

PUBLIC LAW BOARD NO. 3838

PARTIES: United Transportation Union (C&T)

and

Union Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of Cheyenne, Wyoming, Trainman
B. A. Levensgood for expungement of a
31-day suspension from claimant's personal
record and pay for all time lost involved
in the incident."

FINDINGS: The Board, upon the whole record and all the evidence,
finds that:

The Carrier and Employees involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended. The Board has jurisdiction over the dispute and the parties involved herein. The parties to said dispute were given due notice of hearing.

The claimant, Brian A. Levensgood, a brakeman with a seniority date of November 20, 1975, reported for work at Rawlins, Wyoming, in the early morning hours of March 3, 1983. He had been assigned to work as head brakeman on Extra 2911 East on the day in question. According to the record, he had been

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advised to report for duty at 4:20 A. M. and arrived at the Register Room shortly after 4:00 A. M. that morning. When he arrived, he noticed that other members of the crew were present including Conductor Warren and Engineer Storer. He testified that he did not notice anything unusual about Mr. Storer although he did recall that one of the mechanical men who was present had asked him what was wrong with Mr. Storer.

Shortly after Extra 2911 East departed Rawlins, Mr. Mills, the individual with whom Mr. Storer had been arguing, contacted the Chief Dispatcher at Cheyenne, Wyoming. Mr. Mills indicated to the Dispatcher that the Engineer on Extra 2911 East had departed Rawlins at a high rate of speed, and in his opinion, was not in any condition to be running a train.

Upon receipt of this information, the Chief Dispatcher advised Trainmaster Omundson who was located at Hanna of the situation. When informed of this situation, Trainmaster Omundson advised the Dispatcher to have the train held up at C. P. 643. The train did stop at C. P. 643 after an emergency application of the brakes, and the crew got off.

After the train had come to a stop, Mr. Omundson, upon checking the speed tape, noted that the train had been travelling in excess of 60 miles an hour at a time when its speed should not

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have exceeded 50 miles per hour. He also observed that Mr. Levengood had not provided flag protection at the front end of the train and that it was evident to him that Mr. Storer, the Engineer, had been operating the train while under the influence of alcohol.

Brakeman Levengood in discussing the events that had transpired stated that he was unaware of any problems with alcohol concerning Mr. Storer until the train was well under way. Also, he had noted that the speed had gotten up on a couple of occasions and had taken steps to advise Mr. Storer to correct the situation. He did admit that he had not taken any steps to notify the Conductor while this was going on. He agreed that he had not put out any signals at the front end of the train but felt that this was not required since the train had come to a normal, easy stop. If the train had jolted to a stop, he would have felt that displaying a lighted red fusee and affording flag protection would have been appropriate. In addition, since Trainmaster Omundson was in control of the situation when he got off the train and did not give him any instructions to put out any signals, he did not feel that his conduct was inappropriate.

By memo dated March 4, 1983, claimant was given notice of an investigative hearing scheduled for March 7, 1983:

"...to develop the facts and determine responsibility while you were employed as Head Brakeman at Hanna, Wyoming, at approximately 5:40 A. M., March 3, 1983 on Extra 2911 East, BWUE-32, you allegedly failed to report that the Engineer of your train was in a state indicating the use of an alcoholic beverage. You also failed to control the speed of your train between Rawlins and Hanna, and while stopped at CP 643 at approximately 5:40 A. M., you failed to provide flag protection for your train after emergency application of the air brakes indicating violation of General Notice, General Rules B, E, F and L, Operating Rules 99, 99(A), 101, 102, 106(A), 108, 214, 702, 702(B), 704 and 818 and Special Rules 99-R and 102-R contained in System Timetable No. 6.

The investigation and hearing will be conducted in conformity with Rule 84 of the agreement effective November 1, 1957 between the Company and the UTU(T)...."

As a result of this hearing, it was determined that claimant had engaged in the alleged conduct and had violated General Notice, General Rules B, E, F and L, Operating Rules 99(A), 101, 106(A), 108, 214, 702(B), 704 and 818 and Special Rules 99(R) and 102(R) as hereafter set forth. In addition, he was advised that he had been assessed a 31-day suspension which he would be required to serve.

