

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25361
Docket No. 45503
02-1-01-1-B-2170

The First Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Burlington Northern Santa Fe Railway

STATEMENT OF CLAIM:

"Claim in behalf of Conductor S. L. Terry, Denver, Colorado, for full reinstatement to the Carrier's service, payment of all time lost, seniority unimpaired, vacation rights, and expungement of any mention of the alleged incident on his personal record."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

At the time of the incident that gave rise to this case, Claimant S. L. Terry was working as a Conductor on a train between Cheyenne, Wyoming, and Denver, Colorado. The train was stopped at Broomfield, Colorado, and the crew was in the process of picking up some cars when Mr. Adams, Manager of Operating Rules, who was assigned to a System Operating blitz team, approached the Claimant's train. Adams overheard radio transmissions by the crew indicating that they were performing work in the area. In order to observe the train crew working, he drove his vehicle to a location where he could not be seen and began to observe the crew's operation.

Adams took video pictures of the Claimant while he was doing his job. After the Claimant completed the coupling of the cars on which he was working, Adams radioed the Claimant and told him not to continue working until he talked to him. Adams confronted the Claimant about switching safely and pointed out to him the safety violations he had observed and had recorded on tape. The Claimant was then told to wait in the engine until instructed to do otherwise. Adams called the Superintendent in Denver, reported the incident, and requested instructions. Adams was told to have the crew continue its work

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and to bring the train to Denver. The crew was to be interviewed on their arrival in Denver by Terminal Train Master J. V. Wetta. As a result of the interview, Adams' eye witness report, and Terminal Superintendent Perdew's viewing of the video tape of the incident, the Claimant was notified as follows:

"April 30, 2001

INV - 083

CERTIFIED MAIL #

S.L. Terry Conductor	#7932288	7000 1670 0007 3343 5949
I. Dawson Engineer	#7934219	7000 1670 0007 3343 5956

Attend investigation in the Second Floor Conference Room, 3700 Globeville Road, Denver, Colorado, at 0900 hours, May 7, 2001, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure or contributing to the failure of properly abiding by the following rules: 1) Getting on or off moving equipment, 2) Going between or working on the end of rail equipment, 3) Providing a minimum separation of 50 feet between cars or locomotives before going between or crossing between equipment, 4) Stepping on rails, and 5) Proper position to operate or release a handbrake at approximately 1505 hours, April 26, 2001, at MP 14, Front Range Subdivision, while assigned as crew members on train M-LAUDEN 1-24, on duty 0600 hours, April 26, 2001.

Mr. Terry, this is to advise you that you are being withheld from service pending results of the investigation.

Mr. Dawson, forty-eight hours prior to your investigation it is your responsibility to input electronic layoff request with Crew Support for the time of the investigation.

You may arrange for representation in line with the provisions of schedule agreement governing the working conditions, and you may arrange for the appearance of any desired witnesses.

Please acknowledge receipt by signing below and returning signed copy.

Respectfully,

J. T. Perdew
Terminal Superintendent"

The Investigation in the matter was held as scheduled. The video of the incident was shown and there was testimony by the Claimant, Engineer Dawson, Terminal Train Master Wetta, and Adams, via telephone. BLE Local Chairman T. D. Sutton represented

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the Claimant. All parties received ample opportunity to examine and cross-examine witnesses (even though Adams was examined by telephone) and to make comments on the record.

As a result of the Investigation the Claimant was found guilty of violating numerous Safety Rules known in the industry as the "Seven Cardinal Rules." The Carrier concluded that dismissal was the appropriate penalty and the Claimant was sent the following letter:

"May 17, 2001
INV - 083

CERTIFIED MAIL #

S. L. Terry Conductor #7932288 7000 1670 0007 3343 5710

This letter will confirm that as a result of formal investigation held May 7, 2001, concerning your failure to properly abide by the following rules: 1) Getting on or off moving equipment, 2) Going between or working on the end of rail equipment, 3) Providing a minimum separation of 50 feet between cars or locomotives before going between or crossing between equipment, 4) Stepping on rails, and 5) Proper position to operate or release a handbrake, at approximately 1505 hours, April 26, 2001, and your blatant disregard for your own safety and failure to accept responsibility for your actions, you are dismissed from employment for violation of Rules S-13.1.1, S-13.5, S-13.2.4, S-13.1.3, and S-13.6.3 of the TY&E Safety Supplement, No. 1 effective April 1, 1998 as amended or supplemented.

Please arrange to return all Company property and any Amtrak transportation passes in your possession. A check will be issued for any moneys due you.

This letter will be placed on your personal record. Your signing below serves as receipt of this dismissal.

Respectfully,

K. C. Wilkowski
Division Superintendent
RECEIPT ACKNOWLEDGED BY:"

The Organization immediately filed a claim on the Claimant's behalf. The claim was denied at all levels and, on November 7, 2001, it was progressed to the Board for final resolution.

The Board has reviewed the record in detail and viewed the video tape that is the primary piece of evidence in this case. As a result of that review, the Board has concluded

that the Claimant did in fact violate those Safety Rules that were listed in the May 17, 2001, letter from K. C. Wilkowski to him. The Board understands that since this Docket was considered by the Division, the Claimant has been restored to service. Thus, there remains to be determined the appropriate measure of discipline in this case.

