PUBLIC LAW BOARD NO. 4244

Award No. 302
Case No. 309

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when on February 26, 2003, Mr. A. W. Ballesteros was issued a Level S 60-day Actual Suspension and 3 years probation for violation of Maintenance of Way Operating Rules 1.6 and 5.4.1 and Maintenance of Way Safety Rules S-1.2.3 and S.1.2.5.

2. As a consequence of the Carrier's violation referred to above, Mr. Ballesteros shall be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing January 30, 2003, continuing forward and/or otherwise made whole. [Carrier File No. 14-03-0067. Organization File No. 180-13N1-033.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Arnold W. Ballesteros, entered the Carrier's service in 1979. He was working as a Track Supervisor in the Carrier's Maintenance of Way Department on January 28, 2003, engaged in patrolling track on the double track main line between San Bernardino and Los Angeles, California. In the course of his patrol, the Claimant found a defective switch frog on No. 1 main track, which required the most restrictive speed limit, 10 m.p.h., at the site. Maintenance of Way Operating Rule 5.4.1, captioned "Temporary Restrictions," governs the placement of slow orders to protect such temporary conditions. The pertinent part of that Rule reads:

> When a condition exists that requires a train to be restricted, advise the train dispatcher of the location of the restriction by using mile posts and tenths of a mile from mile posts. The location must include the station names located immediately outside the location of the restriction.

In accordance with the above Rule, the Claimant contacted the Train Dispatcher to place the speed restriction order. The record in this case includes a tape recording of the conversation between the Claimant and the Train Dispatcher. The Claimant asked that a 10 m.p.h. speed restriction be placed on Track No. 1 between Mile 6.4 and 6.5. After the Train Dispatcher repeated the speed and location, he asked, "That is east of Highgrove, correct?" The Claimant replied, "Yeah, just east of our – the plant there."

The Train Dispatcher then asked if he could run a train over Track No. 2 around the site, and thereby need not give the speed restriction order to such a diverted train. The Claimant replied, "That is correct." After discussion about the Claimant's further movements, their conversation was concluded. The record indicates that there is a crossover at Highgrove over which trains eastward trains could be diverted from Track No. 1 to Track No. 2, thus bypassing the supposed location of the defective frog. In fact, however, the defective frog was located west of the crossover at Highgrove.

The Claimant arranged for two Welders to proceed to the site of the defective frog to begin repair. After they arrived and as they were preparing to begin their work, two eastward trains passed over the frog at an estimated speed of 50 m.p.h., the normal track speed at the site. These two trains did not have the slow order because the Train Dispatcher was under the impression they were being diverted to Track No. 2 before they reached the point of restriction. The Welders reported the passing of these trains at excessive speed and it was then determined, by consultation with the Train Dispatcher then on duty (for the shifts had changed in the Dispatchers' office), that the speed restriction was at the correct Mile designation, between 6.4 and 6.5, but was in fact west of the crossover at Highgrove, rather than east of Highgrove. Corrective action was taken by the then-on duty Train Dispatcher.

As a consequence of this irregularity, two days later, on January 30, 2003, the Claimant was notified that he was disqualified as Track Supervisor and his rights in that class were revoked. He was also withheld from service on that date pending investigation. The revocation of his Track Supervisor rights and his disqualification are issues that are not before this Board.

On February 3, 2003, the Claimant was ordered to attend an investigation on February 6, 2003, to determine his responsibility for violation of various cited Operating and Safety Rules when he "allegedly failed to give a BNSF Dispatcher the proper location and information regarding the placement of a slow order on track in San Bernardino, Milepost 6.4." The investigation was held on the appointed date and a transcript of testimony and evidence offered therein appears in the record before this Board. The Claimant was capably represented by the Organization's Vice General Chairman.

On February 26, 2003, the Carrier's Division Engineer notified the Claimant that he was being issued a Level S actual suspension of 60 days, and placed on a three-year probationary

period, as the result of the investigation. The notice stated that his suspension would commence on February 28, 2003, and he would be reinstated to service on April 27, 2003. He was found in violation of Maintenance of Way Operating Rules 1.6 and 5.4.1, and Maintenance of Way Safety Rules S-1.2.3 and S-1.2.5.

The Organization promptly appealed the Carrier's disciplinary decision. The appeal was denied and the dispute now comes before this Board for a final and binding disposition.

The Organization argues that the outcome of the investigation was prejudged. The transcript shows that Roadmaster Augie Morales discussed the incident with Division Engineer Michael Theret, who decided the Claimant was guilty of an infraction of the Rules. Mr. Morales then issued the notice of charges, and appeared as the Carrier's only witness in the investigation. Division Engineer Theret then issued the notice of discipline, which had already been predetermined by these Carrier officers, the Organization believes.

