

PUBLIC LAW BOARD NO. 5939

Case No. 25

Award No. 25

PARTIES TO DISPUTE: BROTHERHOOD OF LOCOMOTIVE ENGINEERS

-and-

**BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim on behalf of Engineer J. A. Dross for removal of discipline (36 day suspension) from his personal record and that he be compensated for all time lost.

FINDINGS:

This Board, upon the whole record and all the evidence, finds as follows:

That the parties were given due notice of the hearing;

That the Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1932;

That this Board has jurisdiction over the dispute involved herein.

On January 6, 1997, Claimant was assigned as the Engineer of Train 08AA428. The train went on duty at 6:00 a.m. at Gillette, Wyoming. It operated eastbound from Gillette to Edgemont, South Dakota. The other member of the crew was conductor R. D. Rizzs.

At approximately 12:10 p.m. Train 08AA428 entered Kara, Wyoming. The first signal the crew received before entering Kara was a flashing yellow signal that required them to proceed prepared to pass the next signal not exceeding 40 miles per hour.

The next signal the crew received was at the crest of a hill at MP 563.8. The Claimant and Conductor Rizzs contend hat this signal was clear (green) which would have allowed them to proceed past the next signal at Kara without stopping. However, the next signal was an absolute signal displaying a double red requiring the train to stop.

When the Claimant saw that the signal at Kara was displaying a stop indication he began to make a controlled stop. There was no one ahead of the train on Main Track 2 so the Claimant did not put the train into emergency. When the train was at the switch in Kara the Claimant noticed that the switch was lined against their movement so he put the train into emergency. Nevertheless, the train went through the switch and came to a stop about 2,000 feet beyond it. There was approximately \$5000 in damage to the power switch and swing-nose frog at Kara.

The Claimant and Conductor Rizzs were notified to attend an investigation to ascertain the facts and determine their responsibility, if any, for failing to obtain authority before passing the absolute signal at Kara, Wyoming resulting in damage to the switch and swing-nose frog. The hearing was held on January 27, 1997.

On February 11, 1997, the Claimant was assessed a 36 day suspension for his putative violation of Rules 9.1, 9.1.15 and 9.5 of the Carrier's General Code of Operating Rules.

On February 12, 1997, the Carrier revoked the Claimant's certificate to operate as a locomotive engineer under Federal Railroad Administration (FRA) regulations due to his purported "[F]ailure to control a Locomotive or Train in accordance with a Signal Indication that Requires a Complete Stop before passing it." The Claimant appealed revocation of his engineer's certificate to the FRA Locomotive Engineer Review Board (LERB). On December 18, 1997, the LERB ruled that the Carrier had improperly revoked the Claimant's certificate due to its failure to make Dispatcher Hyler available at his hearing on January 27, 1997.

This decision of the LERB is not binding on this Board. Rather, the dispute before us is a *de novo* proceeding whereby we have been called upon to decide if the Carrier was justified in suspending the Claimant for 36 days for his alleged violation of several General Code of Operating Rules. Nevertheless, in this particular case, we agree with the conclusion reached by the LERB that the absence of Dispatcher Hyler from the Claimant's hearing deprived him of a fair and impartial investigation.

On January 25, 1997, Train Dispatcher John Hyler wrote to John Snow, BNSF Director of Administration, about the incident at Kara, Wyoming on January 6, 1997. Among other things, Dispatcher Hyler stated:


"I have been a train dispatcher for over fifteen years. During that time, I have seen and heard of many such incidents, or ones similar to this, where signal aspects were not complied with correctly. In the majority of cases, crew error has indeed been a major culprit. However, enough incidents have occurred that are not so cut and dried. I feel that this may be one of them, with incorrect (false) signal aspects being displayed in spite of what the electronic records may indicate"(underlining in original).


Dispatcher Hyler's January 25, 1997, letter was entered into the record at the January 27 investigation as was a recording of his communication with the crew of Train 08AA428 at Kara, Wyoming on January 6, 1997. The Carrier contends that there was nothing further that Dispatcher Hyler could have added to the record so he was not a necessary witness to the Claimant's investigation. We respectfully disagree.

When Dispatcher Hyler raised the possibility that the absolute signal at Kara may have displayed a false stop aspect the investigation should have been continued to give him the opportunity to explain the basis for his conjecture. The Claimant's representative made a timely request for the Dispatcher's attendance. At the very least, some arrangement should have been made to allow the Claimant's representative to question the Dispatcher about his January 25, 1997, letter to Director Snow. The Carrier's decision not to make the Dispatcher available to the Claimant's representative for questioning deprived the Claimant of his right under Rule 63 to a fair and impartial investigation, in this Board's opinion. For this reason only, the claim must be sustained without addressing the question of whether the Claimant violated any BNSF General Code of Operating Rules.

AWARD: Claim sustained.

The Carrier is ordered to make the within Award effective on or before thirty (30) days from the date hereof.


Robert M. O'Brien, Neutral Member


Don M. Hahs, Employee Member


Nick Markos, Carrier Member

Dated: 