

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

Award No. 25419  
Docket No. 44994  
03-1-00-1-U-2201

The First Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(L. L. Lovelady (D. E. Thompson)

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"The employees respectfully request the discipline letter of December 15, 1999 be expunged from the personal record of Engineer L. L. Lovelady and that he be paid for all time lost including vacation credits and pay resulting from the investigation and suspension."

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.

By letter dated November 9, 1999, the Petitioner was directed to appear for a formal Investigation and Hearing into charges that he violated Carrier Operating Rules, Air Brake and Train Handling Rules, and Safety Rules when he "allegedly let Engine UP 9504 get of control and roll through the West Main line power switch at Palomas, New Mexico, MP 1613.7, on November 3, 1999. The engine then continued West striking the Engines of the MNEP." After a postponement, the Investigation was conducted on December 6, 1999. As a result of the Investigation, he was found guilty of the charges, and the Carrier issued a Level 3 to the Petitioner under the UPGRADE

Discipline policy, involving a five-day suspension. A claim was filed on the Petitioner's behalf, challenging the Carrier's decision to discipline him. The Carrier denied the claim.

The Carrier initially contends that there were no procedural defects in its handling of this matter that would justify voiding the discipline. The Carrier maintains that there is no evidence or merit to support the Petitioner's procedural allegations. Instead, the number of these allegations demonstrates that he is attempting to avoid the substantial evidence and testimony presented at the Investigation showing his guilt. The Carrier emphasizes that the Petitioner has failed to identify any objection or challenge that denied him a fair and impartial Hearing.

As for the Petitioner's objection that the Notice of Investigation was not timely issued, the Carrier asserts that the BLE System-Discipline Rule specifies that such notices must be issued within ten days of the time the appropriate Carrier officer knew or should have known of an alleged offense. The Carrier points out that instant Notice was issued within six days of the date of the incident. The Carrier further asserts that contrary to the Petitioner's assertion that he and his representative were not allowed to examine material prior to the Investigation, there is no evidence that the Petitioner or his representative requested to examine any material prior to the Investigation. The Carrier additionally contends that there is no merit to the Petitioner's argument that the Letter of Discipline was untimely. The Carrier points out that the BLE System-Discipline Agreement requires that such a decision be issued within ten days after completion of the Hearing. The Letter of Discipline in this matter was issued nine days after completion of the Hearing. The Carrier then asserts that the Petitioner's belated argument that the transcript of Investigation was incomplete also must fail because there is no evidence that he or his representative sought an examination of the hearing tapes or a correction of the transcript. Moreover, a review of the transcript page at issue reveals that the testimony recorded thereon was not entirely pertinent to the overall record.

The Carrier contends that it complied with the governing procedures in its handling of this matter. The Carrier argues that the Petitioner's procedural challenges are without merit and must be denied or dismissed in their entirety.

The Carrier goes on to contend that there is substantial evidence that the Petitioner is guilty as charged. His own statement makes it clear that he and the other crew members had no clear understanding of who was going to do what specific job to

make the proper engine exchange of UP 9504. The facts further establish that the Petitioner intended for his train to go into emergency brake application when he disconnected his two lead units, UP 8504 and CNW 8707, from his third unit, UP 9504. When he pulled the two lead units westward, however, his train did not go into emergency, which would have set the brakes on his train unit, UP 9504. The Carrier contends that the record therefore shows that he and the other crew members did not have a proper job briefing prior to making the engine exchange, which ultimately failed. The Carrier points out that it was due to luck that no personal injury or other catastrophe occurred.

The Carrier further asserts that the evidence shows that someone released the knuckle pin, which caused the knuckle between UP 9504 and UP 9533 to open. This allowed UP 9504 to run away and hit the MEPHN-02 power consist head on. Neither the Petitioner nor any other crew member admitted to pulling the pin or to knowing who did this. The Carrier contends that the Petitioner's violations puts the Carrier at risk with regard to timely service for its customers, and these violations subject the Carrier to penalties and/or possible loss of business for failing to meet required customer commitments. The Carrier maintains that in an effort to shift the blame to others, the Petitioner assumed that he complied with the Rules. The Carrier maintains, however, that to "assume" rather than "ensure" the Rules had been complied with is a defense that will not stand. The Carrier contends that the Petitioner did not ensure that the Rules were complied with, thereby providing substantial evidence of his guilt.

