

SPECIAL BOARD OF ADJUSTMENT NO. 1063

In the Matter of the Arbitration Between:
NORFOLK SOUTHERN RAILWAY
COMPANY

and

NMB Case No. 544
Claim of Michael W. Oswald
Thirty days actual suspension

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM: Appeal of discipline assessed Engineer Michael W. Oswald of a "thirty (30) days actual suspension". On behalf of Engineer Oswald, we ask that this assessment of discipline be removed from his record and that he be paid for all lost time in connection with this discipline.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant(s) employees within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on June 25, 2003 at Norfolk, Virginia. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Engineer's craft.

Claimant is employed by the Carrier as an Engineer. He entered service with the Carrier on April 6, 1996, and was qualified as a Locomotive Engineer on February 17, 1999. He served as a Yardmaster for a period ending on January 26, 2000, at which time he returned to engine service. Refresher training and requalification were required; and to that end Claimant availed himself of an opportunity to operate from Moberly to Kansas City on February 10, 2000. He was assigned to Train 145D309 operating from from Kansas City to Moberly working with a crew consisting of Engineer Randell Fidler and Conductor T. W. Lind.

The Crew originated at the Carrier's North Kansas City yard, was routed to BNSF's Argentine Yard, where they picked up their train and was then routed over Kansas City Terminal track to BNSF track and then on to Moberly. The crew approached KCS Junction Interlocking, where NS and KCT both connect and cross at approximately 10:00 p.m. It was snowing; and visibility was

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reduced. The train was on Track 3. A major railroad construction project was underway at the time; and construction supplies and debris were present in proximity to the right of way. Both track routing and signals were affected by the construction.

At the interlocking, the crew observed a high-mast signal to the left of the track. The signal was dark, apparently the result of a power failure in the area. The crew stopped short of the dark signal and contacted the KCT Dispatcher by radio. The Dispatcher was apparently also affected by the power outage and could not see on his CRT display the precise location of the train. The crew was given permission to proceed east on Track 3 to pass two signals indicating "stop". The instruction was not given in the format required by KCT rules, which restrict such authorization to one signal at a time and require specifics in the instruction which were lacking. The instruction did not identify the signals by number.

The crew confirmed the Dispatcher's instruction. They could see the first of those signals, lit and displaying a stop indication, before they commenced to move. There is some confusion in the communication whether the reference to passing two signals meant two signals within KCT Junction Interlocking or within KCT Crossing, a smaller segment of track within the Interlocking and whether either the Dispatcher or the crew understood the difference.

~~Claimant and the crew were familiar with and qualified on the KCT territory over which they were moving, although there is no evidence to establish that Claimant had operated over the territory since issuance of the Orders and bulletins which described the changes which led to the incident and he was only then requalifying over the territory. The crew understood that KCT timetable instructions and bulletins govern the movement of the Carrier's trains while they are on KCT track.~~

Claimant and the crew understood the Dispatcher's instruction to be to pass signal 94R at the Junction and signal 38RA at Rock Creek Junction. That was not, in fact, the Dispatcher's intent, since between 94R and 38RA was a dwarf (low) signal 102R located to the right of the track between signals 94R and 38RA. That signal had been relocated and, because of the power failure, was dark. It was also small and located in an area full of construction supplies and debris and was not seen by the crew in the snowy darkness.

With Claimant actually operating the train, the crew passed 94R, then passed signal 102R, not knowing it was there, and then passed signal 38RA. The crew then overheard on the radio another (C&NW) train questioning a red signal it had received at Rock Creek, which indication was triggered when Claimant's train passed signal 38RA and entered the block. Because of concern that there might be a problem, Claimant and the crew stopped their train and contacted the Dispatcher. The crew had, in fact, passed signal 38RA without authority, permission having been given (although not by signal number) only to pass signals 94R and 102R.

The Carrier is advised by KCT of changes in routes and signals through orders and bulletins. Those instructions are sent to the Carrier and are supposed to be transmitted to both Moberly and North Kansas City, where Carrier officer Browning (in North Kansas City) and Cox (Moberly) post them for review by crews, who are responsible to review postings. The existence of signal 102R was described in General Order No. 3 dated April 1, 1999. The signal was new at that time. Claimant and the members of the crew denied ever having seen that Order.

