

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6672**

Parties to Dispute:)
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)
UNITED TRANSPORTATION UNION)
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)
-and-)
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)
THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY CORPORATION)
_____)

OPINION & AWARD

**Case No. 31
Claimant N. A. Ketterling**

EMPLOYEE'S STATEMENT OF CLAIM:

“Claim in behalf of Grand Forks, ND Brakeman N. A. Ketterling for pay for all time lost attending investigation on September 17, 2001 and complete record clearance, including three (3) year probation account deferred thirty (30) day suspension for alleged violation of Rules S-13. 1.1, S-13. 2.4 and S-13. 6.3 of the TY&E Safety Supplement (alleged failure to provide 50 feet of separation between SMNX 370 and BN 500168 prior to going between, failure to properly adjust draw bar, and failure to properly release handbrake) on August 17, 2001.”

FINDINGS

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

Claimant Ketterling had been working as a brakeman on August 17, 2001 when his train stopped in the area of Noyes, MN to perform station work while two Carrier officials were at the same site conducting efficiency training. According to Trainmaster Mark Keller and Terminal Manager Grant Warning, both observed Claimant engaging in several unsafe work practices, as described more fully below, as a result of which this discipline ensued.

The record reflects considerable disagreement over the salient facts. According to Keller, he watched Claimant from a distance of 250-300 feet as he was doubling his train from Track 2 to Track 1. When the train failed to come together with the cars standing on

Track 1, Claimant had his engineer pull ahead to separate the cars. Keller says to facilitate coupling Claimant then stepped between the two cars as his engineer pulled away and kicked the drawbar of the south car standing on Track #1 with his foot. At the time of this incident, Keller says Claimant was between cars separated by a distance of about 50 feet.

After Keller informed Warning, the two men decided to cease their training and discuss the matter with the Claimant. As they drove in his direction, however, both state they then observed him releasing the handbrake of the south car of the cut while standing on the ground, foul of the track.

It is undisputed that Carrier's Rules prescribe how a misaligned drawbar must be adjusted and prohibit accomplishing that task with one foot. They further prohibit going between cars or locomotives unless the equipment is separated by at least fifty feet, and they do not allow for applying and releasing handbrakes from the ground while fouling the track. Accordingly, Claimant was charged with those infractions and following investigation held on September 17, 2001, found responsible for each violation asserted.

The transcript from Claimant's hearing establishes that at the time of these events he took no exception to the charge of failing to provide 50 feet of separation between SMNX 370 and BN 500168 before going between them. According to Carrier's witnesses, upon being asked by Terminal Manager Warning whether he had thought he had 50 feet of separation immediately after being confronted, Claimant openly admitted, "No, probably not, more like 30 feet." Although Claimant repudiated that admission at his hearing, the Board concludes Carrier's credibility determination in favoring Keller and Warning over the Grievant was appropriate and beyond the scope of our review.

The Board is, however, attentive to the Organization's arguments that Carrier has failed to bear its burden of proof on the question of whether Claimant actually operated hand brakes from the ground, Claimant insisting that he merely grasped the wheel, checking to see if the brake was applied. Confidence in the contrary testimony of the Carrier officials is sapped by the fact that they state their observations began while they were at a distance of 250-300 feet from Claimant and ended as they were within 25-30 feet of him. Given the visual difficulty of accurately observing this movement over the length of a football field and the practical question of the minimal time it takes to operate a


handbrake, there would appear to be some reconciling required here on the time and distance aspects of the narrative. Accepting Claimant's testimony at face value and discounting that of Carrier witness Keller based solely on those factors, the Board concludes there is insufficient evidence to establish that Claimant moved or released a handbrake as charged.


With respect to kicking the drawbar to align for coupling, Safety Rule S-13.2.4 (Adjusting Mismatched Couplers) sets forth the proper procedure for proper joining, indicating that the brakeman is to stand to the side of the knuckle and lean against it, not kick the drawbar. Only Trainmaster Keller testified with respect to Claimant's use of his foot, stating that he observed this violation from the same 250-300 foot vantage point at the south end of where Claimant was putting his train together. Given the highly visible nature of that movement, even at the distance involved, the Board has no basis for not crediting Mr. Keller's observations as accurate. This charge is sustained.


The Board concludes in view of the foregoing that Carrier has failed to prove all elements of its charges. Remedy issues in this instance are somewhat complicated by the unusual length of time passed since discipline was imposed and the Board's lack of insight with respect to Claimant's service record prior to or following these incidents. Under the circumstances, we will direct Carrier to remove all references to this discipline from Claimant's records.

A W A R D

The Claim is sustained.


James E. Conway
Chairman and Neutral Member


Roger A. Boldra
Carrier Member


Jay L. Schollmeyer
Employee Member

Dated: Great Falls, VA
March 20, 2009