

Award No. 15
Carrier's File: 9500274
Org.'s File: D9500274

PUBLIC LAW BOARD NO. 5681 - (Expedited)

Parties: Brotherhood of Locomotive Engineers
and
Union Pacific Railroad Company

Statement of Claim:

Claim of Engineer T.L. Collins, North Platte, Nebraska, for all time lost and for removal from personal record of any entry of this UPGRADE (Level 2) discipline.

Background:

The Claimant Engineer with a September 1978 seniority date, on November 29, 1994 received a Level 2 discipline (1 day or a 1 round trip) suspension after a duly noticed Investigation for his alleged improper actions on November 2, 1994 resulting in the derailment of Unit 4210 and tank car UTLX 70331 in the North Platte yard, at 7:00 PM.

On the day in question the other members of the Claimant's crew were Mr. AlOi, Foreman, and Mr. Swarthout, Switchman. The gravamen of the charge against the Claimant was while shoving East Bowl 9 at the west end to a joint in Yard 2, the joint was not made, between the Unit and the tank car, but the Claimant continued to make the shove which resulted in the derailment of the Unit and the tank car. This occurred on straight track. One wheel of the Unit and a set of trucks of the tank car were on the ground. There was no damage either to the Unit or the tank car. About 90 feet of rail had to be respiked and anchored (Tr 24).

Foreman AlOi testified that SYO Arce gave him instructions that the Claimant crew when starting tracks were not to couple the tracks but to shove them making sure the east end was protected (Tr 54).

The Claimant testified after getting instructions from Foreman AlOi, that he was in the east end of his unit facing the direction of the coupling. His unit touched the tank car and proceeded eastward and stopped when he realized the coupling had not been made and the tank car was on the ground (Tr 83-84). The Claimant stated his speed was about one mile per hour when the movement took place.

MYO Poff explained to what starting a track meant (Tr 27). Mr. Poff stated after the incident he went back to the Tower to talk to SYO Arce who told him that the Claimant crew were doing their job correctly with regard to not coupling the entire track when they were shoving down (Tr 31).

Mr. Poff, on cross examination, stated that in his discussion with Mr. Arce, Mr. Arce said that he did not tell the crew not to couple to the first car (Tr 34). Mr. Poff added Mr. Arce told him that he did not want the Claimant crew disciplined because they did what he told them to do (Tr 36).

SYO Arce was not present at the Investigation. The Claimant's Representative protested the absence of Mr. Arce and the UTU representative introduced a letter dated November 18, 1994 to Director Bradley requesting that Mr. Arce be a witness at the

forthcoming Investigation (Ex 3). UTU Representative Charbonneau testified that Director Bradley refused to sign a acknowledgement of this letter or reply to it (Tr 17).

The representative of the Claimant crew protested throughout the Investigation Mr. Arce's absence and the refusal of the Carrier to produce SYO Arce as a witness (Tr 17, 27-28, 35).

The record shows the Claimant and crew rerailed the derailed equipment.

Carrier's Position

The Carrier asserts the Claimant was guilty as charged. The Claimant admitted he knew the joint was not made but he continued to make the shove. The Claimant admitted that he was facing in the direction of the coupling when the derailment occurred.

This was not Claimant performance in accordance with professional standards while working in the TE&Y service. The Carrier stated that to derail a car that the locomotive was going against at 1 MPH while facing the car is not believable. It further added that professionals plan their work in a safe efficient manner and do not need to have a picture drawn for them to do their work that accomplishes their goals.

The Carrier denied that it committed any material procedural error in its conduct of the proceedings.

The Carrier stated SYO Arce was not a necessary witness because he was not the direct supervisor of the Claimant crew. He

was not on the ground supervising them. Mr. Arce, as the supervisor of yard operations, was located in the Tower and he could not have left it to help the crew in any way to make the coupling on the first car. The Claimant crew had to assume the responsibility on their own. The Carrier added this is comparable to a situation when a road crew is on the line and the dispatcher who is a hundred miles away tells them to make a pick up and the crew then gets into trouble over derails, running through switches, etc. This would not involve the dispatcher.

The Carrier stressed that SYO Arce's functions would not involve going down into the bowl with the crew. Regardless of what he told them about shoving or coupling, the fact remains a derailment occurred in Bowl 9 causing a delay of four hours to a crew. The Carrier states the crew was under the charge of a foreman who receives extra pay to supervise the crew in its movements into the Bowl as well as to prevent derailments. The Carrier maintains no error was committed when it did not have SYO Arce present at the Investigation because he was not directly involved in the actual operations executed by the Claimant which caused the derailment.