The Carrier then argues that the assessed discipline was reasonable in light of the seriousness of the offense. The Carrier emphasizes that the Petitioner's guilt is not lessened by the responsibility of the other crew members. Violations of Operating and Safety Rules are serious matters. The Carrier recognizes the Petitioner's disciplinary record, but it asserts that the evidence supports the finding that he violated the Rules as charged. In light of the Petitioner's record and the Carrier's consistent and progressive discipline policy, the Carrier argues that it properly assessed a Level 3 in this matter. The assessed discipline was not unjust, unfair, or excessive. The Carrier maintains that the magnitude of his violation and discipline record fully justifies the assessed discipline. The Carrier therefore contends that the instant claim should be denied in its entirety.

The Petitioner contends that he had 41 years of incident-free service with the Carrier and its predecessor. He asserts that the record does not provide even a scintilla of evidence that suggests he was at fault or in any way responsible for the incident at

issue. The Petitioner maintains that he did not violate any of the Rules listed in the charge notice or the discipline letter.

The Petitioner argues that the record shows that he never was on the third unit or between the third and fourth unit. Instead, after he stopped the train and Conductor Boatman made the required uncoupling between the second and third unit, he returned to the lead unit and operated the two unit west to the clearance point, leaving the third and fourth units, as well as the train, secured as verified by Carrier Officer Craft. Whatever happened between 9:46 and 10:03 A.M., the Petitioner asserts he was not responsible for the uncoupling, the pulling of the pin between the third and fourth unit, or the release of the brakes, which allowed the unit to roll away. The Petitioner argues that it is clear that he remained on the lead unit during this time period, and he was not responsible for what occurred.

The Petitioner goes on to argue that the record makes clear that the charge letter was not given to him until November 14, 1999, after the expiration of the ten-day period set forth in the System Agreement. The Petitioner contends that the Carrier cannot comply with this requirement simply by mailing the notice within ten days of the incident because the agreement clearly provides that the employee will be given written notice within ten days, which means that the letter must be provided to the employee within that time, not issued or mailed.

The Petitioner further asserts that the agreement requires the Carrier to provide a full and complete copy of the transcript. The Petitioner points out that when informed of the missing testimony, the Carrier failed to take advantage of the agreement provisions for correcting the error. The Petitioner argues that the Carrier therefore must be held accountable. He contends that there are at least four sustaining awards on the property given the Carrier's failure to timely provide a complete transcript pursuant to the agreement.

The Petitioner ultimately contends that the claim should be sustained.

The parties being unable to resolve the issues at hand, this matter came before the Board.

The Board has reviewed the procedural arguments raised by the Petitioner and we find them to be without merit; he was afforded a fair and impartial Hearing.

The Board has reviewed the evidence and testimony in this case, and we find that the Carrier has failed to meet its burden of proof to support the finding that the Petitioner was guilty of violating Carrier Rules by letting an engine get out of control and roll through a power switch. The record reveals that there were at least four Carrier crew members who were involved in the runaway unit event, and a thorough review of the record fails to provide convincing evidence that it was the Petitioner's wrongdoing that led to the mishap. The Carrier argues that the parties failed to develop a clear understanding of which employees were doing what procedures; however, the fact that they did not have a good meeting in advance does not necessarily mean that the Petitioner violated the Rules causing the accident.

It is fundamental that just because something bad occurs does not mean that an individual employee is deserving of discipline. There must be sufficient proof that the Petitioner acted in violation of the Rules and was somewhat responsible for the accident. The extensive record in this case makes it clear that there were at least four employees who did not act properly in some respects who may have been responsible for what occurred. However, the Board finds that that is not enough to support a Level 3 discipline of the Petitioner.

Since the Carrier has failed to meet its burden of proof in this case, the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Petitioner(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 30th day of April 2003.