

AWARD NO. 2

Case No. 2

Organization File No.

Carrier File No. EE-KED-07-01

PUBLIC LAW BOARD NO. 6945

PARTIES) BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN
)
TO)
)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of Pocahontas Division Engineer R. S. Daniels for reinstatement with all benefits restored and pay for all time lost due to an investigation held December 19, 2006 to determine the facts and place responsibility, if any, in connection with "... passing a Stop Signal without proper authority in the vicinity of Williamson, WV, MP N469.7 at approximately 12:05 p.m., December 2, 2006 while performing service as Engineer on Train 274U201.

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 14, 2006, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

The facts in this case are not in dispute. While working as an engineer in through freight service on December 2, 2006, Claimant operated his train past a stop signal. According to Claimant, he received an advance approach signal, an approach signal and then a stop signal. While within the one-half mile block between the approach and stop signals, Claimant tried to phone his wife, who was experiencing a difficult pregnancy. This distraction caused Claimant to misjudge his braking

distance. Consequently, he placed the train in emergency and passed the stop signal by approximately 92 feet.

Claimant was consequently directed to attend a formal investigation at which he was charged with passing a stop signal without authorization. At the investigation, Claimant admitted his responsibility in connection with this incident. Following the investigation, he was dismissed from service.

Claimant's admission of responsibility for this incident constitutes substantial evidence to support the Carrier's charge against him. The only question remaining for this Board relates to the appropriateness of dismissal in his case. The Carrier, in arguing that dismissal was warranted, cites a September 26, 2006 letter to all train and engine service employees from Executive Vice President Operations Mark D. Manion. This letter states:

We all know there is nothing more critical to the safety of operations than complying with stop signal indications. Despite our continued rules compliance checks and the diligence displayed by the vast majority of you, stop signal violations continue to occur.

I ask that each of you take a few moments to consider the danger posed any time a train fails to stop short of a stop signal and to think about what you can do to ensure neither you nor your co-workers are put in that situation.

We know these incidents will be prevented if we remain alert, focused on the job and strictly comply with the operating rules. We are all responsible for making safety our first priority; however, only you can ensure you and your crew take this approach each time you board a train.

While I know our collective efforts, skill and professionalism will prevent these incidents from occurring in the future, please remember stop signal violations are major offenses. Employees who fail to comply with a stop indication are subject to dismissal. The disposition of employees dismissed for stop signal violations will be dictated by the contract grievance procedure and arbitration.

I believe it is necessary to write this letter for the continued safety of our operations, employees and the public. No one intentionally passes a stop signal, and almost all of you

comply without exception; but never forget – it only takes a single violation to have catastrophic consequences.

Do not let a stop signal violation jeopardize your safety, your career, your life or someone else's.

Policies such as this, which mandate dismissal for any violation, are often referred to as “zero-tolerance” policies. In recent years, zero-tolerance policies have been addressed by arbitrators in numerous work environments. In some cases, the zero-tolerance policy has been agreed upon by the union representatives, effectively making it part of the parties' collective bargaining agreement. In such cases, the arbitrator may have little or no latitude once it is determined that the charged employee is guilty. In other cases, zero-tolerance may be dictated by some government regulation, although it is often said that the regulation itself must require termination. In the absence of either of these circumstances, the zero-tolerance policy is understood to be a unilateral action by management, and like all such actions must be held to a standard of reasonableness.

The Board does not question the Carrier's concern about trains running past Stop signals. It is one of the primary rules of railroading, and the consequences of a violation may be fatal. It is for this reason that we have generally upheld the Carrier's disciplinary decisions up to and including dismissal. We agree with nearly everything Mr. Manion wrote.