GENERAL RULES:

B. Employees must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, they must apply to proper authority of the railroad for an explanation.

E. Employees must render every assistance in their power in carrying out the rules and special instructions, and must report any violation thereof to the proper officer.

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F. Accidents, failure in the supply of fuel or water, defects in track, bridges or signals or any unusual condition which may affect the safe and efficient operation of the railroad must be reported promptly to the proper authority by the quickest means of communication.

L. Employees while on duty must be alert and attentive, and in case of danger to the company's property or interests, they must unite to protect it.

OPERATING RULES:

99(A). Conductors and engineers are responsible for protection of their train, and when protection is necessary, they must see that it is provided with utmost promptness and in strict accordance with the rules.

Other duties must not be permitted to interfere with the protection of a train.

101. Trains and engines must be fully protected against any known condition which interferes with their safe passage at normal speed.

When conditions are found which may interfere with safe passage of trains or engines at normal speed and no protection has been provided, the radio, telegraph or telephone must not be depended on to notify other trains; protection must be provided in accordance with Rule 99 and a report must be made to train dispatcher by quickest means of communication.

If any member of a train or engine crew has reason to believe that their train or engine has passed over any dangerous defect, the train or engine must be stopped at once and protection provided.

106(A). Other members of the crew must call attention of conductor or engineer immediately to any apparent failure to observe the requirements of rules, time-table, train orders, messages or other instructions.

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When conditions or signals require that the train be stopped or speed of train be reduced and the engineer or conductor fails to take proper action to do so, or should the engineer become incapacitated, other members of the crew must take immediate action to stop the train, using emergency brake valve if necessary.

108. In case of doubt or uncertainty the safe course must be taken.

214. Train orders must be read promptly upon receipt by those to whom they are addressed. Conductors must, when practicable, obtain from engineers an understanding of all train orders before they are acted upon.

Conductors must, when practicable, show train orders, clearances and messages to their trainmen. Engineers must show train orders, clearances and messages to all members of the crew on the engine.

Other members of the crew must read and be familiar with the contents of train orders and messages and must assist the conductor and engineer in observing the requirements contained in them.

702(B). Employees must comply with instructions from proper authority.

704. Employees are required to report any misconduct or negligence affecting the interest of the railroad.

Withholding information or failure to give factual report of any irregularity, accident or violation of the rules is prohibited.

818. Members of train and engine crews must observe the indication displayed by train order signals, be prepared to and pick up train orders or messages, keep in mind the requirements of time-table, train orders, rules, special rules, bulletins or instructions affecting the movement of their train.

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Other members of the crew must immediately call attention of the conductor or engineer to any oversight or mistake, taking action, when necessary, to insure the safety of their train.

SPECIAL RULES:

Flag Protection

99(R). Union Pacific Operating Rule 99 is revised as follows:

Unless otherwise provided, when a train is moving on main track at less than one-half the maximum authorized timetable speed for trains at that location, protection must be provided by a member of the crew dropping off lighted fusees at intervals that do not exceed the burning time of the fusees.

When moving at more than one-half the maximum authorized timetable speed for trains at the location, but under circumstances in which the train could be overtaken, the crew member responsible for providing protection will be governed in the use of fusees by the grade, track curvature, weather conditions, sight distance, and relative speed of his train to following trains.

When a train stops, except when clear of the main track, a member of the crew must go back immediately with flagman's signals a sufficient distance to insure full protection. One-half mile from the rear of his train he will place two torpedoes on the rail; continuing back one and one-half miles from the rear of his train he will place two torpedoes on the rail. He may then return one-half the distance to his train where he must remain and flag approaching trains until relieved or recalled.

When required by rule, the front of the train must be protected by a member of the crew going forward immediately with flagman's signals. One-half mile from the front of his train, he will place two torpedoes on the rail; continuing forward one and one-half miles from the front of his train he will place two torpedoes

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on the rail. He may then return one-half the distance to his train, display a lighted fusee and remain at that location until recalled.

During foggy or stormy weather and in vicinity of obscure curves or heavy descending grades, or if other conditions make it necessary, he must increase the distance, placing two torpedoes at every one-fourth mile beyond the second set of torpedoes.

