

his employment with the Carrier in 1974 in the Track Department. In 1976 he transferred to the Mechanical Department, in 1977 to Train Service and in 1993 he was promoted to Locomotive Engineer. From 1997 to 2002 he served as a Road Foreman of Engineers.

On December 29, 2003, Claimant was the Engineer of Train M-SBDBAR-30 operating between San Bernardino and Barstow, California. When leaving San Bernardino Claimant passed a stop signal (red block) without authority. He neither received a proceed signal nor permission from the dispatcher to pass the signal. This was an "absolute stop indication" signal. Immediately after the incident occurred, Grievant wrote up the incident in which he accepted full responsibility.

On January 5, 2004 Claimant and the remaining crew were scheduled to attend an investigation. At the request of the Organization the investigation was postponed to January 29, 2004. In the interim, the General Chairman attempted to resolve the matter via alternative handling which request was declined by the Carrier based upon the fact that Claimant had a previous event within a twelve (12) month period which was handled via alternative handling.

By letter dated February 24, 2004, Claimant was dismissed from service.

FINDINGS:

Based upon the record, the Board finds that the parties herein are the Carrier and the Employee Representative within the meaning of the Railway Labor Act, as amended. This Board is duly constituted by agreement of the parties, has jurisdiction over the dispute involved herein and the parties were given due notice of the Hearing held.

The facts in this matter are not in dispute. The Carrier maintains Claimant went through a signal displaying an "absolute" stop indication. This was verified by Signal Supervisor, J.A. Saavedra, who testified at the investigation that the only display the signal at the top of East B Yard will show is "either ... a red for stop or a flashing red ..." and the "log revealed no abnormalities". (Carrier Ex. 4) Therefore, the Carrier concluded Claimant went through the signal inasmuch as the switch was not lined for his intended movement and as a result the electronics of the switching system would not have permitted the signal to indicate any "manner of proceed" because the route was not properly lined. (Carrier Brief, p. 4)

Claimant acknowledges without qualification that he went through the signal by testifying at the investigation as follows:

- Q. Mr. Carr, what do you know about the incident?
- A. Well, obviously I was at the control of the locomotive on the alleged day when, December 29. We had, got our train together, we had a job briefing in the yard office. We went out to the B Yard, got our train together, did the air test on our train. Our brakeman was going to roll-by the release on the train. He was doing an additional air brake test. Pulled out of the B6 track, pulled up to B1 and stopped short. Mr. Campbell got off to line the switch. Mr. Campbell boarded the train again, gave me a proceed signal, and we started to depart San Bernardino.
- Q. Mr. Carr, at any time from your vantage point at the controls of the locomotive as you were coming out of Track 6, were you able to see that signal indication on the pot signal at the top end of the B Yard?
- A. It's pretty much impossible to see it from down into the B6 switch. From B1 where we stopped to line the switch, yes, you can see the switch. If you were paying attention to it, yes, we can see the switch or the signal.
- Q. Mr. Carr, when you stopped and Mr. Campbell departed the locomotive to line the switch for your movement on the lead, were you able to see the signal indication on that signal at the top of the B Yard?
- A. If I would have been paying attention, yes, I could have seen it. I was not paying attention to it at the time.
- Q. Mr. Carr, then you did not look at the signal at that time, is that correct?
- A. That's correct.
- Q. Mr. Carr, when Mr. Campbell ascended the stepson the locomotive on the engineer's side and gave you a proceed indication, at what point, Mr. Carr, did you look at the signal that authorized your movement down the lead?
- A. I can't really say that I really did pay a whole lot of attention to it. I assumed that it was flashing red, but I rally didn't pay any attention to it.
- Q. Well, then, Mr. Carr, you cannot state whether it was solid

red for stop or flashing red for proceed for your movement, is that correct, sir?

A. I, like I said, I just assumed that it was flashing red, and I took off. But I couldn't see it, that's correct. I didn't pay any attention to it.

Q. Mr. Carr, as you proceeded down the lead preparing to department, [sic] did you have any contact with the dispatcher prior to movement out of Track 6?

A. The dispatcher did call the train and we changed the general track bulletin, which is considered a GTB, to put our locomotive number on it. I personally didn't talk to him, the conductor did, and he said we would be lined up at the bottom of the A Yard and to go ahead and proceed.

Q. The instruction for your train was signal indication, is that correct?

A. That's correct.

Q. Did you and Mr. Campbell have any further job briefing or communication prior to initiating your movement?

A. He instructed me on what the brakeman was going to do, and that was after we had our GTB's changed, that it was okay to, okay to depart. And that's about all, the only conversation that we had about that.

Q. Mr. Carr, there was no conversations between yourself or your conductor regarding signals or anything relating back to the dispatcher's instructions?

