PUBLIC LAW BOARD NO. 4450

AWARD NO. 94
NMB CASE NO. 94
UNION CASE NO. 06265A
COMPANY CASE NO. 9503699

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(Western Region)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM: Appealing the UPGRADE Level 4 Discipline of Engineer A. F. Jimerson and request the expungement of discipline assessed and pay for all lost time with all seniority and vacation rights restored unimpaired. Action taken as a result of investigation held March 6, 1995.

OPINION OF BOARD: On February 18, 1995, Mr. A. F. Jimerson, ("Claimant") was the Engineer assigned to operate train KSLAV-15, westward towards Los Angeles, along with Conductor R. A. Salazar. At MP 41 on the Los Angeles Subdivision, near Turner Avenue, MTOs Mark Jones and Scott Sullivan conducted an efficiency test on Claimant's train by placing two sets of torpedoes on the main line adjacent to each other and approximately 155 feet apart. The intent of the test was to see if the train would slow from maximum authorized speed to restricted speed traveling no greater than 20 MPH. At about 3:00 am, Claimant's train exploded all four torpedoes as the MTOs observed and followed the train for more than two miles, noting that the train was never reduced to an empirical speed of not more than 20 miles per hour until it headed into the siding of Montclair near MP 36 on signal indication.

The testing team took exception to the fact that Claimant had not immediately reduced to restricted speed and traveled at that speed the required two miles. The train stopped in the Montclair

siding where the managers boarded the train and interrogated the crew. At a subsequent disciplinary investigation, MTO Jone testified and MTO Scott corroborated testified that during the interrogation of the crew at Montclair, neither Claimant nor the Conductor was aware that they had exploded torpedoes:

> "...they came to a stop about - - approximately MilePost 35 and a half, and we each boarded the locomotives and I talked to both Mr. Jimmerson and Mr. Salazar and I asked them if they had heard anything. They said, well we thought we heard something, we didn't know what it was, we thought maybe somebody was throwing something at the locomotives. They were wearing hearing protection; they were in a Comfort cab with the windows and doors closed, and that was the response that we got was that they couldn't determine if there was a torpedo or not that had gone off at that location..."

Notwithstanding, Carrier subsequently charged the crew with Rules violations and following formal investigation assessed Engineer Jimerson a Level 4 UPGRADE discipline for allegedly violating the following Rules:

5.7 Torpedoes

> If one or more torpedoes explode, the train must slow to restricted speed immediately and remain at this speed until the head end is 2 miles beyond where the torpedoes exploded.
>
> (Illustration with Diagram A. not reproduced)
>
> When placing torpedoes, two must be placed not less than 150 feet apart on each rail. They must not be placed near station buildings, crossings, or on other than main tracks and sidings.
>
> (Illustration with Diagram B. not reproduced)

6.27 Movement at Restricted Speed

> When a train or engine is required to move at restricted speed, movement must be made at a speed that allows stopping within half the range of vision short of:
>
> - Train
> - Engine
> - Railroad car

- Men or equipment fouling the track
- Stop signal

or

- Derail or switch lined improperly

The crew must keep a lookout for broken rail and not exceed 20 MPH.

Comply with these requirements until the leading wheels reach a point where movement at restricted speed is no longer required.

Careful analysis of the record evidence convinces this Board that the disciplinary action imposed in this case must be reversed. Carrier did meet its initial burden of going forward with sufficient evidence to make out a *prima facie* case of Rules violations, when it proved that the Claimant took no action to slow his train to restricted speed in response to the detonation of the torpedoes. However, Claimant and the Organization then came forward with persuasive probative evidence to rebut that *prima facie* showing of culpability, when they showed by a preponderance of the evidence that neither Claimant nor the Conductor was able to hear and recognize the sound made by the torpedoes. In the final analysis, Carrier did not carry its overall burden of persuasion that Claimant was culpable on this record.

All things being equal, the detonation of four torpedoes should be readily detectable in a conventional cab. It should be obvious that mere self-serving assertions of "I didn't hear it" would not be enough to persuasively rebut Carrier's evidence. But in this case, it was proven that Claimant and Conductor Salazar were inside locomotive UP 9465, which was at that time a unit equipped with a radically different style of cab. The so-called North American "Comfort Cab", has a sound-deadening interior operating compartment, far superior than conventional designs in noise reduction.

KSLAV-15 was traveling approximately 62 MPH in 8th run (maximum power output and noise level) at MP 41 when it exploded the two sets of torpedoes. The two MTOs were positioned away from the train in close proximity to the torpedoes, sitting in their Jeep with doors and windows open so they could hear the bursts. However, it is undisputed that Claimant and the Conductor were in the sound-deadening cab, operating a full power, with the windows closed, the radio on, and wearing ear plugs. Their testimony is palpably persuasive that they simply did not hear the torpedoes, other than as a dull thud consistent with someone throwing rocks at their train. Given the state of this record, Carrier failed to carry the burden of proving Claimant guilty of the charges against him.

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 May 8, 1999

Union Member

Company Member