After the flagman has the necessary torpedoes placed and has returned one-half the distance to his train, when he is recalled he may return removing the two torpedoes from rail placed one-half mile from train if safety to his train will permit.

If the flagman is recalled before reaching the required distance, he will, if necessary, place two torpedoes on the rail.

When returning to rear of his train, flagman must leave a lighted fusee at the location from which he returns and while returning to train, lighted fusees must be left at intervals not to exceed the burning time of the fusees. When train departs, a member of the crew must leave a lighted fusee and must continue dropping off lighted fusees at intervals not to exceed the burning time of the fusees until train speed is not less than one-half the maximum authorized timetable speed for trains at that location.

Should a train be seen or heard approaching before the flagman has reached the required distance, he must at once place two torpedoes on the rail, and if it is by night or during foggy or stormy weather, he must at once place two torpedoes on the rail and leave a lighted fusee at that point and continue in the direction of the approaching train and flag it with a lighted fusee.

Flagman's signals:

Day Signals - A red flag, not less than ten torpedoes and six fusees.

Night Signals - A white light, not less than ten torpedoes and six fusees.

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Note 1 - Where authorized by timetable or special instructions when a train stops on main track where rear of train is protected by at least two block signals, flagman must go back immediately with flagman's signals, but need go back only a sufficient distance to insure full protection against a following train moving at restricted speed.

Note 2 - Where authorized by timetable or special instructions when rear of train is protected by at least two block signals of a continuous automatic block signal system, protection against following trains on the same track is not required.

Note 1 and Note 2 in no way modify the requirements for full flag protection under other circumstances or where protection in accordance with Rule 99 is required by other rules. These provisions do not authorize a reverse movement without full flag protection and do not apply to any unit of equipment which does not actuate the block signals or to a work extra on single track.

Where Note 1 or Note 2 are in effect or when a train is relieved from providing flag protection against following trains on the same track by train order or special instructions, dropping off of lighted fusees by a member of the crew when train is moving at less than one-half maximum authorized timetable speed is not required.

102(R). Union Pacific Operating Rule 102 is revised as follows:

When a train is disabled or stopped suddenly by an emergency brake application or other causes, a lighted red fusee must be immediately displayed on adjacent tracks which may be obstructed, including tracks of other railroads, at front and rear of train and flag protection as required by Rule 99 must be provided in both directions. After lighted fusee has been displayed at front of train, headlight must be extinguished. Concurrently, prompt radio transmission must be made stating exact location and status of train. This transmission must be repeated at least two times. Trains approaching disabled train must move at restricted speed and be prepared to stop for flagman or obstruction.

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Flagmen must not be recalled until it is known that adjacent tracks are not obstructed or first train has been stopped on each of the adjacent tracks which may be obstructed or when control operator advises he has provided protection against all trains moving towards the disabled train.

In Rule 251 territory, if disabled train was moving with the current of traffic, rear flagman must not be recalled until train dispatcher advises there are no trains moving against the current of traffic on adjacent track.

Before proceeding, it must be determined by inspection that the train involved and the track to be used are safe for movement. A train on an adjacent track must not pass the disabled train unless preceded by a flagman or they have been assured by the conductor of the disabled train that the track is clear and it is safe to proceed.

Following the investigation on March 7, 1983, claimant was notified by letter dated March 14, 1983 that he had been suspended for 31 days. The Organization appealed this decision to the Carrier through the appropriate steps of the grievance procedure, but at each step, appeal was denied by the Carrier. Grievances are governed by Rule 84:

RULE 84. Discipline Procedure states:

"(a) Investigations. No employee will be disciplined or dismissed without a fair hearing. Suspension in proper cases pending hearing will not be considered a violation of this principle. Hearings will be held as promptly as possible and within 5 days of the date charges are preferred and decision rendered within 10 days of completion thereof.

At a reasonable time prior to the hearing, the employee will be advised of the charge against him. An employee may be represented by an employee

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of his choice, and the accused and his representative shall be permitted to hear the testimony of and interrogate all witnesses.

A copy of the transcript of the investigation will be furnished to the interested Local Chairman upon his request in cases where discipline has been assessed.

An employee failing to appear at a hearing, after having been properly notified in writing, and who makes no effort to secure a postponement, will automatically terminate his services and seniority rights.

