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NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25440

Docket No. 45588

03-1-01-1-U-2694

The First Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of Engineer Charles M. McKenzie for removal of Discipline, requesting immediate reinstatement, claiming full back pay, fringe benefits, vacation and seniority rights unimpaired, and clearing this notation of discipline from Engineer McKenzie's record."

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.

The Carrier charged the Claimant, an Engineer with 29 years of service, with:

1. Allegedly being careless of the safety of himself and others;
2. Engaging in reckless behavior while operating a locomotive consist; and,
3. Allegedly failing to conduct a proper job briefing before entering the service track area.

All of the charges stem from an incident involving an injury suffered by the Conductor on the Claimant's train on January 4, 2001.

The Carrier withheld the Claimant from service pending the Investigation. The Investigation was held on several days over a period from February 13 to March 13, 2001.

At the Investigation and during the on the property appeal, the Organization raised a number of objections contending that the Carrier deprived the Claimant of his contractual due process right to a fair and impartial hearing. The Board will only address the major objections raised by the Organization. We overrule all of the other objections because either they were not properly raised on the property or they were not properly joined rendering any consideration of the issue premature.

The Organization initially contends that the Investigation notice was fatally defective because it alleged that the safety violations occurred on January 3, 2001 when, in fact, the Conductor was injured on January 4, 2001. the Board concludes that the Investigation notice contained a typographical error, due to clerical inadvertence, which did not prejudice the Claimant or his representative from proffering an effective defense on the Claimant's behalf. Indeed, the 575 pages of transcript definitively reveal that the Claimant and his representative were given every opportunity to examine and cross-examine each witness in great detail. They knew on which day the alleged infractions occurred. They were prepared for the hearing. The mistake in the date was immaterial.

The Organization next charges that the Carrier violated Item 7 of the System Disciplinary Rule because it failed to furnish materials (on which the Carrier intended to rely on during the presentation of its case at the Investigation) to the Claimant's representative before the hearing. Item 7 of the System Disciplinary Rule states:

"Where request is made sufficiently in advance and it is practicable, the engineer and/or the BLE representative will be allowed to examine material or exhibits to be presented in evidence prior to the investigation. At the investigation, the engineer and/or the BLE representative will be afforded the opportunity to examine or cross examine all witnesses. Such examination will extend to all matters under investigation."

The Carrier retorted that the Claimant's representative did not take advantage of a chance to examine the documents but the representative declined.

Section 7 of the System Disciplinary Rule gives the Claimant's representative access to "... examine material or exhibits ..." which the Carrier intends to present at the Investigation "sufficiently in advance" of the Investigation provided the examination is "practicable." In Public Law Board No. 6040, Award No. 85 (Eischen), the Board ruled that the Carrier may not perfunctorily deny the Organization access to relevant documents. However, the Board stressed that Section 7 uses the word "examine" and an examination can occur only if it is "practicable." The Rule does not specifically require the Carrier to supply the Organization with copies of materials and exhibits.

The Board concludes that Item 7 imposes mutual obligations on the parties. The Rule is written so that Carrier officials and Organization representatives should try to reach a mutual accommodation that is convenient for both parties so long as the accommodation is practicable. Mutual accommodation means that the two parties must work together to determine the best method of giving the representative a reasonably adequate opportunity to examine the documents in advance of the Investigation.

In this case, the Organization wants the Carrier to completely accommodate its needs and conveniences but, the Organization disregards the conveniences and needs of the Carrier. The Board need not decide what would constitute a mutual accommodation that is practicable. We merely decide that mutual accommodation does not involve a requirement that the Carrier satisfy all of the Organization's demands to furnish copies of the Carrier's exhibits in advance of the hearing. Thus, the Carrier did not violate Section 7 of the Disciplinary Rule.

The Organization also objected to the fairness of the hearing because the Conductor failed to appear as a witness at the hearing. The record reflects that the Carrier attempted to procure the Conductor's presence but he was not medically capable of attending the Investigation. The Carrier proceeded with the Investigation over the objection of the Organization and it denied the Organization's request for a postponement.

In this particular case, as will be discussed later in the Opinion, the Carrier's failure to call the Conductor affected its burden of proof on at least one of the charges. Therefore, the Carrier acted at its own peril by failing to grant a postponement of the Investigation until the Conductor was able to attend. Nevertheless, the Conductor's medical restrictions prevented him from attending the Investigation which was, under the unique circumstances herein, beyond the Carrier's control. Thus, the Conductor's absence did not render the Investigation unfair. To reiterate, the inability of the Carrier and the Organization to question the Conductor affected the Carrier's burden of proof.

Turning to the merits, on January 4, 2001, the Claimant was working as the Engineer on Train MASNL-03. At approximately, 2:10 p.m., the Claimant was operating a two unit consist toward the service track at the North Little Rock Terminal. Shortly after traversing the crossover, the Conductor disembarked from the locomotive to align a switch for further movement. The Claimant testified that the Conductor, who was out of his line of vision, gave the Claimant the go ahead signal over the radio. The Claimant admitted that during the job briefing, previously conducted with the Dispatcher, they did not discuss exactly where the Conductor would go after aligning the switch or, more specifically, if the Conductor would mount the locomotive. The Claimant testified that he thought the Conductor would board the engine.

Because the Conductor did not appear at the Investigation, the record does not reflect exactly how the Conductor attempted to mount the moving engine. The Claimant did not observe the Conductor. In a written report, the Conductor attested that his hands or feet slipped as he tried to mount the engine and he fell back hitting his head on either a tie or a rock.