A. No.

Q. Mr. Carr, when the dispatcher called over the radio, did you figure something was wrong?

A. Yes, sir.

Q. Mr. Carr, did the dispatcher ask your location or did they just come out and tell you to stop your train?

A. They told us to stop the train. (Transcript pp. 26-28)

Based upon the above admission, and the statement Claimant gave the night immediately following the incident which reads in part thereof:

Started to pull from B Yard, stopped at the B1 switch to line. After conductor lined switch, we started to pull toward the top end of the A Yard. Conductor talked to the dispatcher to change the GTB's, general track bulletins. Overheard dispatcher calling A Yard about someone occupying the lead at the east B's. Was told by the dispatcher to stop train. I was sure that the signal was clear but I was not paying attention to the signal. I was the one controlling the locomotive and take all responsibility for this incident.

The Carrier determined that Claimant violated a signal which violation "warrants significant discipline" and in some cases, justifies a "stand-alone" dismissal. This together with the fact that this was Claimant's second Level S infraction within a twelve (12) month period, the Carrier dismissed Claimant from service.

In support of discharge, the Carrier relied upon Public Law Board No. 6041, Case Nos. 72 and 73, wherein the Board determined that Claimants Patterson and Lucero passed a red signal at Long Beach Junction without proper authority.

The Carrier noted a severe lack of communication between the crew members, submitting that Patterson demonstrated little concern for the rules when he

anticipated that the Badger Bridge Operator had cleared all signals. The Carrier concluded that passing a red signal is one of the most flagrant violations a train crew can commit, citing Award 2 of PLB 5403, in support of its position. In said case, Referee Quinn concluded that:

The claimant was properly found at fault for proceeding past a red signal. The claimant was afforded an impartial investigation and the discipline imposed was for just cause. It has been upheld time and time again that running a red signal is one of the most fundamental infractions of safety known to the railroad industry and absent any warranted mitigating circumstances, dismissal is justified.

Based upon the foregoing, the Board found that dismissal was the appropriate sanction in Case Nos. 72 and 73. Specifically, the Board found that Patterson's prior service record indicated several Level S suspensions, the last of which occurred fewer than thirty-six months prior to the incident then at issue. And, the Carrier concluded that a second serious incident within a thirty-six month review period will subject the employee to dismissal.

Finally, the Board found that Claimant Lucero also received a Level S suspension and three years' probation and such misconduct subjected Claimant to dismissal. The Board concluded that both employees were sufficiently warned that future

violations could result in immediate dismissal and such policy is reasonable and enforceable.

In further support of its position, the Carrier relied upon Public Law Board No. 4901, Award No. 203 (Wallin, Neutral Member) in which the Board concluded that the Carrier was justified in dismissing Claimant based upon its finding that Claimant stopped short of a dark signal.

The Board noticed that Claimant had just under twenty-five (25) years of service and that Claimant's work record in the last five (5) months indicated that a Level S suspension as well as a dismissal resulted from his failure to line the proper switch which resulted in injury to an Engineer.

Wallin noted that three of the ten violations against Claimant were subsequently dismissed but that the Level S discipline remained in effect. Therefore, Wallin ruled that Claimant had two prior matters on appeal to the Board resulting in probation in the year preceding the instant discipline.

Wallin further concluded that Claimant's claim was unfounded and that reduced visibility did not reduce Claimant's responsibility. Instead, Claimant should have had heightened responsibility in order to detect the signal and slow to a crawl until

the condition of the signal could be verified.

For the foregoing reasons, the Board concluded that the discipline of discharge was not harsh or unreasonable when taken together with prior discipline.

The Board in the instant matter submits that a different set of circumstances exist with respect to the instant Claimant, who had only one Level S suspension prior to the instant matter, in the past twelve (12) months and no record of injuries, violations or disciplines in the five years prior to his first Level S offense in January 2003 for which he received alternative handling.

In support of its position that Claimant should be reinstated to service with the BNSF, the Organization submitted that the Carrier's assessment of Claimant's dismissal was arbitrary and excessive.

The Organization relies upon the fact that Claimant had thirty (30) years of railroad service with the BNSF when he was charged with passing a red signal without authority.

The Organization acknowledged that early in the year of the subject incident, Claimant failed a drug/alcohol test. Claimant submitted that he was distracted by

personal problems and as a result, he sought the assistance of the Twelve Point Program to deal with his problems and focus on his work. Based upon the foregoing long-term record and Claimant's efforts to correct the situation, the Organization concluded that Claimant should not be dismissed, particularly since no one was harmed. In addition, the Carrier failed to consider the employee's tenure, previous good service, personal circumstances and his efforts to ensure no recurrence of wrongdoing by means of the Twelve Point Program.