(b) Appeals. (1) Appeal from the decision must be filed with the Superintendent in writing within thirty days from date thereof. Final decision of Superintendent on appeal consideration must be made within thirty days from date of appeal. If it is found the employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with seniority rights unimpaired and compensated for wage loss, if any, resulting from such suspension or dismissal.

(2) An employee dissatisfied with decision of Superintendent may appeal to the General Manager. Appeal must be made in writing by the employee or his duly accredited representative within sixty days of the date of the decision appealed. If appeal is not made to the General Manager within sixty days, the claim will be deemed to have been abandoned.

Decision on appeal will be made in writing within twenty days, if practicable, and not later than thirty days from the date of written request. Conference on such decision, if requested, will be granted within twenty days, if practicable, and not later than thirty days from date of written request. Decision in writing by General Manager will be made within fifteen days of conclusion of conference. Decisions not appealed to the General Manager within the time limit herein specified shall be barred and deemed to have been abandoned. If not handled by the General

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Manager within the time limit herein specified, the claim shall be considered valid and settled accordingly.

(3) Initial decision of the General Manager, or decision following conference, if conference is held, shall be final and binding unless within one year from the date of the latest decision, such claim is disposed of on the property or proceedings for final disposition of the claim are instituted by the employee or his duly authorized representative, and General Manager is so notified. It is understood, however, that the parties may by agreement in any particular case extend the one year period herein referred to.

(4) Appeals for leniency consideration will not be subject to time limits of this rule."

Preliminarily, the Carrier raises the issue that this case was not timely processed by the Organization. From the record, in this case, it appears to the Board that the time limits as set forth in the Rule which governs the processing of claims have not been strictly observed. The Board is well aware of and endorses as eminently sound a number of Awards cited by the Carrier wherein a claim was barred for failure to comply with contractual time limits. However, in the course of presenting this matter before the Board, it was elicited that the Carrier has for many years exercised great flexibility with respect to the Rule in question. Numerous cases, identical in character, have been processed for hearing without any complaint being raised that time limits have not been observed. Because of the

longstanding practice that has existed prior to this time, it would be inequitable to preclude the Organization from processing this case or those of similar vintage.

However, the fact that the Board finds the Carrier to be estopped from raising the issue of timeliness under the particular circumstances of this case should not be misconstrued by the Organization. The Carrier having now given clear notice of its intent to begin enforcing a Rule which heretofore had gone unobserved, the Organization will henceforth be operating at its own peril if it fails to timely comply with the limits as set forth therein.

In seeking to set aside the penalty which was imposed, the Organization raises the following defenses:

1. The claimant was denied a fair hearing.
2. The Carrier failed to sustain the charge against the claimant.

In support of defense #1, the Organization cites several circumstances which it believes support the position that Mr. Levengood did not receive a fair hearing. The Organization urges that the Notice of Hearing dated March 4, 1983 was couched in terms which clearly show that the Carrier had already pre-judged the claimant as being guilty before an investigation to determine the

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facts had ever been held. In addition, all of the witnesses who had knowledge of the event were not called to testify at the hearing. Furthermore, a statement by an absent witness was admitted into the record as hearsay testimony precluding the Organization from questioning this particular individual.

The purpose of the Notice of Hearing is to reasonably apprise the claimant of the charges which are being brought. The fact that the Notice of Hearing has been, perhaps, inartfully phrased so as to give rise to an allegation of an appearance of pre-judgment of guilt is not the critical concern. The critical question is whether or not the claimant was afforded a fair opportunity to present his defense at the investigatory hearing. The Board holds that a determination of fair play should not turn on grammatical niceties. Rather the determinative question is whether or not the investigative hearing as a whole comports with the spirit of fair play to which a claimant is entitled. The Board finds no evidence that the claimant in this case was not fully able to fairly and adequately present his views at the time of the hearing.

It is true that certain hearsay evidence was permitted by the Hearing Officer. However, it is not unusual in arbitral matters for hearsay testimony to be allowed into evidence.

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This Board is disposed to accept hearsay evidence although it would generally not accord it the same weight as live testimony. Accordingly, the Board finds that the failure of the Hearing Officer to preclude certain hearsay remarks being entered into the record did not deny Mr. Levengood the due process to which he is entitled.

