

AWARD NO. 145
NMB CASE NO. 145
UNION CASE NO. 20112
COMPANY CASE NO. 1251001

PUBLIC LAW BOARD NO. 4450

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(Western Region)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

R. N. Surgeon, 544-72-5115 / "...appeal the Upgrade Level 1 Discipline assessed to Engineer R. N. Surgeon and request the removal of discipline assessed and pay for any and all time lost with all seniority and vacation rights restored unimpaired."

OPINION OF BOARD: While walking from the yard office to his yard engine at the beginning of his shift at Barnes Yard in the Portland terminal on December 28, 2001, Engineer R. N. Surgeon ("Claimant"), slipped in the mud and twisted his knee and ankle. He duly reported the injury to his supervisor, MTO V. E. Shultz, who promptly charged him with violating the following Carrier Rules:

Rule 1.1.2: Alert and Attentive: Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

Rule 80.2: Precautions Against Slips, Trips, and Falls: Take precautions to avoid slipping on: Slick surfaces such as recently washed, waxed floors, oil, grease or soap on the walkway. Snow, ice, wet spots or other hazards caused by inclement weather. Use appropriate footwear and accessories and/or other spread sand/salt mixture (as appropriate) on ice before proceeding when icy conditions exist. When walking keep your eyes on the pathway and if hazardous under foot conditions exist. Keep your hands out of pockets for balance. Take short, deliberate steps with toes pointed outward. When stepping over objects, such as rails, be sure your front foot is flat before moving your rear foot.

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Following investigation and hearing on January 17, 2001, Carrier assessed an Upgrade Level 1 Discipline against the personal work record of Claimant, as set forth in the letter of January 26, 2001, from Superintendent K. H. Hunt:

After having carefully considered evidence presented at the investigation held in Portland OR, on Wednesday, January 17, 2001, I find the following charges have been sustained: while you were employed as Engineer on the YBA66-28 at approximately 5:00 p.m., P.T., on December 28, 2000, near M.P. 5.5, Barnes on the Portland Subdivision #830, you were not alert and attentive causing injury to yourself while stepping over rail when commencing to perform your duties. Your actions were in violation of Rule 1.1.2 of the Union Pacific Rules, effective April 2, 2000, and Rule 30.2 of the Union Pacific Safety Rules, effective October 23, 1998.

This is a Level 1 rules violation. Your current discipline status of Level 3, plus this Level 1 violation results in assessment at this time of Level 4 discipline. Upgrade Level 4 discipline is as follows: Thirty days off work without pay and must pass necessary annual operating rules or equivalent in order to return to work.

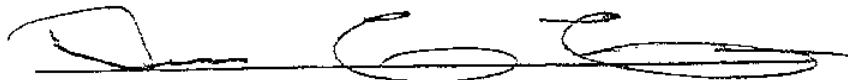
The Organization's appeal of the disciplinary action in this case must be sustained. On the procedural aspect of this case, Carrier failed to effectively refute the Organization's showing that Claimant never received the Notice of Investigation. Beyond that, there is a complete failure of proof in this record that Claimant violated the cited safety rules. Charging Officer Schultz told Claimant approximately one week after incident, but prior to the hearing, that he had failed to be alert and attentive when incident occurred. At the investigation, however, MTO Schultz testified that he was not present when Claimant slipped and injured himself and had no direct knowledge that Claimant had not been alert and attentive. Moreover, the MTO corroborated the testimony of Claimant and Engineer Hepburn that there was a pool of mud, soda ash and other debris in the area. Claimant's testimony that he tried to cross in the most accessible place and had complied with the requirements of the Rules is not refuted by any probative evidence. Post-accident speculation and conjecture that the charged employee "must have been" negligent or careless, by the charging officer who did not witness Claimant's fall, is not sufficient to carry the requisite evidentiary burden.

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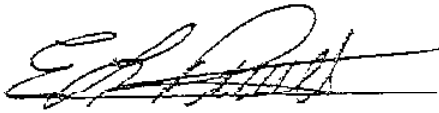
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1) Claim sustained.

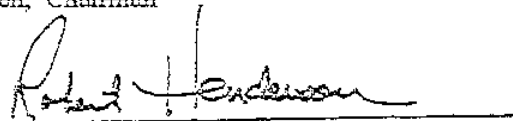
2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.



Dana Edward Eischen, Chairman



Union Member



Company Member