The parties in this case take a number of disturbing and illogical positions. The record reveals that the Carrier offered the Claimant a settlement of his claim for a 30-day Suspension, a 30-day actual Suspension, a 30-day record Suspension, participation in a safety briefing in regard to the seven cardinal Rules, and acceptance of responsibility for his actions. The Claimant rejected this offer and continued to remain out of service.

The Board finds it difficult to understand why the Claimant would not at least take responsibility for violating the Rules where the Rule violations are clearly visible on the video tape. For example, it shows him getting off a piece of moving equipment and stepping on rails. This alone warrants a 30-day Suspension. The Board has therefore concluded that some of the hardship visited upon the Claimant was of his own doing. He could have been back to work with only 30 days' loss of pay.

On the other hand, the Carrier has been overly aggressive in dealing with the Claimant. It has demanded as part of its settlement offer that the Claimant accept responsibility for his actions, as he should have. The Carrier, however, allowed the Claimant and his crew to work the train back into Denver after he was accused of numerous safety violations. There is no doubt that this was done for the convenience of the railroad. The operation of a train by a crew accused of unsafe practices was put aside until they arrived in Denver and were interviewed by the Terminal Trainmaster, J. V. Wetta. This is not an appropriate procedure to follow in this situation, especially since the Claimant was held out of service from this point on. If he was good enough to work the train from the point of the alleged Rule violation, he was good enough to work at least until his trial was over and he was found guilty as charged.

The Carrier also erred by not having Adams at the Hearing to confront the Claimant and be available for cross-examination by the Claimant and his Representative. While Adams' presence at the Hearing would not have altered the images on the video tape or a record of what took place on the scene, it would have had an appearance of evenhandedness, which is a requirement of Investigations under the Railway Labor Act.

Finally, the Board must comment on a letter in the record dated July 12, 2001, from the Claimant to Wilkowski, Division Superintendent, that indicates that the Claimant and Wilkowski met in his office to discuss improving attitudes and morale and reducing injuries for the Colorado Division. It appears from this letter that the Claimant was offered his job back if he took responsibility for his actions. He also seems to have been offered a job in some category as a representative to work toward this end. The Claimant responded by saying he would consider such a position if his record was cleared of all charges in the instant case and he was made whole for all monetary losses. There is no indication in the record of a response to that letter.

Given the total record, the Board is confronted with a 25-year employee with only one element of discipline on his record and no lost time accidents. He is an employee who apparently has a good work record. He is nonetheless stubborn about agreeing that he violated Safety Rules on April 26, 2001, while working at Broomfield, Colorado. This stubbornness has cost him a considerable amount of lost wages.

The Carrier has dismissed the Claimant on the one hand and offered him his job back on the other if he accepted responsibility for his actions. He might even be given a special position in attempting to develop better attitudes and morale among employees and, by so doing, improve the safety record on the railroad. The Board is surprised that given the conditions that exist here, the parties, as experienced negotiators, have not been able to effect a satisfactory resolution of this case.

Since the Board has already concluded that the Claimant should not be permanently dismissed from the Carrier's service, based on all of the facts before it, it remains only to specify the conditions under which he shall be returned to work:

- 1) The Board has concluded that the Claimant worked in a manner that violated numerous Safety Rules involving the switching of cars. He is responsible for these violations and should recognize this for his own good.
- 2) The Carrier has taken an intolerant position with the Claimant because he will not admit that he is wrong. The Board does not consider this element in the case sufficient to justify the Claimant's permanent dismissal.
- 3) The Organization's argument that Adams should have intervened when he observed the first safety violation (the Claimant getting off a moving train) has some merit. The Claimant's crew should not have been allowed to work the train back to Denver. By so doing, the Carrier undermined its position that unsafe workers will not be tolerated.
- 4) The Carrier should have had Adams at the Hearing, in spite of the good intentions of the Hearing Officer to proceed with him on the phone, rather than being present. It would have made the Hearing appear more evenhanded and the Organization could have cross-examined him face to face.
- 5) The Board concludes that much of what took place in this case was for the convenience of the Carrier and while not fatal to the Carrier's case, it to a degree undermines the validity of its position.
- 6) The Board is confronted with a case that, if decided for or against one of the parties, would be a gross injustice to the losing side. The facts

of this case call out for a modification of the Carrier's action short of the Union's demand for complete exoneration of the Claimant and pay for all lost time and benefits. The Carrier's demand for the Claimant's permanent dismissal is also unacceptable. The Board therefore directs as follows:

1. The Claimant shall be assessed a nine-month Suspension. He shall be paid for all lost time beyond nine months.
2. The Claimant shall be required to attend safety meetings at the direction of the Carrier addressing the "seven cardinal Rules."
3. The Claimant should be on notice that regardless of how poorly he thinks the Carrier has handled his case, the video tape shows that he was in violation of the Rules and he should recognize that and move on from here.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 5th day of September 2002.