

PUBLIC LAW BOARD NO. 7425

**PARTIES) SMART - TRANSPORTATION DIVISION
TO)
DISPUTE) BNSF RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim of Tacoma, WA Conductor B. A. Kemp for removal of Level S, Thirty (30) Day Record Suspension and One (1) Year Review Period and pay for all time lost as the result of the investigation held on April 10, 2013. (Organization File No. D2129; Carrier File No. 50-13-0034)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

This dispute arises out of a Carrier determination that testimony and exhibits brought forth at an April 10, 2013 hearing show the Claimant to have failed to properly protect and control a road switcher shoving movement of auto rack cars, resulting in damage to security gates protecting a customer's property, the Kent Rail Auto Facility, on February 9, 2013. The Carrier held the Claimant to have violated GCOR 6.5, "Shoving Movements."

In a prehearing hand-written statement the Claimant described the incident at issue to have been as follows:

I was the conductor on R-NWE7101-09 on duty at 1800 2-9-13. We were shoving from the controlled siding to the Kent auto facility with 51 loaded auto racks. As we neared the gate I gave a 5 car count. The engineer indicated that he was having a hard time understanding me and asked me to repeat. I then gave him a 3 car count. Next I gave him a 2 car count. The engineer asked the brakeman to take over as he could not hear my radio clearly. The brakeman gave the engineer an additional 2 cars then told the engineer to bring it to a stop. I felt that we would not stop in time and instructed the engineer to "dump the train" at about 1 car length from the gate. The engineer put the train into emergency. We stopped about 5 feet past the gate causing damage to the two gates at the auto facility. No damage occurred to the rail car and no one was injured. This occurred at approximately 2105 hours.

The pre-hearing statement of the train's Engineer reads as follows:

Shoving into Kent Auto Facility. With Conductor and Brakeman riding and protecting the point. The countdown to a stop was given from the Conductor. Shortly after the 5 or so car count. I requested control of the movement be changed to the Brakeman, due to radio issues. Request was granted. I then received a three car count to a stop. Immediately thereafter I received two car count immediately to a (stop), from the Brakeman. The Conductor then stated, place train into emergency.

The train's Brakeman provided a hand-written statement that reads as follows:

While riding the side of an auto rack into the auto facility, the engineer instructed he was having difficulty hearing the conductor's instructions while protecting the shove. The conductor raised his voice to be better heard over the radio, but the engineer was still having some difficulty hearing. The conductor handed the communication and shove protection off to me and I relayed the last car count of "3 cars to a stop" to the engineer. I immediately shortened the count to 2 and then to "stop" as I was not certain of the stopping distance to the gate and wished to stop 1 car short. When it became apparent that the cars didn't seem to be slowing, I repeated the command to stop and the conductor simultaneously instructed the engineer to "dump it," which he promptly did. The cars continued to travel approx. 50', impacting the auto yard's security gate and came to rest approx. 5' beyond the plane of the gate. There was no evident damage to BNSF equipment, and the gate suffered damage to the two swinging panels.

It is the position of the Carrier that the above crew statements and testimony at the hearing support a finding that the Claimant was essentially in control of movement notwithstanding that control was said to have passed to his Brakeman in what the latter said was about 20 seconds before the draw bar of the auto rack car on which they had been riding on opposite sides of the car hit the outer and then the inner gate to the facility. This change of control, the Carrier offers, after the Claimant said he had given a two car count to a stop; a passing of control too late for the Brakeman to handle as evident from the Brakeman saying that the "cars didn't seem to be slowing" and he "immediately shortened the car count to two and then to stop," with the Claimant simultaneously telling the Engineer to "dump the train."

The Carrier further says it being evident that the crew was admittedly having difficulties communicating with each other, that they should have stopped the shove

for a re-briefing and not have sought to handle the communication issue “*on the fly*,” it being evident that resort to the latter was not a good decision.

The Organization contends that the Carrier failed to properly conduct the hearing in accordance with the Uniform Investigation Rule, particularly as concerns certain documents offered into evidence not having been provided prior to the hearing.

In overall study of the record the Board finds no basis to hold that the Claimant was denied benefit of a fair and impartial hearing. The cited documents were not of such import as to declare a mistrial. Moreover, the hearing officer provided opportunity of recesses for the Claimant and his representative to study such documents.

It is the position of the Organization on the merits of the dispute that because it is evident from the record that the Claimants train was only going two miles per hour when the Engineer was directed to make an emergency application of the braking system it cannot therefore be said that they did not have control of their train.

The Board fails to comprehend the logic of this Organization contention. The emergency brake application became necessary because both the Claimant and his Brakeman found the shoving move was no longer under their control, with this action coming too late to prevent damage to the security gates of the auto facility.

Nor is the Board persuaded that the incident be recognized as nothing more than an unfortunate accident and the presence of an unusual amount of slack in what is offered as a misjudgment of auto rack cars having long draw bars. Certainly, the Claimant and crew knew or should have known the type of cars they were handling.

It being evident to the Board that the Carrier has met a necessary burden of proof for its assessment of discipline for the Claimant’s infraction of rules, we do not find the penalty as imposed to be harsh or unreasonable. The claim will be denied.

Award: Claim denied.



Robert E. Peterson
Chair & Neutral Member



Melissa A. Beasley-Coke
Carrier Member



J. Michael LaPresta
Organization Member

Fort Worth, TX

Dated: 1/9/17