With respect to the allegation that certain witnesses were absent who had information surrounding the events of March 3, 1983, the Board finds that this goes primarily to the weight of the evidence. While either party's case might suffer for failure to provide sufficient probative evidence, the absence of a particular witness does not per se constitute reversible error.

In the instant case, Mr. Mills was not present to testify. We have only a memo in the record regarding his observations concerning the unfit condition of Mr. Storer, the Engineer, and the high speed of the train when it departed Rawlins. However, the Carrier's case was not primarily dependent on these remarks. Rather its case is grounded substantially on the observations of Mr. Omundson who was present when the train was flagged to a halt, observed the condition of Engineer Storer at that time and verified the speed at which the train had been travelling through the speed tapes on board.

If the memo offered by Mr. Mills was seriously contraverted

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and was the only evidence offered by the Carrier, it conceivably could cause the Carrier's case to fail. However, given that Mr. Mills' statements are not seriously contraverted by other evidence and are not inconsistent with other conclusions that may be drawn from the record, the Board does not find it inappropriate to accord some consideration to these remarks.

The second defense raised by the Organization is a substantive one. It asserts that the Carrier failed to establish its case by substantial evidence. In support of the Organization's position, it points out that claimant Levengood testified that he had not observed anything indicating that Engineer Storer was intoxicated before the train departed Rawlins. In response to the question of excess speed, the Organization cites the testimony of claimant Levengood indicating that he had brought this to the attention of Engineer Storer. While it is conceded that Mr. Levengood did not follow flagging procedures after the train came to a halt, it is urged that not only do the Rules not call for it under the circumstances (the train came to a smooth stop rather than a sudden stop), but Trainmaster Omundson who was present and effectively in charge did not make any request that flagging procedures be initiated.

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In support of its case, the Carrier offered testimony by Trainmaster Omundson. On the morning of March 3, 1983, he had been advised that there was a problem concerning the Engineer on Extra 2911 East, BWUE-32 which had departed Rawlins early that morning. As a consequence, he directed that the train be stopped at C. P. 643 as he set out from Hanna to meet the train. The train did stop as a result of an emergency application of the brakes, and Mr. Omundson related what occurred thereafter.

He first encountered claimant Levengood who stated without prompting:

"I don't know what the problem is. There is a problem, and I am not going any further."

As he entered the cab of the locomotive, he could smell alcohol on the breath of Engineer Storer, and his eyes were extremely bloodshot. While removing the speed tape which indicated excessive speed, he continued to converse with Mr. Storer. In addition to bloodshot eyes, he noticed that Mr. Storer's speech was slurred, and at one point, Mr. Storer addressed him saying,

"Ken, please don't, don't do it. I am begging you, I need my...job, and I am taking care of it very well. Ken, I didn't do it on purpose, damn it."

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After his encounter with Engineer Storer, he got off the train and had some further discussion with Mr. Levengood. He asked him how the operation of the train had been between Rawlins and Hanna. Mr. Levengood replied,

"Not too great, I was going to plug it down here and go call somebody. We were coming down on that red block, I started praying. I had my hand on the emergency brake right here, and if he didn't plug it when he did, I was going to. I don't have to go any further with him, do I?"

He informed the claimant that he would not have to go any further and returned to Hanna to arrange for a crew change.

None of the crew took serious issue with this account of events as related by Mr. Omundson. If anything, the testimony elicited at the investigatory hearing only served to confirm Mr. Omundson's observations. Trainmaster J. M. Roberts who was present at the Hanna depot at about 7:05 A. M. recounted that Mr. Storer's eyes were very bloodshot, glassy and red. In addition, his speech was slurred and slow at times. Various members of the crew acknowledged that they began to suspect a problem with alcohol when they reached the Hanna depot, and Mr. Levengood conceded that he had become concerned about Mr. Storer's condition during the course of the trip as the train was leaving Fort Steele.

