

**PUBLIC LAW BOARD NO. 6040**

**PARTIES TO THE DISPUTE:**

UNION PACIFIC RAILROAD COMPANY

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS  
(Eastern District)

**STATEMENT OF CLAIM:** Claim of Engineer ~~V~~ H. Fullwiley of Ogden, Utah for pay for all time lost and removal of discipline from his personal record (Level 4).

**OPINION OF BOARD:** On July 14, 1998 Engineer C. H. Fullwiley ("Claimant") was working as an Engineer between Green River, Wyoming (far terminal) and Salt Lake City Utah (home terminal) on the MNPOS-13 a westbound train. At the start of the trip, Claimant and Conductor Combe were issued Form B No. 10262, requiring operation at restricted speed through a section of track between MP 916.00 and 916.25, where maintenance forces were performing work on a bridge. As the MNPOS-13 was on approach to these Form B limits, MTO S. A. Austin and MOP C. G. Cox asked Track Patrol Foreman Case to clear Claimant's train through the red board at restricted speed, so they could conduct an "efficiency test" on this train. The test consisted of a radar gun speed check and stepping out into line of sight to give a stop signal with a red flag from a position approximately one-half mile beyond the point where the westbound train comes around a curve on a descending grade.

At approximately 12:35 p.m., Foreman Case gave Claimant's train permission to pass through Form B at restricted speed. As Claimant's train approached MP 916, MTO Austin stepped out and gave the stop sign with a furled red flag, while MOP Cox made a radar speed check of the train from their parked vehicle about 15 feet away. It is not disputed that while the supervisors were conducting this test on Claimant's westbound train an eastbound train was passing on the adjacent track. Nor is it disputed that Claimant's speed was 17 mph, that Conductor Combe and Engineer Fullwiley saw and recognized the stop sign and that the train could have been stopped short MTO Austin and the red flag if Claimant had elected to put the train into emergency. However, because Claimant concluded that putting his heavily laden train into emergency might well have resulted in dumping something into the path of the passing train, he elected to bring the MNPOS-13 to a controlled stop.

As a result, his train passed MTO Austin and the red flag by a distance of approximately 18 car lengths. Carrier charged Claimant with violating that portion of Rule 6.27-Movement at Restricted Speed, which requires a train or engine to proceed at a speed which will permit stopping within one-half the range of vision of, *inter alia*, a stop sign. A hearing was held on August 11, 1998 and the Claimant was subsequently issued an UPGRADE Level 4, 30 day suspension without pay, effective on July 15, 1998.

Because safety is paramount in train operations, this Board is fully cognizant that Carrier must strictly construe and enforce compliance with the operating rule in question. But this case presents one of those extremely rare "Catch-22" occasions when an Engineer is required to make a "Hobson's Choice" between competing safety requirements. In the exercise of his discretion under

Rule 1.47 (B)(1), Claimant elected to violate the requirement of stopping short of the red flag during the efficiency test when he made the informed judgement to make a controlled stop rather than putting his train into emergency. The Board finds it signally important that even the Carrier officers who tested him concurred that Claimant made the right choice under the confronting facts and circumstances in this unique case.

Under cross-examination at the formal hearing, MTO Austin, the Carrier officer who actually conducted the red flag test, quite candidly testified that he found no fault with Claimant's train handling in this situation (transcript page 30):

- Q . . .He did not, to your knowledge, make an emergency application of the train?
- A: Yeah. When we were talking initially in the cab, he told me had not placed the train in emergency, because they were in a curve and there was a train passing them, on their south side, going eastbound. And he felt it a prudent decision not to place the train in emergency for the obvious reasons, that something may've come off the track in the face of that eastbound.
- Q: Would you have taken any exception to that being his response, of doing that?
- A: I'd have to say I really wouldn't take any exception to that, based on the reason he made that decision.

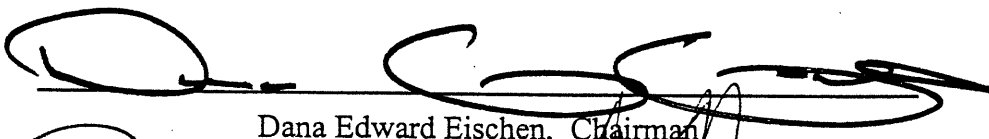
Similarly, MOP Cox, who assisted in the test, testified under cross-examination that Claimant acted properly when he made a controlled stop rather than placing the train into emergency so as to stop short of the red flag in these particular circumstances (transcript page 68) :


- Q: On this particular situation, on this day, and I think it's been testified in here that the train was not placed in emergency. In your experience as an MOP and as an engineer over the years, would this have been a situation that would've warranted possibly placing this train in emergency?
- A: With the passing eastbound train and what they had in their consist, I think it was handled properly.

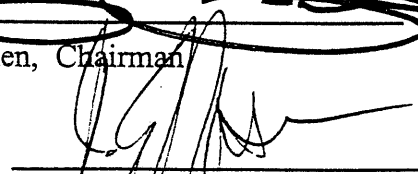
Claimant was traveling at less than 20 mph, *i.e.*, "restricted speed", but with the benefit of hindsight, it is evident that he would not have been confronted with choosing between two evils if his speed had been less than 17 mph. Because of the general need for strict compliance with all of the requirements of Rule 6.27, Carrier cannot be expected to exonerate Claimant for the violation of that rule in this case. In the unique facts and circumstances presented on this record, however, the imposition of a Level 4 UPGRADE disciplinary suspension was unreasonably harsh. Accordingly, the Carrier is directed to reduce the penalty to a Level 2 discipline for this occurrence.

AWARD

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

  
Dana Edward Eischen, Chairman

 6/28/03  
Union Member

  
Company Member