The Organization further questions the assessment of a 60-day actual suspension, beginning on February 26, 2003, when the Claimant was taken out of service on January 30, 2003. It believes the Claimant should be paid for the time he was withheld from service pending the investigation, since the notice of discipline did not begin the 60-day actual suspension until February 26. (The Board notices that the actual suspension began on February 28, according to the Division Engineer's notice of discipline).

The Organization also argues that the Claimant has more than 23 years of service with a clear record, the last ten years as a Track Supervisor. When the subject incident occurred, the Claimant was accompanied by a Carrier officer who was performing an audit of his performance, which placed the Claimant in a stressful situation. While discussing the placement of the slow order with the Train Dispatcher, the Claimant was also being subjected to comments by the accompanying officer. This resulted in a misunderstanding of the Train Dispatcher's question about the location of the site. In any event, no damage resulted from the misunderstanding before the slow order was corrected.

The Organization believes that the Train Dispatcher shared responsibility for the misunderstanding. The correct Mile location was given to the Train Dispatcher. It then became his/her responsibility to properly protect train movements at the site.

During the course of the investigation, the Conducting Officer and the Carrier's witness, Roadmaster Morales, implied that the Claimant placed the Welders in jeopardy by reason of the misunderstanding of the precise location of the defect and its slow order protection. In response to that implication, the Organization argued that it was the Welders' responsibility to provide their own protection while performing their work on the defective frog; their on-track protection was not being provided by the Claimant. The Organization concludes that the discipline is "extreme,

unwarranted and unjustified," and the discipline is excessive even if the Carrier sustained the charges, but the Organization asserts that the Carrier failed to carry its burden of proof.

The Carrier rejoins that when the Train Dispatcher asked if the slow order was east of Highgrove, the Claimant gave an affirmative response, although the actual location was west of Highgrove. The Train Dispatcher then asked whether trains could be run down Track No. 2 and thus avoid running them over the defect and site of the slow order. Again the Claimant answered affirmatively. The Carrier states that the opportunity for a disaster when trains operate over the defect at normal track speed cannot be overstated.

As for the Train Dispatcher's part in the error, the Carrier responds that he was unsure whether the defect was east or west of Highgrove and depended on the Claimant for that information. The Claimant supplied the incorrect answer to the Train Dispatcher's question. The Carrier argues that the incident cannot be explained away by asserting it was a simple misunderstanding. Misunderstandings can have serious consequences. The discipline in this case is appropriate.

The Carrier further points out that the Claimant's record is not clear of disciplinary entries, as the Organization argues. In 1996 he received a suspension for failure to comply with instructions, and in August, 2001, he was assessed a 30-day Level S record suspension for improper inspection. The Carrier argues that the current instance is the second serious violation within a three-year period, and the Carrier's discipline policy provides that two serious violations within a three-year period may result in dismissal. The Carrier asserts that it was lenient in this situation.

The Carrier rejected and denied all the other arguments, objections, and claims raised in the appeal, and states that failure to rebut any such shall not be construed as an admission nor a waiver of its right to do so.

The Board has studied the transcript of evidence taken in the investigation, and carefully considered the arguments and positions of the Parties. With respect to the Organization's assertion that the outcome of the investigation was prejudged, the Board finds no evidence that it was determined in a manner any differently than any disciplinary procedure in this industry. In the record, Roadmaster Morales admitted that he and Division Engineer Theret discussed their preliminary findings and jointly decided to charge the Claimant and afford him the investigation to which he is entitled under the Parties' Agreement. A reading of the transcript leads to the conclusion that all the essential facts were known to these officers even before the investigation. Only the Claimant's aspect and that of his representative remained unknown. The Organization is correct to the extent that any notice of charges and investigation indicates that someone in a position of authority has deemed that some event points to someone's failure to abide by the rules. That is a fact of life in this industry. The purpose of the investigation, formalized in the Parties' Agreement, is to give the charged employee an opportunity to be heard and to present his

defenses. The Board does not agree that the Claimant was denied a fair and impartial investigation.

The Claimant's personal record refutes the Organization's argument that it is clear of disciplinary entries. The Carrier has corrected that impression in its rejoinder to the Organization's appeal. His disciplinary entries are in the record before this Board. In his more than 23 years of service, the Claimant has three disciplinary entries and one quality performance award. The Board notices that he began serving a three-year probationary period in August, 2001.