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The Board can certainly empathize with the difficult situation that faced Mr. Levengood. He did not want to be responsible for causing a fellow crew member to get into serious trouble with the Carrier. Nonetheless, by his own admission, he suspected that something was seriously wrong. The extent to which he was visibly shaken when the train came to a halt serves to underscore the gravity with which he viewed the situation. Indeed, Mr. Storer himself acknowledged the extent of his problem at the investigatory hearing and admitted that he was seeking help through the Employee Assistance Program.

Based on all of the above, the Board must conclude that Mr. Storer posed a serious threat to the safety of all concerned because of his intoxicated condition on the morning of March 3, 1983. Mr. Levengood who was riding in the same cab with Mr. Storer took no steps to inform others that he had good reason to believe that the Engineer was in no condition to be operating the train. According to the record, the trip from Rawlins to Hanna had taken over an hour which provided ample opportunity for Mr. Levengood to observe Mr. Storer's condition. Considering the unrefuted evidence concerning Mr. Storer's appearance after the crew arrived at Hanna, it could not have escaped Mr. Levengood's attention that Mr. Storer was more than slightly

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inebriated. While the Board understands that every employee feels a certain sense of obligation to look out for the interests of a fellow employee, there exists a higher duty. The safety of the crew, the public at large and the Carrier's property is of paramount importance. The tragic consequences that may result are too grave to be ignored. Under the circumstances, the Board sympathizes with Mr. Levengood's predicament. Nonetheless, the Board must conclude that he did not properly carry out his responsibilities.

In addition to failing to report Mr. Storer's condition, Mr. Levengood did not display any flagging devices when the train came to a halt. The record indicates that the rear brakeman, Mr. Tuma, did immediately display appropriate flagging devices. Given that the circumstances immediately preceding the train's coming to a stop with the use of emergency brakes was sufficiently unnerving to cause Mr. Levengood to state at the hearing,

"I was in an extremely nervous state, and I believe I was more concerned with getting off the train than anything else,"

the Board is persuaded that flagging procedures should have been implemented.

The Board finds that not all of the Rules which were cited are necessarily applicable to Mr. Levengood's conduct.

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Nonetheless, based on substantial evidence in the record, the Board must conclude that numerous Rule violations did occur. The Board, therefore, finds that the claimant failed to abide by General Rules B and E which require him to obey the Rules of the Carrier and to assist in carrying out those Rules. The Board also finds violations of Operating Rule 704, which requires an employee to report misconduct affecting the interest of the Carrier, as well as Rule 108, which requires an employee to take the safe course when in doubt, and Rule 101, which requires an employee to provide full protection for the safe passage of the train.

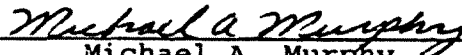
Finally, the Board finds that Special Rules 99(R) and 102(R) concerning appropriate flagging procedure were not properly carried out.

The Board having decided that the foregoing Rules were violated must determine whether a 31-day suspension was appropriate under the circumstances. The Board is cognizant that the claimant, Mr. Levengood, was in an awkward dilemma. However, having had an extended opportunity to observe the repeated speed violations as well as the obviously unfit condition of Mr. Storer, he should have taken action to forestall what he himself described as a very harrowing experience. Furthermore, al-

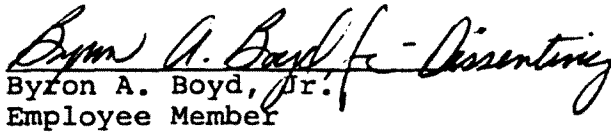
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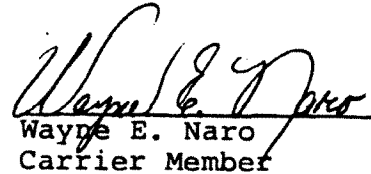
though one may quibble over what is meant by a sudden emergency stop, the Board finds that the events leading up to the emergency application of the brakes were sufficiently exigent in nature to fall within the intended spirit of the Rule in question. Whatever doubts Mr. Levengood had should have been resolved in favor of following flagging procedures. On balance, the Board cannot find that the penalty imposed was disproportionately severe for the nature of the infractions.

AWARD: Claim denied.



Michael A. Murphy
Chairman and
Neutral Member


Byron A. Boyd, Jr.
Employee Member


Wayne E. Naro
Carrier Member

Issued at Springfield, Virginia
July 22, 1985