The Organization requested that Claimant be offered alternative handling, which request was denied. Said request was denied by the Carrier based upon the 2002 Alternative Handling Agreement. Specifically, the Carrier relied upon Part VI, subparagraph B entitled "Employee Eligibility for Alternative Handling" which provides, as follows:

(I) Class I offenses - An employee is ineligible for alternative handling if he/she has: (1) more than three prior alternative handling events for Class I violations, (2) three violations of any kind in the previous 12 months, (3) a Class I violation in the previous 12 months, or (4) a violation of the same Class I offense in the previous 24 months. (Carrier Ex. 4)

In addition, the Carrier in the instant matter relied upon its Policy for Employee Performance Accountability (PEPA) which provides that in the event of a Serious

Rule Violation, the following discipline is appropriate, namely:

c. A second serious incident within a 36-month review period will subject the employee to dismissal. Exception: the serious-incident review period will be reduced to 12 months for employees who have completed at least five years' service and who have been injury and discipline free during the five years of service preceding their first serious incident. (Carrier Exhibit 15)

The Board in the instant matter notes that paragraph "d" as set forth in the Serious Rule Violations of PEPA, states:

In some cases, alternative handling may be offered to employees involved in serious rule violations, in lieu of record suspension.

However, the foregoing alternative handling is not available to Claimant in the instant matter because the matter under appeal is Claimant's second Level S offense within a twelve (12) month period.

Notwithstanding the provisions of alternative handling, hereinabove discussed, the Board recognizes that factors other than alternative handling should be considered in those instances where a finding of discharge would be unreasonable. Thus, in

National Railroad Adjustment Board, First Division, Award No. 24875 (Referee Wesman) the Board noted that an Engineer should be reinstated to employment. The Board noted that Claimant had a clean disciplinary record for seventeen (17) years, was thereafter assigned to the position of Locomotive Engineer, a position he held for five months, when he was dismissed. The dismissal was imposed because the train on which he was engineer passed a red block and collided with another train.

It is undisputed that Claimant and the conductor slowed the train down and then put it into emergency but there was insufficient time to stop the train.

The Board ruled that the Engineer shared in the responsibility for the accident but in light of his prior record and long years of service, a penalty of dismissal would be excessive.

In National Railroad Adjustment Board, First Division, Award No. 23902 (Referee Fletcher), the Board also concluded that Claimant's record of thirty eight (38) years' service also justified reinstatement to employment.

Claimant in this matter passed an absolute stop but the investigation determined that the signal was located in an unusual position. Claimant had used the route before

and it was the Carrier's policy to avoid the route and since the incident, the Carrier stopped using the route totally.

Notwithstanding the Organization's contentions, the Board concluded that Claimant should have been alert to avoid passing a stop signal. However, the discipline was reduced to a thirty (30) day suspension while holding that passing a red absolute signal cannot be taken lightly. The Board in the instant matter finds significant similarities between the foregoing matter and the instant matter and agrees with the findings set forth in Arbitrator Fletcher's award.

In National Railroad Adjustment Board, First Division, Award No. 25919 (Referee La Rocca), the Board concluded that Claimant's dismissal was excessive. Claimant provided twenty-four (24) years of loyal service to the Carrier but gave Claimant a final warning that he must comply with all Rules and upon reinstatement to service, he will be placed on Level 4 so that if he commits another offense within the applicable period of time, he will be discharged.

This Board agrees with the findings in National Railroad Adjustment Board, First Division, Award No. 25919 (Referee La Rocca), which similarly reduced a Claimant's culpability based upon his multiple years of service.

Relying upon the foregoing Awards, the Board concludes that Claimant's dismissal was unduly harsh. The Board finds however, that Claimant's admitted inattentiveness to his duties warrants significant discipline and his dismissal shall be reduced to a suspension of time served and he shall be returned to work without compensation or benefits for time lost. While the Board recognizes that no harm was done in this situation, that fact does not diminish Claimant's culpability.

Under the foregoing circumstances and recognizing that the Carrier must exercise concern for safety and that Claimant violated a major safety issue by passing a red signal the Board is satisfied that Claimant accepted responsibility for his wrongdoing, that he has resolved the personal issues which contributed to such wrongdoing and that he has endeavored to comply with all requirements necessary for reinstatement.

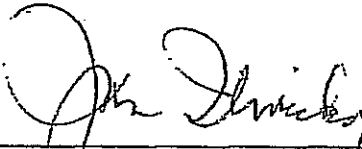
Under the foregoing circumstances, the Board concludes that Claimant shall be offered an opportunity to resume employment by the Carrier, mindful of the fact that a similar act of wrongdoing may result in dismissal.

AWARD:

Claim sustained in accordance with the Findings hereinabove discussed.

The Carrier shall have thirty (30) days from the date of postmark to comply with

the Award.



JOAN ILIVICKY, Chairman
and Neutral Member



GENE L. SHIRE, Carrier Member



STEPHEN D. SPEAGLE, Organization Member

Dated: August 25, 2006

