

Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way)	
Employees)	
)	
vs)	Case 27/Award 27
)	
Burlington Northern Santa Fe)	

Statement of Claim

1. That the dismissal of Claimant Terry Triplett for the alleged violation of Rules 1.6, 8.2 and 8.3 of the BNSF Maintenance of Way Operating Rules was arbitrary and capricious.
2. That the discipline be set aside and that the Claimant to this case be reinstated to service with all rights unimpaired and that he be compensated and made whole for all lost wages.

Background

The Claimant was advised on December 9, 2001 to attend an investigation in order to determine facts and place responsibility, if any, in connection with his alleged failure to properly restore the switch to the mainline position after performing maintenance on the east switch near Arminto, Wyoming, Casper Subdivision. According to the charges against the Claimant, this happened on December 7, 2001 near Milepost 260.4 at approximately 1:30 PM while the Claimant was working as a track inspector. According to the charges the Claimant 's actions caused an accident when trains H-FTWLAU1-03 and X-LVJOMA1-27 collided which resulted in a derailment in the death of an engineer.

The Claimant was held out of service pending an investigation.

An investigation was held on December 20, 2002 at Thermopolis, Wyoming. The Claimant was then advised on January 14, 2002 that he had been found guilty as charged and he was dismissed from the service of the Carrier, effective December 7, 2001.

This discipline was appealed by the Organization, and denied by the Carrier, in the proper manner under Section 3 of the Railway Labor Act and the operant labor Agreement up to and including the highest Carrier officer designated to hear such. Absent settlement of the claim on property it was docketed before this Board for final adjudication.

Discussion

The Claimant to this case held assignment as track inspector at the time of an accident which occurred on December 7, 2001. On this date the Claimant's track inspection duties included the maintenance of a switch at Arminto, Wyoming which is located at Milepost 260.9 in the Casper Sub-division. The Claimant was operating a hi-rail on this day and was going east on the main track. When he arrived at MP 260.9 he states that he parked his hi-rail truck on the main line. In a written statement of an interview he gave to two road masters after an accident happened, which is the focus of this case, the Claimant states that he oiled the switch at Arminto and when doing so lined it to the siding. However, he states that he then restored and locked the switch "...back to position..." which was the usual procedure used when maintaining such switches. Back

to position here means that the switch was lined back to the main line. The Claimant stated to the road masters that he did not remember exactly when he did this work since he had thrown away his official work log at the end of his shift on the day in question. He then left this location and inspected track up to Milepost 240.1 which is what is known as the Powder River siding. The Claimant states that he did inspection and maintenance work on the siding switches at that point. He then finished the work with his hi-rail and turned in his track permit when finishing his shift on December 7, 2001.

Some five hours after the Claimant turned in his track permit or at about 6:30 PM a freight train traveling on the main line going west from Casper to Greybull, Wyoming turned into the siding at Arminto, Wyoming and it struck grain train sitting on that side track. The engineer of the freight train was killed. There was also extensive damage to both of the trains which were trains H-FTWLAU1-03 and X-LVJOMA1-27 as noted earlier. According to the record the damage exceeded \$2.5 million.

The sole issue in this case is whether the Claimant was culpable of causing the derailment of the two trains when the main line train exited onto the siding and collided with the second train that was parked there. The proximate cause of the collision, derailment and the unfortunate fatality that resulted centers on whether the switch at Arminto, Wyoming was in its proper position. The Claimant testified at the hearing that he had set and locked the switch at Arminto and he states that he double checked his work.

On the contrary, however, the Carrier concluded after it conducted an investigation of the incident and after it held a hearing on December 20, 2001 that the Claimant had violated Carrier's Rules 1.6, 8.2 and 8.3 and he was dismissed from service. The Claimant's dismissal letter was signed by the division engineer.

Findings

This is a discipline case and the burden of proof lies with the Carrier as moving party to prove, with sufficient substantial evidence, that the Claimant in this case is guilty of violation of the rules at bar.

There is a file on this case which includes the transcript of the investigation; rather voluminous correspondence between the parties dealing with the Claimant's discharge and appeal; exhibits related to investigations done by a number of entities including the local sheriff's office, the Carrier's internal security, and the FRA among others; and photos of the location where the accident of December 7, 2001 took place which have been presented to the Board in a number of formats.¹ After reviewing the extensive record on this case the Board concludes as follows.

First of all, a train had safely passed the Arminto location on the main line prior to the time that the Claimant did the maintenance work on the switch at that point. The Claimant returned his hi-rail at about 1:45 PM on December 7, 2001 and it was after that time that the accident happened at 6:30 PM.² Thus the accident happened after the

¹ Hard copy and CD.

² The Carrier mistakenly states in its Submission that the accident occurred at 1:30 PM on December 7, 2001. See

Claimant's watch.

Secondly, the Claimant was the last known person to have maintained and/or to have had anything to do with the Arminto switch. After the accident occurred an investigation of the switch showed that it had been locked properly and there was no evidence that it had been tampered with. There was allegations by the union that it had been tampered with but the Board has been unable to find sufficient evidence in the file to warrant that this really happened.