The Organization argues that the Claimant was being subjected to comments by the Carrier officer, Roadmaster Darren Martin, who was accompanying him, at the same time that he was discussing the placement of the slow order with the Train Dispatcher. There is testimony in the record, although it is seemingly garbled, that the accompanying officer's conversation caused him to misunderstand the questions being directed to him by the Train Dispatcher:

> A. When we're rolling going east, the dispatcher asked about this east. All I heard, Adam, was really I was focusing on something else. And I looked to Darren he goes (indicating). All I heard can you run trains on Number 2. And Darren said, yeah, fine. That's why I lost him right there in the station [conversation?]. So and from there I focused on different other avenues, you know, down the road but –
>
> Q. So based on what you just said, the roadmaster then that was riding with you had some effect on the answer that you gave back to the dispatcher; is that what you're answering, saying?
>
> A. Yes. He nodded his head and he says (indicating) keep rolling Number 2's fine.
>
> Q. He gave you a signal to keep the trains rolling?
>
> A. Yeah. Number 2.
>
> Q. On the tape that's when you answer the dispatcher "yes"?
>
> A. Yes. I thought he said, you know, if I was east of Highgrove myself, not the slow order. That's what I thought he said. But apparently –
>
> Q. And the roadmaster that was riding with you, he was telling – giving you signals or telling you that yes, that's correct?
>
> A. He didn't say anything. He just said (indicating) keep on rolling, you know, okay to run trains on Number 2.

While it may be true that the Claimant's attention was diverted from his discussion with the Train Dispatcher by the comments and the gestures of Mr. Martin, that is not an acceptable excuse for the failure to reach a clear understanding with the Train Dispatcher about the precise location of the speed restriction. Obviously, this was not an intentional act of negligence, (the Claimant had been patrolling this piece of track four times a week for three years; he knew where

he was), but that does not lessen the potential for disastrous consequences. If the Claimant's attention was being distracted by Mr. Martin, it was nevertheless his responsibility to ensure that there was no possibility of a misunderstanding in a matter of this imperativeness.

The Organization argues that the Train Dispatcher shared responsibility for the misunderstanding, because the correct Mile location was given and understood. The Board agrees that the Train Dispatcher shared responsibility. If he/she had examined the track profile or the timetable station list, or been familiar with the physical characteristics of the dispatching territory, it should have been apparent that Mile 6.4 was west of Highgrove. Nonetheless, this failure on the Train Dispatcher's part should have been apparent to the Claimant when the Train Dispatcher asked, "That is east of Highgrove, correct?" The Claimant's affirmative response implicated him in the Train Dispatcher's initial error of presumption. The second affirmative response to the question about evading the restriction by rerouting trains to Track No. 2 only reinforced the Train Dispatcher's erroneous impression.

Maintenance of Way Operating Rule 5.4.1 requires that the Train Dispatcher be advised of the restriction by its Mile location and the station names immediately outside the location of the restriction. It was the Claimant's initial responsibility to provide those station names to the Train Dispatcher. When he failed to do so, it became the Train Dispatcher's responsibility to question the Claimant to determine those station names. The Train Dispatcher made an effort to do so when he asked, "That is east of Highgrove, right?" Even though he planned to divert the two trains to Track No. 2 to bypass the restriction, as he supposed (incorrectly), the Claimant's representative suggested, through cross examination of Roadmaster Morales, that it was still the Train Dispatcher's responsibility to supply a copy of the speed restriction to these trains. Whether or not this is correct, it does not lessen the Claimant's failure to ensure the Train Dispatcher had the correct information for the slow order.

The Board is not persuaded that the Welders were placed in jeopardy by the incorrect placement of the slow order. The Board believes that it was the responsibility of the Welders to provide their own protection while working on the defective frog.

The Board believes that the disciplinary penalty is clearly warranted by the gravity of the Claimant's offense and is not excessive in consideration of his overall experience, years of service, and past disciplinary record. There remains one thorny issue to be considered. The Organization points out that he was withheld from service on January 30, 2003, pending the investigation, which was promptly held. Then he was assessed a 60-day actual suspension, from February 28, 2003, until April 27, 2003. The Organization asks, "How does the Carrier plan to pay the Claimant for the twenty-eight (28) days that they held him out of service before the suspension began? Why is this not part of the Actual Suspension?" The Carrier rejected these objections and arguments without any specific discussion. Rule 13(b) of the Parties' Agreement permits one to be withheld from service pending result of investigation in certain circumstances:

It is understood that nothing in this Rule will prevent the supervisory officer from holding men out of service where flagrant violations of Carrier rules or instructions are apparent, pending result of investigation which will be held within thirty (30) calendar days of date of suspension.

The Board is precluded from granting the Claimant any relief, although withholding him from service pending result of the investigation effectively extended his overall loss of time by almost 30 days. First, the Agreement does not provide for payment for time lost except when an employee has been unjustly suspended or dismissed. (Parties' Agreement, Rule 13 (f)). Second, the rightness of the Claimant's removal from service was not placed squarely before this Board for adjudication; the merits of that issue, therefore, cannot be addressed, not having been raised on the property.

AWARD

The claim is denied.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

Thomas M. Rohling, Carrier Member

July 23, 2003
Date