When the Claimant did not see the Conductor on the engine, he looked around and saw the Conductor walking on the ground. While the record is unclear, the Claimant apparently stopped the movement so the Conductor could catch up to the consist. The Claimant then learned that the Conductor was injured.

The Director of Terminal Operations testified that the Conductor was bleeding profusely from the back of his head. The Manager of Terminal Operations transported the Conductor to the hospital where he received medical treatment including six stitches.

According to the Manager of Terminal Operations, the Conductor told him that his hands or feet slipped from the engine. The Manager of Terminal Operations confirmed that the Conductor was wearing approved footwear.

The Manager of Terminal Operations downloaded the data from the event recorder in one of the units in the consist. Based on this data, the Manager and several other Carrier officers re-enacted the incident the following day.

The Manager of Terminal Operations and the Director of Terminal Operations testified that the data showed that the Claimant had the throttle at the eight notch. He simultaneously set the brake for about four seconds and then released the brakes. While the Manager of Terminal Operations said that the tape data did not directly implicate the Claimant in the Conductor's injury, the Director of Terminal Operations took great

exception to how the Claimant operated the consist. He stated that the effect of the Claimant's operation of the engine meant that the engine would have quickly lunged forward and could easily have been traveling up to 7 or 8 miles an hour in the short distance between the starting point and switch. The Manager of Terminal Operations testified that starting the movement this way was akin to how a sling shot works. The data also indicated that, a short while later, the Claimant operated his consist 13 miles per hour in a five mile per hour zone in the mechanical facility.

The officers testified that emulating the Claimant's operation revealed that the consist was going 7.2 miles per hour (and perhaps as fast as 8.3 miles per hour) when the Conductor attempted to board the consist. The officers specified that four miles an hour is the maximum speed for safe boarding. The Manager of Road Operations, who was playing the role of Conductor in the re-enactment, testified that he did not even try to mount the locomotive because the unit was traveling too fast. The Director of Terminal Operations testified that he was frightened by how fast the consist was moving at the time that the Conductor would have tried to board the consist.

The Claimant did not deny the veracity of the information on the data tapes taken from his consist. However, he took exception to how far he was from the switch when he started his movement suggesting that the speed of the consist might not have reached 7.2 miles per hour at the point where the Conductor tried to mount the consist. Also, the Claimant stated in his written report that snow and ice was a factor in the Conductor's slip and fall.

Following the lengthy Investigation, the Carrier assessed the Claimant with level 5 on its Upgrade disciplinary program, that is, permanent dismissal.

The Carrier proved that the Claimant operated his consist in a negligent manner two successive times while on the service track and in the mechanical facility. First, the data recorder showed that the Claimant was going more than four miles an hour when he should have known that his Conductor would be mounting his consist. The Claimant inexplicably operated the consist in an abnormal fashion so that the consist could reach a speed above the limit within seconds after starting from a stationary position. The Claimant failed to articulate why he operated the engine in this unusual manner especially since he believed the Conductor would board the consist near the switch. The Claimant was negligent. The job briefing was inadequate since the Claimant and his Conductor did not discuss precisely what the Conductor would do after aligning the switch.

The Claimant's excessive speed created an unsafe condition and a hazardous work environment. Moreover, the re-enactment illustrated that the Claimant's conduct created a dangerous condition for the Conductor inasmuch as the Carrier officials did not even try to mount the moving engine because it was traveling too fast. The Claimant's negligent conduct was, at least, a partial cause of the Conductor's injury but, because of the Conductor's absence from the Investigation, it is impossible to determine whether the Claimant was primarily responsible or merely secondarily culpable for the mishap. Because the Carrier failed to call the Conductor as a witness or to postpone the Investigation to a time when the Conductor was medically fit to participate in the Investigation, the record is void of whether external conditions or whether the Conductor, himself, contributed substantially to the injury. For example, the Conductor may have exercised poor judgment by even trying to board a fast engine. Since the officers did not even try to board the fast moving engine, one wonders why the Conductor did not follow the prudent course of refraining from mounting the engine. While the Claimant speculated that snow and ice may have caused the Conductor to slip and fall, the Conductor is the only one who truly knows whether the ground was dry, wet or icy. Also, the Conductor may have lost his grip or lost his footing as he tried to get on the engine.

Therefore, while the Claimant's conduct was one factor contributing to the accident, the Carrier failed to prove that the Claimant was the substantial or sole cause of the Conductor's injury.

In addition, the Claimant exceeded the speed limit in a mechanical facility which was a serious safety violation because it was a blue flag protection area. The Claimant deserved a stiff punishment for blatantly disregarding the five-mile per hour speed limit. Fortunately, the Claimant's safety violations did not cause any injuries.

The Claimant admitted to the speed violations because he did not deny the accuracy of the data on the tape. Thus, the documentary evidence coupled with the Claimant's admission means that the Carrier proffered substantial evidence that the Claimant committed two serious safety violations.

The Board has the judicial discretion to fashion the appropriate level of discipline without modifying the components of the Carrier's Upgrade Disciplinary Program. Because the Carrier failed to prove that the Claimant was substantially responsible for the Conductor's injury and due to the Claimant's many years of fine service, we conclude that permanent dismissal was an excessive and unduly harsh punishment. We adjudge that the time the Claimant has spent out of service should serve to impress upon him that, in the future, he must strictly follow all Safety Rules.

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Therefore, the Carrier shall reinstate the Claimant to service, with his seniority unimpaired, but without pay for time lost. When the Claimant is reinstated to service, his status shall be Level 3 on the Upgrade Disciplinary Program.

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 Claimant(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 day of 2003.