We cannot accept, however, that the Carrier may unilaterally adopt a blanket policy dictating that every violation of this nature shall result in the employee's dismissal. Our reservation is expressed in Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. (BNA, 2003) as follows:

Arbitrators scrutinize zero-tolerance policies with particular care because these policies may fail to take into account all the information that is normally relevant to the termination of an employee. Thus, the arbitrator in *Kimberly-Clark Corp.* refused to uphold the termination of an employee with an uncontroverted “26-year record [that was] immaculate,” who was terminated pursuant to a zero-tolerance policy. The arbitrator found that the

employee's long and distinguished work record should have been given serious consideration in the context of the discipline decision. The arbitrator emphasized that a "just cause" decision is not limited to determining if the employee violated a rule: consideration of the employee's work history, consistency of the application of the rule, as well as other factors come into play in most discipline cases. (pp. 1011-1012) . .

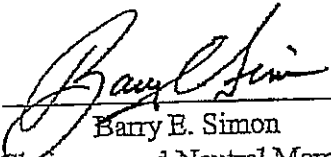
This Board is not holding that the Carrier may not dismiss an employee for passing a Stop signal. There are certainly circumstances that would warrant such action, even for a first offense. But unless the Carrier can justify its action in a particular case, the concept of "just cause" would require us to consider a dismissal as being arbitrarily imposed.

The fact that the Carrier relied upon Mr. Manion's letter in its assessment of discipline does not mandate that the discipline be reversed in its entirety. The Board is left with the discretion to determine whether the disciplinary action would be warranted even in the absence of the letter. Alternatively, the Board may consider what discipline would be appropriate in each case and modify the Carrier's action accordingly. These questions are within the broad remedial powers that have been afforded to Boards of this nature.

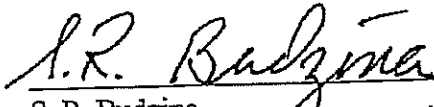
In Claimant's case, the record provided to the Board indicates he was first hired by the Carrier as a fireman in 1970, and established seniority as an engineer in 1974. Since that time, it appears that Claimant had been disciplined only once, having received a 15 day deferred suspension for damage to equipment and delay to train in 1985. That sort of record for 36 years of service is highly commendable, and certainly should have been given serious consideration when the decision to discipline him was made. While it is true that Claimant should have realized that his attention should have been focused on his work, we feel that the time he has been out of service has suffi-

ciently reinforced that concept in his mind. Accordingly, we will direct that Claimant be reinstated to service with seniority rights unimpaired, but without compensation for time lost.

AWARD: Claim sustained in accordance with the above Findings.


Barry E. Simon
Chairman and Neutral Member


M. J. Ruef
Employee Member

 7-17-07
S. R. Budzina
Carrier Member
Written Dissent
Attached

Dated: June 30, 2007
Arlington Heights, Illinois

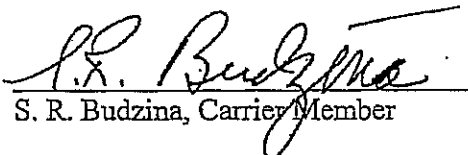
Carrier Member's Dissent to Public Law Board 6945, Award No. 2

The Carrier's fundamental obligation is to the public, its employees, its customers, and to the safety of its operation. Hence, there is nothing more critical to the safety of operation than complying with stop signal indications.

The Carrier must ensure that employees not only comply with stop signal indications, but that employees are aware of the consequences for failure to comply with stop signal indications. The Carrier placed all Train and Engine service employees on notice that stop signal violations would not be tolerated and discipline for proven infractions would be dismissal. The Carrier's policy is evenhanded and necessary to address, and most importantly, to enforce deterrence of stop signal violations.

The discipline may appear harsh in incidents where there is no damage, no injuries, nor loss of life. But the Carrier bears the responsibility for the actions of its employees. Thus, the Carrier should not be required to maintain in its employ a person who has demonstrated the inability to comply with a rule critical to safety until that person is involved in a catastrophic incident. For these reasons the Carrier must Dissent.

Respectfully submitted,


S. R. Budzina, Carrier Member