

PUBLIC LAW BOARD NO. 6540

AWARD NO. 14

CASE NO. 14

Organization File: D000605.1

Carrier File: 71-00-1188

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:

"That Engineer T. J. Christian's (the Claimant) discipline be reversed, that she be made whole for any and all time and benefits lost, including time attending the investigation, and that the notation on her personal record as a result of this incident 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 assessed a 30-day Level 3 deferred suspension and a 3-year probationary period for allegedly putting flat spots on the wheels of Locomotive BN 2316 by moving it when its brakes were set. On January 27, 2000, while adding it to her train consist, Claimant allegedly pulled the engine for 43 seconds at speeds up to 5 mph with another locomotive without releasing the brakes. At the time of the alleged infraction, Claimant had some five years of service. Her work record showed four prior instances of discipline.

The Organization raised several procedural and substantive objections to the discipline. After careful review of all of the relevant circumstances, the Board finds itself compelled to sustain this dispute on one of the procedural challenges. Nonetheless, some discussion of the merits is necessary to fully explain the rationale for the procedural finding.

The Organization initially contended the investigation was held outside of the 10-day time limit. We disagree with this contention. The investigation was set on the tenth day following the Carrier's first knowledge of suspected misconduct by Claimant. More important, however, is the fact that the Organization wrote letters dated February 2 and 4, 2000 to the Carrier requesting witnesses and event recorder information. Both letters were written after the Organization received the notice of investigation. Neither letter raised any objections to the date of the investigation. It is well settled that procedural objections of this kind must be raised at the first opportunity to do so or they are

deemed to be waived. On this record, therefore, the Organization waived any potential objection to the date of the investigation.

The Organization also contended that Claimant was denied a fair and impartial investigation due to the multiple roles played by the same Carrier official and the absence of certain requested witnesses and missing documentary evidence. We agree with these contentions. Taken together, they show Claimant was denied a fair and impartial investigation.

A single Carrier official initiated the notice of investigation, conducted the hearing, and made the disciplinary decision. In addition, however, he ignored the Organization's February 4, 2000 letter that notified him of the identity of two eyewitnesses to the alleged infraction that possessed knowledge favorable to the Claimant. Both witnesses were employees under the Carrier's control. The thrust of their testimony was described in sufficient detail in the Organization's letter that their presence was necessary to comply with the Carrier's obligation to provide a fair and impartial investigation.

In addition, the sole basis for the Carrier's disciplinary action was the interpretation of a locomotive event recorder printout by the Carrier's road foreman of engines. The printout, however, was never made a part of the record of investigation. It is not, therefore, available to us for our review of the evidence. The net effect of this omission is that the opinion of the Carrier's sole witness is lacking a proper foundation.

It is also undisputed in the testimony of Claimant and the conductor that the initial direction of movement of BN 2316 was forward when it was pulled by Claimant's locomotive. According to the interpretation of the event recorder, however, BN 2316 was initially pulled in the opposite direction.

It is further undisputed in the testimony of the Claimant and conductor that they were notified that flat spots had already been reported on BN 2316 before they moved it.

Finally, although the conductor was initially disciplined similar to Claimant based on the same evidentiary record that resulted from their joint investigation, the conductor was later exonerated in the claim handling process.

As a result of the foregoing, we find that the Carrier denied Claimant a fair and impartial investigation. The same Carrier official served as prosecutor, judge, and jury. That official failed to secure the testimony of known eyewitnesses under the Carrier's control that possessed important knowledge of the incident that was highly relevant to the issue of culpability. That official also failed to develop a proper evidentiary record by failing to include the document that provided the foundation for the opinion of its sole witness; thus, we have been denied the ability to fulfill our evidentiary review obligation. Finally, the hearing officer's decision provides no information whatsoever to explain how he reconciled the significant evidence that sharply conflicted with his decision to reach the conclusion he did.

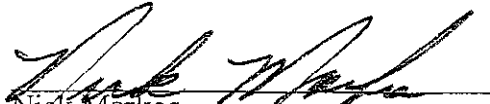
Given the foregoing discussion, we are compelled to find that the Carrier's decision lacks support from substantial evidence in the record. In light of the manner in which that decision evolved, we find that Claimant was denied a fair and impartial investigation. Her Claim, therefore, must be sustained.

AWARD:

The Claim is sustained.


Gerald E. Wallin, Chairman
and Neutral Member


Stephen D. Speagle,
Organization Member


Nick Markos,
Carrier Member

Date: 