The evidence establishes that General Order No. 3 was posted in Moberly, but discarded in error, along with other bulletins, by Mr. Cox. The Order was also missing from North Kansas City, as conceded by Mr. Browning. It is not established that the bulletins were ever re-posted; indeed, the sufficiency of the Carrier's procedures in effect at the time to ensure the posting of foreign road orders at the time is in doubt¹. The Board is not persuaded that the Carrier made the bulletins available to North Kansas City-Moberly crews at times relevant to this claim. Thus, concludes the Board, neither Claimant, his Conductor nor Engineer Oswald were aware of the new signal until after the incident.

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Hearing Officer Quinn did not allow the Organization to explore fully Carrier policies with respect to the posting of foreign road bulletins, characterizing the inquiry as "irrelevant", a view the Board does not share and which hearing officers make at the risk of being overturned. Indeed, the transcript reveals that the Hearing Officer inserted himself inappropriately and injudiciously throughout the investigation. As indicated in the body of the Opinion, because of the disposition of the dispute on other grounds, the Board does not specifically rely on the Hearing Officer's handling of the hearing as a basis for overturning the discipline; however, the Carrier is admonished to correct inappropriate Hearing Officer conduct of the type displayed herein.

The Carrier removed Claimant and the crew from service following the incident, conducted a reenactment and then convened an investigation at which the above evidence was adduced. The Carrier determined as a result of the investigation that Claimant and Engineer Fldler and Conductor Linn had each violated Operating Rule 240, which requires employees to stop short of stop indications. It assessed Claimant a disciplinary suspension of 30 days.

The Carrier also revoked Claimant's Locomotive Engineer Certificate for 30 days, an action which BLE appealed to the FRA Locomotive Review Board, which, by ruling dated March 20, 2001, held:

While a requalifying engineer is responsible for any violations unrelated to familiarity with the territory (e.g., operating a train at excessive speed), by definition he or she is not charged with knowing the physical characteristics of the territory upon which he is requalifying. Therefore, at the time of his requalification trip, Petitioner [Claimant herein] was not responsible for knowing such details as the movement of Signal 102R from the north to the south side of Main Track No. 3.

On that basis, it disapproved the Carrier's revocation of Claimant's certification.

The instant claim, seeking rescission of the suspension and compensation for wages and benefits lost, was presented in due course and progressed on the property in the usual manner, but without resolution; and it was submitted to this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues the record contains substantial evidence of Claimant's guilt of violating the Rule with which he was charged. It asserts that Claimant and the crew admitted that they failed to stop short of signal 38RA which was displaying a stop indication. The Carrier asserts that the conversation between the crew and the CKT Dispatcher establishes that the crew had been given permission to pass only two signals, but passed three, the last (at Rock Creek) being without authorization. It is not disputed that the crew were jointly and severally responsible to observe and comply with the signal indications. In particular, the Carrier asserts that Claimant, who was operating the train, was responsible to observe signals

affecting its movement. The Carrier points out that LERB decisions do not involve questions whether the governing agreement was violated and are not binding on a Special Board of Adjustment.

The Carrier rejects the procedural challenges to the discipline which the Organization presents. It points out that the Claimant and the crew acknowledged the essential accuracy of their communications with the Dispatcher, confirming the sufficiency of the transcript furnished. For those reasons, it maintains that the failure to produce the Dispatcher as a witness was immaterial. As to the Organization's assertions that the governing KCT bulletins were not available to Claimant and the crew, the Carrier asserts that it was the crew which had the obligation to be aware of any changes in signals and the obligation to proceed with particular caution because they were operating in the darkness and during a power outage. The Carrier points out that Claimant and the crew failed to clarify the instructions from the Dispatcher. As to the Organization's complaints concerning the conduct of Hearing Officer Quinn, the Carrier asserts that he conducted himself appropriately throughout and did not improperly limit the Organization's questioning.

The Carrier concedes that the incident resulted in certain changes in operational practices by KCT, but denies that the conduct of the Dispatcher or even the unavailability of the bulletins excuses Claimant's failure to properly carry out his responsibilities.

The Carrier argues that the penalty assessed was appropriate to the offense in light of Claimant's record. It points to prior awards of this Board as confirming the appropriateness of the penalty. See Awards 445 and 469 (Vaughn, Neutral). The Carrier urges that the claim be denied.

The Organization concedes the seriousness of running Red signals and acknowledges that Claimant and the crew passed three signals, rather than the two authorized by the Dispatcher, but asserts that the Carrier failed to prove Claimant's disciplinary culpability for violation of Rule 240. It asserts, in the first instance, that the Carrier failed to afford Claimant a fair and impartial hearing, since the Hearing Officer was biased and intimidating, interfering with the Organization's presentation of its case. BLE complains that the Carrier failed to produce the Dispatcher as a witness, presenting instead a KCT official who lacked knowledge of what had transpired in the incident and that the transcript of the communications between the Dispatcher and the

crew was inadequate and inaccurate.

