addition, it was undisputed that there was rough and uneven footing in the area of that 15-foot mark. Finally, the record contains no evidence to suggest that Decedent remained alive beyond the 15-foot point. Thus, there is no proper basis in the record for concluding that Claimant's alleged rule violation contributed to the fatality in any manner whatsoever without indulging in an impermissible degree of speculation and conjecture.

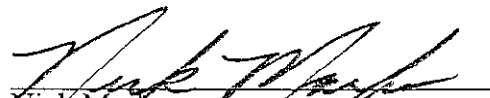
Given the foregoing findings and observations, we are compelled to sustain the Claim in its entirety. Accordingly, the Carrier is directed to offer Claimant reinstatement to his former employment status with seniority and other benefits of that status unimpaired together with full back pay for the time he has been out of service.

AWARD:

The Claim is sustained.


Gerald E. Wallin, Chairman
and Neutral Member


Stephen D. Speagle,
Organization Member


Nick Markos,
Carrier Member

Date: 