Thirdly, the Board is not persuaded that the sabotage theory provided by the union in this case is a viable alternative hypothesis of cause of the December 7, 2001 accident. There is insufficient evidence to support such hypothesis. The union cites a number of incidents of sabotage having taken place at other points in the past. This could be albeit the Carrier argues that the circumstances are not on point with this case and so on. Irrespective: what may or may not have happened at some other point in time and place does not warrant conclusions that the same thing happened when the accident of December 7, 2001 occurred at Arminto, Wyoming. This Board must be guided not by what could have happened, but by evidence of what did happen with respect to the narrow issue before it. There were foot prints found in the snow by the sheriff's department and pictures were taken. The union states that they could not have been made by the Claimant because the prints are bigger than the size boot worn by the Claimant. This may be. But it

is never clarified whether the Claimant was wearing overshoes over his work boots which is commonly done by track inspectors which would have accounted for the difference in size between his work boots and the foot prints found in the snow. It is unclear to the Board from the different photos in the record that there were two sets of foot prints found by the Arminto switch after the accident. If there were allegedly two, no one saw any second person. If there was a second person that person must have come from the road to this quite isolated spot and must have had a key and must have known exactly what they were doing in performing an act of alleged sabotage. ^{This RCR} If is a lot of "ifs". Such does not rise to the level of evidence. The lock on the switch gave no indication that it had been tampered with. The local sheriff department's investigation, which the union criticizes as being incomplete and/or in effect amateurish, concluded that there was not two, but only one person around the switch from the foot prints that the investigators from that department found.³ What the tracks near the switch do suggest, from the manner in which the indentations are made in the snow, is that the person who made them worked on the switch. Since no other person has ever been pointed out, seen or identified, reasonable minds would conclude that the person who made those tracks around the switch must have been the Claimant. The Carrier's special agent concluded, after his investigation, that no vandalism was involved. Although there was an investigation by the National

³ The union criticizes the quality of this investigation because the sheriff's department did not interview the Claimant and because that department's investigators allegedly had a poor grasp of what the work of a track inspector involved. It is unclear to the Board how this in and of itself invalidated the physical evidence that the sheriff's department did discover shortly after the accident occurred.

Transportation Safety Board it did not pursue this case as it might well have done if it suspected that vandalism (or since it was after 9/11: terrorism) was involved. Certainly there was a heightened propensity on the part of the NTSB to pursue an investigation if its personnel may have suspected sabotage but it did not do so. It concluded, in a letter to the Claimant, that it was not developing a formal report which would have included information/conclusions about formal cause. A Board such as this one would be improperly exercising its authority and jurisdiction by basing its conclusions on those of ~~those of~~ other investigating agencies, and it will not use the conclusions of those agencies as basis for its own. Concurrently, however, it can indeed underline that its own conclusions in this case are not inconsistent, after scrutinizing the full file here, with those of such agencies. There was also an investigation conducted by the Federal Railway Administration and an investigation by an attorney representing the engineer who was killed.

Given the full file here the Board is unable to conclude that vandalism was involved in this case. The union argues that many keys were available for someone to have sabotaged the switch at Arminto. Without doubting that, the Board is not persuaded by the evidence of record in this case that this is what happened. What could have happened and what did happen are not the same things. Boards such as this have ruled on numerous occasions that speculation is not the same as evidence.

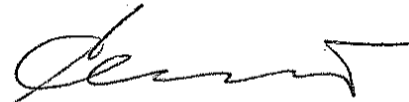
After review of the full record in this case the Board is unable to conclude that the

Carrier has not sufficiently borne its burden of proof as moving party, on the merits of this case, and the Board must rule accordingly.

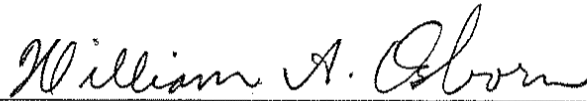
A review of the due process arguments set forth by the Organization fails to convince the Board that they are sufficiently persuasive to offset conclusions reached here by the Board on merits. The instant case is about an extremely serious matter. It involves an on-the-job fatality and considerable economic loss to the Carrier. In an industry where safety is paramount, the incident involved in this case represents both the Carrier's and the employees worse nightmare. A Board such as this must be particularly vigilant in setting precedent given such a scenario and it is not permitted to issue rulings on basis of hypotheticals. The accumulation of the evidence of record in this case warrants no other reasonable conclusion but that the claim be denied.

Award

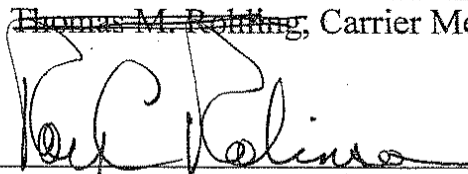
The claim is denied.



Edward L. Suntrup, Neutral Member



William A. Olson, Carrier Member



Roy C. Robinson, Employee Member

Date: June 4, 2007