The Organization argues that the record establishes that the crew believed only one signal (94R) to govern the KCT Junction Interlocking and was unaware of signal 102R, a belief to which the crew testified. It points out that Claimant was not qualified on the territory and that he had made no previous trips over the territory following relocation of signal 102R and since the issuance of General Order No. 3. It points out, in any event, that the bulletins which would have informed him of the change were not posted by the Carrier and were not available to him, as a result of failures by Carrier officials. It asserts that Claimant had literally no way of knowing of the change. BLE also points out that dwarf signal 102R which the crew passed was dark and was invisible in the snowy darkness and construction clutter.

The Organization also argues that the Dispatcher violated KCT's own rules, which provide procedures and protections to reduce risk, including limiting instructions to pass signals to one signal at a time and at restricted speed. It points out that the inadequacy of KCT's procedures is confirmed by the post-incident changes it made. It also points out that the Dispatcher could not tell the location of Claimant's train.

BLE points out that the LERB overturned the Carrier's action suspending Claimant's certification. It points out that the LERB concluded that Claimant was "not responsible for knowing such details as the movement of signal 102R . . ." BLE maintains that other Boards have recognized LERB rulings as warranting consideration. Here, asserts the Organization, the LERB's conclusion that Claimant was not responsible to know of the relocation of the signal should be given weight.

The Organization argues that, in any event, the discipline assessed was excessive in light of Claimant's lack of qualification and his inability to have done anything different. It points out that Claimant's prior record was excellent, with only two prior infractions, both small and unrelated to the instant matter. It also contends that a suspension imposed in such a situation cannot be deemed to be instructive and corrective. BLE urges that the claim be sustained.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to introduce substantial credible evidence considered on the record as a whole of Claimant's guilt and to establish that the penalty of a 30-day suspension was the appropriate response. The Board concludes

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that the Carrier failed to meet its burden to establish that Claimant's passing the stop indication at signal 38RA occurred under circumstances which warrant discipline. Accordingly, the claim will be sustained.

The evidence establishes to the Board's satisfaction that the signal (102R) which Claimant and his crew passed to reach signal 38RA was small and dark, invisible in the darkness, snow and clutter. The record also establishes that Claimant was not qualified on the territory and had not previously traversed the territory since the signal had been moved and had no experience alerting him that the signal was there. The Dispatcher's instructions gave no clue as to the existence of the new signal and, by instructing the crew to pass two signals under the same instruction, increased the potential problem.

Employees are responsible to be familiar with and comply with applicable bulletins governing the territory over which they operate. However, the Carrier was responsible to make KCT bulletins available to its crews, but the evidence is that it failed to do so, leaving Claimant and the crew with no knowledge of the installation of signal 102R and leaving no way for them to check to determine that the bulletin was missing or that the signal was governing. The Board is likewise unconvinced that Claimant or the crew could have seen the second, dark dwarf signal. Under such circumstances, the imposition of discipline on Claimant for having passed signal 38RA is simply not sustainable.

The Board notes the several procedural challenges advanced by the Organization. Employees are entitled to due process and fair hearing; and when the Carrier fails to provide the Organization with requested documentation, fails to present relevant and competent witnesses and allows the hearing officer to function in an advocacy role, it does so at its peril. In this instance, because of the Board's conclusion with respect to the merits of the dispute, it is unnecessary to reach the procedural arguments.

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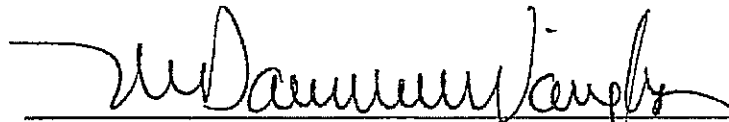
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AWARD: The claim is sustained. The Carrier failed to submit evidence sufficient to sustain its burden to show that Claimant's conduct in the incident warranted discipline.

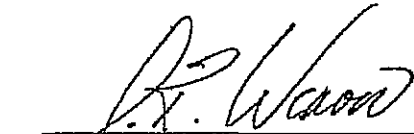
Claimant's suspension shall be rescinded and he shall be made whole for wages and benefits lost as a result of the action. Claimant's records shall be amended so to reflect.

The Carrier shall implement the Award within 30 days from the date of its issuance.

Dated this 1st day of December, 2003.



M. David Vaughn, Neutral Member



S. R. Weaver, Carrier Member
(I dissent)



P. T. Sorrow, Employee Member
