

AWARD NO. 109
NMB CASE NO. 109
UNION CASE NO. 97057
COMPANY CASE NO. 1068672

PUBLIC LAW BOARD NO. 4450

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(Western Region)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

Appealing the Upgrade Level 4 Discipline assessed against Engineer H. K. Barton (SSN 519-72-8047) and request expungement of discipline assessed and pay for any and all time lost with all seniority and vacation rights restored unimpaired. Formal hearing held August 27, 1997.

OPINION OF BOARD:

H. Keith Barton ("Claimant") was employed as an Engineer Las Vegas, Nevada. On August 16, 1997, Claimant and Conductor D. J. Ertle, were called on duty at 0830 at Las Vegas, to operate train ZNPLA-14 to Los Angeles. While awaiting delayed arrival of the inbound train, this crew conducted their job briefing and secured necessary paperwork. That documentation included a train consist showing four locomotives, 25 loads, 0 empties for 1900 tons and 2987 feet, as well as track Bulletin Form B 14114, restricting movement so as to protect track work near the station limits of Las Vegas, Nevada, between Mile Post 331 and 330.25. The crew was also instructed by MYO Escalante to set out the second and fourth locomotives at Arden; but due to congestion those units were subsequently set out at Houston Lumber within terminal limits.

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When the delayed ZNPLA-14 arrived at Las Vegas at 1020, Conductor Ertle learned that the actual train consist this crew would be handling was significantly different than that listed in the paperwork which he and Claimant had received in their job briefing. Just prior to their expedited departure, Conductor Ertle was informed by the inbound conductor that ZNPLA had been combined with another train somewhere east (or north) of Milford, Utah, the preceding crew-change point. After assuming control of the train near the office building at Mile Post 334 and setting out the two trailing units, Claimant completed the air test and started the train moving on an ascending grade. Before movement started Conductor Ertle advised Claimant in general terms that they had more cars in their train than the original information indicated and then promptly began making new calculations for their total train tonnage and length.

At Mile Post 333, two mile in advance of the Form B restriction, they encountered a Yellow/Red Flag, which both Claimant and Mr. Ertle acknowledged, and Claimant started slowing the train down. There was no contact with the Track Foreman in charge of the Form B limits. As they approached Mile Post 331, they saw a red Flag at the eastward limits of a Form B Track Bulletin. At 900-1500 feet before the Red Flag, claimant applied a 10 pound set to the train air brakes and then increased the brake application to full service, 26 pounds. At about this point, Claimant put the train into emergency and came to a full stop, but slack action pushed the leading end of the train about 100 feet past the Red Flag into the Form B limits.

By letter dated August 18, 1997, Claimant and Conductor Ertle were summoned to a formal investigation on charges reading in pertinent part as follows:

Report to the Office of Manager of Train Operations, 1001 Iron Horse Court, Las Vegas, Nevada 89106, at 1:00 p.m. on Wednesday, August 20, 1997, for investigation to develop the facts and

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determine your responsibility, if any, in connection with the following charges:

While you were employed as Engineer on the ZNPLA-14, on August 16, 1997, at approximately 12:10 p.m., operating Union Pacific Locomotive No. UP9521, near Las Vegas, approximately MP CP 331.00, you allegedly failed to stop your train before passing Form B - Order Number 14114 on Mainline #1 issued August 15, 1997. Your actions indicate a possible violation of Rules 1.1, 1.1.1, 1.3.1, 1.13, 1.47, 2.6, 6.10, 15.1 and 15.2 as contained in the General Code of Operating Rules effective April 10, 1994.

The investigation will be conducted in conformity with the system wide RIF Discipline Rule, and you are entitled to representation as provided in that rule. You may present such witnesses as your [sic] desire at you [sic] own expense. You are being withheld from service pending results of investigation and hearing.

Following an uncontested postponement, the hearing was held on August 29, 1997. Claimant was advised by letter of September 5, 1997 that Carrier considered him guilty of violating the following three (3) of the nine (9) Operating Rules with which he had been charged:

1.1 Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

1.1.1 Maintaining a Safe Course

In case of doubt or uncertainty, take the safe course

15.2 Protection by Track Bulletin Form B

Display yellow-red flags as specified in Rule 5.4.3 (Display of Yellow-Red Flag).

