

December 6, 2005. The disciplinary notice also stated that, "Any future incidents may result in your dismissal."

The Organization promptly appealed the Carrier's disciplinary action and the parties discussed the appeal in conference, the record shows. This matter is now properly before the Board for final and binding adjudication.

The Board has carefully considered the on-property record appropriately before us. Initially, we note there are no due process errors which prevent the Board from affording this case a full review on the merits. With respect to the merits, we find that the charges were not proven by substantial evidence. Although the record is extensive in terms of the volume of testimony developed during the fair and impartial investigation, the record is barren of any evidence in support of the Carrier's findings of guilt and its assessment of the discipline. Consequently, the Organization's claim must be sustained in its entirety. Our reasoning follows.

On the incident date, the Claimant and Conductor J. C. McGraph were assigned to Train Q23005, operating from Chattanooga, TN to Nashville, TN. There is no dispute that, during their road trip, the Claimant stopped the train at four work limit locations, referred to as "Form W" locations. It was the Carrier's position that, together, the stops created a delay of approximately 40 minutes which, in turn, caused the crew to outlaw under the Hours of Service Law and Train Q23005's delayed arrival at Nashville. See CSX Exhibit #3.

The testimony of the Carrier's witnesses, Road Foreman L. E. Johnson, Jr., and Trainmaster J. F. Middleton, established that approximately one month prior to the incident date, Middleton had spoken with the Claimant about avoiding train delays when encountering Form W working limits. Middleton testified that he believed, "we had a pretty clear understanding that the engineer was to not stop the train and write down the employee-in-charge instructions." Transcript page 36. The testimony did not indicate that Middleton gave the Claimant a direct, explicit, or clear order prohibiting Form W stops, and that it was such an order that the Claimant willfully disobeyed on the incident date, the Board significantly notes.

Thus, the evidentiary shortcoming in this case as regards the serious charge of insubordination stems from the Carrier's failure to establish by any testimonial evidence that the Claimant failed to obey a direct supervisory order which carried disciplinary consequences. Simply put, the elements essential for proving an insubordination charge are not established in the present record. In addition, the Board has scoured the record for any evidence in support of the ancillary charges, but we find no proof that the Claimant intentionally operated his train in such a

manner that showed poor judgment or a disregard for the Carrier's efficiency standards.

The Claimant did not deny having had the earlier conversation with Trainmaster Middleton, however, he explained that on the November 7, 2005 incident date, it was necessary for him to take the safe and prudent course by stopping the train before entering the working limits because of excessive radio traffic and the need to proceed with extra diligence given the "unsafe situations" which included track work underway, running a 7,237-foot train over mountainous terrain, and excessive radio traffic. Transcript pages 46 – 50. Through its submission of UTU Exhibit #2, the 10-page Bulletin 19609 governing the Claimant's assignment on Train Q23005 operating on the Carrier's Chattanooga Subdivision, the Organization established that, on the incident date, there were numerous train orders and dispatcher messages which required the Claimant's adherence and compliance.

During cross-examination of the Carrier's witnesses, the Organization successfully established the Carrier's failure to construct a *prima facie* case against this Claimant, we conclude. For example, Road Foreman Johnson testified that the stops the Claimant had made prior to clearing the Form W limits were not the sole cause of the crew's expiration (at Bell Buckle) under the Hours of Service Law, and that he had no specific knowledge of other delays. Transcript pages 10, 11, 16 and 17.

Moreover, Johnson testified that it is sometimes necessary to write down Form W instructions and that if the Claimant was unable to reach Foreman G. E. Church, the employee-in-charge of the Form W work limits extending from MP J 87.0 to MP J 80.3, as the Claimant contended, then he should have stopped the train. Transcript page 18. Although Johnson's testimony indicates that he checked the Claimant's radio and found it to be properly working, he also essentially testified that he did not observe conditions on the Claimant's route and stated that he "wasn't out there." Transcript page 55.

Accordingly, given the Carrier's failure to shoulder its requisite evidentiary burden of proof, the instant claim must be sustained in its entirety. The discipline will be expunged from the Claimant's record and he is entitled to lost wages and to be otherwise made whole as a result of the Carrier's unwarranted disciplinary action in this matter, we rule.

AWARD:

Claim sustained. The Carrier is ordered to comply with this Award within 30 days of its date.

Lynette A. Ross

Lynette A. Ross, Neutral Member

H. Joseph Garcia

H. Joseph Garcia,
Carrier Member

Roy G. Boling
Roy G. Boling,
Employee Member

Dated: 11/27/07