

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25420

Docket No. 44995

03-1-00-1-U-2202

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

(J. D. Dix (D. E. Thompson)

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"The employees respectfully request the discipline letter of March 13, 2000 be expunged from the personal record of Engineer J. D. Dix 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 15, 1999, the Petitioner was notified to attend a formal Investigation and Hearing into charges that while employed as a crew member on the IEPIM-11 at about 11:48 P.M. on November 12, 1999, the Petitioner "allegedly failed to stop at least 400 feet from the signal at the East end of Waldeck while stopped on main track to meet the IIMLB-11, and your alleged failure to line the switch for the opposing train to leave the main track, which may have contributed to your train being struck head-on by the IIMLB-11 at approximately 12:01 a.m., November 13, 1999," thereby violating Carrier Operating Rules. After several postponements, the

Investigation was conducted on March 3, 2000. As a result of the Investigation, the Petitioner was found guilty and assessed a Level 2 under the Carrier's UPGRADE Discipline Policy. A claim was filed on the Petitioner's behalf, challenging the assessed discipline. The Carrier denied the claim.

The Carrier contends that the record provides more than substantial evidence of the Petitioner's violation of its Operating Rules. The Carrier emphasizes that the Board should not rehear the Investigation to decide whether it agrees with the Carrier's decision. Instead, the Board should simply determine whether the Carrier abused its discretion in weighing the evidence and deciding which of conflicting testimonies it will accept. The Carrier maintains that it has correctly applied the discipline mandated by its discipline assessment table. The Carrier argues that substantial evidence shows that the Petitioner did not stop his train at least 400 feet back from the signal. The Carrier emphasizes that had the Petitioner done so, the collision may not have occurred. The Carrier asserts that there were no procedural errors that would require overturning the assessed discipline. The Carrier therefore contends that the claim should be denied in its entirety.

The Petitioner contends that the Carrier has failed to prove a violation of the Rules in this case. He points out that the FRA made its own Investigation of this matter, and found that he had complied with the Carrier's Operating Rules and was not at fault in this accident. The Petitioner asserts that the Board should reach the same conclusion. He emphasizes that the train was stopped more than 400 feet from the clearance point, as required by Rule 6.8. As for the alleged violation of Rule 6.9, the Petitioner argues that the evidence demonstrates that the crew had no knowledge of any opposing train until it came around the curve less than one-half mile from the switch, at which point the conductor started toward the switch. Because of the short distance and the opposing train's speed, it was not possible for the Conductor to line the switch. The Petitioner emphasizes that even if it had been possible for the Conductor to line the switch, the Petitioner would not be in violation. He points out that under Carrier Rules, the Engineer is not allowed to leave the controlling unit unattended with the train on the main line; the Engineer therefore is not required to line the switch in this situation. He contends that under the circumstances of this incident, there was no violation by either the Conductor or himself.

The Petitioner then asserts that the facts demonstrate that the Carrier failed to comply with the procedural requirements in handling this matter. He maintains that the Carrier failed to provide the event recorder data, failed to attach the DAF-1 form,

failed to advise him or his representative of the proposed discipline to be assessed, and failed to designate the Carrier Officer for contact purposes. The Petitioner contends that both parties are equally responsible for fulfilling the clear and unambiguous procedural requirements, and neither side may escape the consequences of failure to comply, even when such failure is alleged to have been harmless. The Petitioner argues that prior Board Awards have sustained claims in light of procedural violations by the Carrier. He asserts that the Carrier's grave violation of Part 3 of the Agreement in this case is undisputed.

The Petitioner maintains that the instant 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.

The Board has reviewed the evidence and testimony in this case, and we find that the Carrier has proven with sufficient evidence that the Petitioner acted in violation of one of the two Rules with which he was charged. However, the Carrier failed to meet its burden with respect to the second Rule.

Rule 6.8 requires that a train must stop "... at least 400 feet from the signal or clearance point of the facing point switch ...". Although the Petitioner has denied being less than 400 feet, the record is clear that the Petitioner stopped his train approximately 165 feet from the signal and approximately 220 feet from the clearance point. Both of those distances were less than the 400 feet required by Rule 6.8. Therefore, we find that that violation was proved by sufficient evidence.

The Petitioner was also charged with failing to line the switch for an opposing train as required by Rule 6.9. However, that Rule, which deals with meeting or passing precautions, assumes that the Engineer is aware that there will be an opposing train. In this case, the record is clear that the Petitioner had no knowledge that there would be a westbound train coming down and had no meet orders with the train that overran the switch. Consequently, it is impossible to find that the Petitioner violated Rule 6.9 since his first knowledge of a westbound train was when the headlight came around the curve. At that point, the Conductor on the Petitioner's train headed toward the switch to line it.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Petitioner in this case was issued a Level 2 discipline. That discipline was based upon the alleged violation of two separate Rules. Since the Board has determined that he was not guilty of violating one of the two Rules and the record also reveals that he has lengthy service with no previous discipline, the Board must find that the Petitioner's discipline shall be reduced to a Level 1 under the Carrier's UPGRADE discipline policy. The Petitioner shall be made whole for whatever monies were lost as a result of the more severe discipline.

AWARD

The claim is sustained in part and denied in part. The discipline shall be reduced to a Level 1 and the Petitioner shall be made whole for whatever lost pay resulted from the more severe discipline.

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 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.