On that basis, Carrier assessed Claimant Level 4 Upgrade Discipline (30-day suspension) and revoked his locomotive engineer certification, citing Part 240.117 paragraph G of the FRA regulations.

Claimant and the Organization made timely appeal of the Upgrade disciplinary assessment and also an appeal of the certification suspension to FRA's Locomotive Engineer Review Board

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(LERB), which culminated in exoneration of Claimant by the LERB. By decision dated August 4, 1998, LERB held in Decision EQAL 97-97, as follows:

The Board finds that Petitioner operated his train in accordance with good train handling procedures, based on the information he had of the train's consist. In trying to stop his train before the red board, Petitioner utilized the train's air brakes for the first time after departing the terminal. (Transcript at 47-48) This was the first time Petitioner obtained an actual sense of how much braking power was needed to stop the train. As it turned out, Petitioner underestimated the actual braking power necessary to stop the train before the red board, due to the significant difference between his perceived weight of the train and its actual weight.

What does warrant reversal of Petitioner's decertification is the lack of evidence that Petitioner himself knew of the gross discrepancy between the reported and actual consist of the train. To be sure, Petitioner did not know that additional cars were added to his train, but the evidence does not show Petitioner knew that his train had in fact doubled in length and tonnage.

Notwithstanding the LERB decision, Carrier declined to reverse its disciplinary action and the claim eventually was appealed to this Board for final and binding determination in arbitration.

At the outset, we are not persuaded that the LERB administrative licensing determination is dispositive of the claim before us for arbitration under the terms of the System Agreement Discipline Rule and the Upgrade Procedures. Although many of the same facts come into play before these respective tribunals, they are parallel tracks for adjudicating separate and distinct rights and duties. As such, each forum may reach a different conclusion and neither has any collateral estoppel effect over the other. In the final analysis, our decisions are based on an independent analysis of all of the evidence on the record before us. LERB determinations are not irrelevant in terms of admissibility before this Board, but we do not accord dispositive or authoritative weight to factual findings made in LERB licensing determinations. Nor do we abdicate to LERB our primary jurisdiction under the controlling collective bargaining agreements and the Railway Labor Act to decide properly appealed grievances presenting issues of culpability and appropriateness of disciplinary penalties.

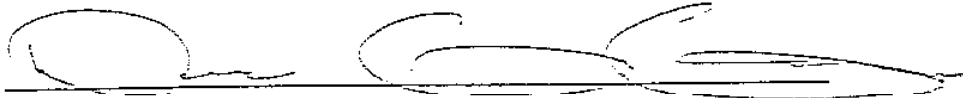
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Turning to the specifics of this case, we conclude that Carrier erred in finding Claimant culpable of violating Rules 1, 1.1.1 and/or 15.2 in the unique facts and circumstances presented on this record. Neither Carrier, FRA nor this Board take lightly charges of employee violations of critical safety rules such as those involved in this case. Carrier made out a *prima facie* showing of a Rule 15.2 violation by the undisputed fact that his train did get past the red flag. But Claimant and the Organization then came forward with equally undisputed evidence that combination of the two trains not only doubled the weight and length of the train from what he thought he was handling but also placed the solid block of loaded auto racks at the rear end. Finally, it is not disputed that the due to the late and hasty departure, the Conductor had not yet completed his tonnage and length calculations for the reconfigured train or relayed that information to Claimant prior to the initial brake application on approach to the red board. Thus, through no apparent fault of his own, Claimant did not perceive the significant difference between the reported and actual weight and composition of his train prior to initial brake application at the red board. Due to the unusual mitigating facts and circumstances, we conclude that Claimant and the Organization adduced sufficient evidence to rebut Carrier's conclusion that he was culpable of the Rules violation for which he was disciplined in this particular case.

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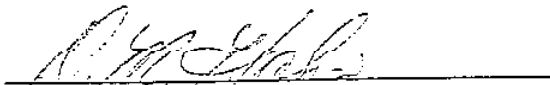
AWARD

- 1) Claim sustained.
- 2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.

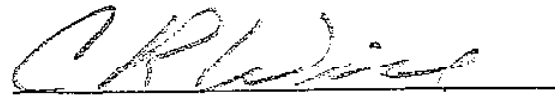


Dana Edward Eischen, Chairman

Dated at Spencer, New York on September 17, 2000



Union Member



Company Member