

PUBLIC LAW BOARD 6394

Award No. 5

Parties to Dispute:

Brotherhood of Maintenance of Way Employes
(Consolidated and Pennsylvania Federations)

and

Norfolk Southern Railway Company

Statement of Claim:

Claim on behalf of A. B. Livingston for removal of a fifty-six (56) day actual suspension and disqualification as a foreman and an assistant foreman and payment for time lost as a result of discipline assessed following a formal investigation held on June 15 and 21, 2000, in connection with his improper performance of duties on May 13, 2000, by allowing a train to pass stop boards while the track was occupied.

(Carrier File: MW-HARR-00-15-LM-159)

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

Claim disposed of as follows: On May 13, 2000, Claimant, an Assistant Foreman, was working as the employee in charge of track protection between C. P. Tara and M. P. 110 on the Harrisburg Line. Stop boards were placed on tracks 1 and 2. At 8:40 a.m., Claimant authorized Train 21-E to proceed past the stop boards, heading west on track 2. Shortly thereafter, the train went into emergency because a Communications & Signal crew backhoe was fouling track 2. The train was able to stop short of striking the backhoe and no damage resulted.

Certain basic facts do not appear to be in dispute. At 8:20 a.m., Claimant told the C & S crew to clear the track and authorized Train 23-M to pass on track 2. After Train 23-M passed, the C &

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S crew re-occupied the track but did not contact Claimant to receive permission to do so. Claimant did not contact the C & S crew before authorizing Train 21-E to pass.

During the investigation and throughout handling on the property, the Organization maintained that the incident was the sole responsibility of the C & S crew because the crew failed to obtain permission from Claimant before re-occupying the track after Train 23-M passed. Carrier, however, maintained that Claimant violated NORAC Rule 135 by not contacting the C & S crew before authorizing Train 21-E to proceed. The parties reiterate their positions before this Board. The Organization also raises several procedural arguments which we shall consider first.

The Organization contends that Carrier violated the Agreement by failing to provide Claimant with notice of the precise charge he would face at the investigation. The notice stated the charge as follows:

Improper performance of duty as a Foreman while controlling Stop Boards on May 13, 2000, between C. P. Tara and M. P. 110 of the Harrisburg Line. You allowed train 21EH413 to pass Stop Boards on Number Two Track at C. P. Tara at approximately 8:40 A.M. while track was occupied by a C&S backhoe and Gang.

The Organization faults Carrier for failing to allege a specific rule violation in the notice. We do not agree. To comply with the Agreement, Carrier is required to provide notice of the charge in sufficient detail to enable the accused to prepare a defense. The notice in the instant case met this standard. It advised Claimant of the specific incident in question, identifying the date, time, location, train involved and actions of Claimant that were alleged to be improper performance of his duty. It is clear that Claimant and the Organization were aware of the matter under investigation. Indeed, the Organization mounted a very vigorous defense on Claimant's behalf.

The investigation began on June 15, 2000, but was continued to June 21, 2000. The Organization contends that Carrier violated Claimant's due process rights by not completing the investigation on June 15 and by not allowing the Vice Chairman to state his objections to the continuance on the record. We find neither objection to be a basis for overturning the discipline. The Hearing Officer continued the hearing when the Organization objected to hearsay testimony by the Road Foreman, who investigated the incident, to a statement made by the C & S Supervisor. The purpose of the continuance was to secure the presence of the C & S Supervisor as a witness. Rather than impede Claimant's due process rights, the continuance furthered them. Furthermore, although we believe it would have been better had the Hearing Officer allowed the vice Chairman to state his objections to the continuance on the record on June 15, we find no prejudice to Claimant's rights as the Vice Chairman was able to state his objections at the beginning of the hearing on June 21.

The Organization also contends that Claimant's due process rights were violated because Carrier failed to produce the tapes of the conversations between Claimant and the C & S crew. However, there was no dispute that the C & S crew did not contact Claimant or otherwise obtain

permission to re-occupy the track after Train 23-M passed at 8:20 a.m. The dispute was over whether Claimant could rely on the absence of communication from the C & S crew when he authorized Train 21-E to pass.

Accordingly, we turn to the merits of the dispute. We find substantial evidence supports the finding made on the property that Claimant violated NORAC Rule 135. As discussed above, the critical issue turns on the significance of the C & S crew's failure to contact Claimant for permission before re-occupying the track after Train M-23 passed at 8:20 a.m. The C & S Foreman testified that the understanding was that the crew returned to work without asking permission to re-occupy the track after each train passed, as long as the crew had not been advised of other trains in the area. Similarly, the C & S Supervisor testified that when advised that a train was coming, the crew would clear the track but immediately go back to work after the train passed unless advised that another train would be coming. The Assistant C & S Foreman testified similarly. Moreover, the Maintenance of Way Foreman who was usually the employee in charge of the stop boards testified that, although some crws would call for permission to re-occupy a track after a train passed, many would just go back to work unless he advised them that another train was coming.

Although Claimant maintained that the crew was required to obtain permission to re-occupy the track after a train passed, he was not entirely consistent in his position. At one point, Claimant testified:

Because usually C&S will call you, and ask you is it all right to go back. *I mean, they can if they want to. They can go back if they want to.* But usually they will call and ask, and then they'll go back. No one never called and asked, can they go back to work.
(Emphasis added.)

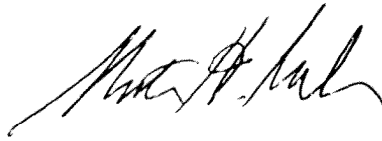
Furthermore, the Road Foreman who investigated the incident testified that shortly after the incident Claimant stated that he mistakenly thought Train 21-E was proceeding on track 1 and, when he realized his error, he tried to contact the C & S crew but used the wrong channel. Claimant denied making such a statement. As an appellate body, we generally defer to credibility determinations made on the property. In the instant case, we see no reason to deny such deference. The Road Foreman's testimony is corroborated by the written statement that Claimant gave at the time of the incident. It is further corroborated by testimony of the Construction Supervisor and the Assistant Foreman.

Accordingly, we find that Carrier proved by substantial evidence that Claimant violated NORAC Rule 135 by failing to ascertain that the C & S crew had cleared the track before he authorized Train 21-E to pass the stop boards. We turn now to the penalty assessed.

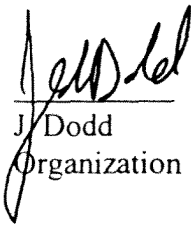
Our role in reviewing the penalty is quite limited. We do not substitute our judgment for that of the Carrier. Rather, we disturb the penalty only if we find that it was arbitrary, capricious or excessive.

In the instant case, the penalty consisted of a suspension equal to the time Claimant had been held out of service plus disqualification as a foreman or assistant foreman. Carrier has cited several awards in which more severe penalties, including dismissal, have been upheld for comparable incidents. The Organization maintained that a supervisor received a suspension of only eleven days for a similar incident. However, there are insufficient details in the record that would enable us to determine whether the two situations are in fact comparable. Accordingly, on the record presented, we see no basis to disturb the penalty.

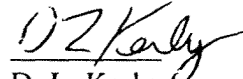
Claim denied.



M. H. Malin
Chairman and Neutral Member



J. Dodd
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois, June 22, 2001