

PUBLIC LAW BOARD NO. 5944

**PARTIES) UNITED TRANSPORTATION UNION
TO)
DISPUTE) NORFOLK AND WESTERN RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim of Virginia Division Engineer R. L. Driggs, appealing forty-five days actual suspension assessed for engaging in unsafe work practices in that his train movement ran through an improperly lined switch, and subsequently made a reverse movement through the same switch, resulting in derailment, and damage to rail equipment and track structure, while performing service as engineer on Train 554V120, at approximately 9:50 p.m., September 20, 1996, at Crewe, Virginia. (Organization File: N-6509; Carrier File: BE-CR-96-3)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

On September 20, 1996, the Claimant allegedly ran through an improperly lined switch, and subsequently made a reverse movement through the same switch. This was said to have been the cause for the derailment of three cars. The Claimant was directed by notice of September 24, 1996 to report for a formal investigation to determine his responsibility, if any, in connection with engaging in unsafe work practices. After a hearing was held in the matter on October 2, 1996, the Carrier administered a 45-day actual suspension to the Claimant in a Notice of Discipline dated October 15, 1996.

Two days after the derailment, on September 22, 1996, which was also two days before the notice of investigation, the Carrier issued a District Dispatcher's Bulletin over the authority of the Superintendent that included the following statement or pronouncement concerning the above mentioned incident:

A rule violation derailment occurred, September 20, 1996 in Crewe Yard, when a road crew made a reverse movement over a switch previously run through by the same crew, violation of Operating Rule 104A. Please review Operating Rule 104A.

At the company investigation the representative for the Claimant inquired of the hearing officer who assessed discipline on the Virginia Division. The latter responded as follows:

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Well, various supervisors are a party to the discipline assessed. The final say so on discipline is normally reserved by the Superintendent.

Although the Carrier urges that nothing more than an information bulletin was issued so as to advise all employees to review Operating Rule 104, it is the Board's judgment that the particular language used in the Dispatcher's Bulletin was prejudicial to the Claimant's rights to a fair and impartial hearing.

In what appears to have been a somewhat similar case of prejudgment prior to a formal investigation that resulted in the annulment of discipline, the First Division, NRAB, in Award No. 13573 (BRT v ACL), Referee Harold M. Gilden, stated:

Article 31 is designed to protect against abuse of the Carrier's power to discipline. The purpose and intent is to provide the right to an investigation before final action is taken on alleged charges of wrongdoing. The rule has value, both as a restraint against arbitrary and indiscriminate disciplinary measures, and as an instrument for determining the propriety and extent of punishment. These commendable attributes are watered down if not altogether dispelled when the proceedings are mere perfunctory gestures occurring after an accomplished act.

Here, contrary to the rule, the claimant's dismissal became effective eighteen days before the holding of a proper investigation. Under these circumstances the penalty must be annulled.

In the circumstances, the Board finds that the Carrier was arbitrary and capricious in conducting a hearing following its issuance of the above mentioned Dispatcher's Bulletin and in thereafter assessing discipline against the Claimant. The claim will be sustained.

AWARD:

Claim sustained.



Robert E. Peterson
Chair & Neutral Member



Scott R. Weaver
Carrier Member
May 8, 1998
Norfolk, VA



David L. Benson
Organization Member