The Carrier stated there was no factual basis for the Organization's contention that there had been no maintenance work performed to tracks in the 26 years of the Yard's existence. There was no evidence that the derailment was caused by the condition of the track.

It requests the Board to uphold the discipline based on the evidence of record.

Organization's Position

The Organization stated the Board should vacate the Claimant's discipline because of procedural errors as well as the lack of any factual basis to find the Claimant guilty of rule infractions.

The Organization states it was a basic procedural error for the Carrier not to have SYO Arce present as a witness at the Investigation. This official had material and relevant information to offer. It was Mr. Arce's instructions to Foreman AlOi which were conveyed to the Claimant that he was to shove and not couple the cars on the track on which the Claimant was working after he protected the east end of the track. The Organization asserted that SYO Arce was the Claimant's supervisor and if the Claimant did not comply with Mr. Arce's instructions he could have been charged with insubordination - a dischargeable offense.

The Organization noted that MYO Poff was not able to answer all the questions posed to him at the Investigation as to why the Claimant was instructed to shove the cars. This made it necessary to have Mr. Arce testify as to just what were his instructions and whether the Claimant and crew had done as he directed or whether they were doing something else on their own volition.

The Organization adds that there was some testimony from MYO Poff that Mr. Arce told him that he did not want the Claimant and

crew disciplined because they were following his instructions. Such testimony coming from Supervisor Arce would have been of probative value in determining whether the Claimant should have been assessed any discipline.

The Organization states the Claimant's rights were also violated when the Carrier commenced the Investigation on a Sunday which made it difficult for the Organization's Representative to reach the Carrier's Labor Relations personnel to ascertain certain facts.

The Organization asserts the failure of the Carrier to have SYO Arce at the Investigation denied the Claimant the fair and impartial hearing that he was entitled to have under Schedule Rule 82.

The Organization states with regard to the merits of the case, there is no probative evidence to show that the Claimant merited the discipline meted out to him. The evidence is patently clear that the Claimant complied with the instructions given him, through his Foreman, by Mr. Arce, namely, that he was to start the bowl and protect the east end and was explicitly instructed not to couple the track. The Organization added the Claimant stated that on the day in question, it was not the first time he had been instructed not to "couple the track". It further added there is ample evidence in the record that it was a common practice for SYO Arce to instruct yard crews not to couple the track because of the delays incident to coupling the cars in the track.

The Organization stressed that it was a maladministration of the discipline procedure to suspend an employee for explicitly executing the work instructions given him by his supervisor.

The Organization requests the Board to set aside the discipline for either procedural or substantive reasons.

Findings:

The Board, upon the whole record and all the evidence, finds that the employee and Carrier are Employee and Carrier within the Railway Labor Act; that the Board has jurisdiction over the dispute and that the parties to the dispute were given due notice of the hearing thereon.

On the basis of the evidence in this case, the Board finds the Organization's procedural objection to the Carrier's failure to produce SYO Arce as a witness at the Investigation is well founded. The Board finds that Mr. Arce had critical and material information to offer as to what the Claimant was directed to do on this particular assignment.

The Claimant was entitled to have entered into the record what were his work instructions from his supervisors concerning shoving Bowl 109, more specifically whether he was ordered not to couple the track after protecting the east end. The Claimant was entitled to offer or present Mr. Arce's instructions as an affirmative defense to the charge filed against him. The Board finds that the testimony of MYO Poff and Foreman AlOi with regard to coupling the

track, was hearsay, and while hearsay evidence is admissible in arbitration, when there exists the opportunity of getting direct testimony rather than hearsay testimony, the former should be accepted as more persuasive or controlling. Moreover, the Claimant was entitled to ascertain directly from Mr. Arce the reasons for his instructions and whether the Claimant had complied with those instructions. To deny the Claimant the opportunity to examine and cross examine Mr. Arce on this central matter is to deny the Claimant the fair and impartial hearing that he was contractually entitled to receive. The Claimant is also entitled to examine Mr. Arce on his alleged statement as to whether he believed the Claimant and crew should not be disciplined because they were following instructions.

The Board finds that the Organization sought in a timely fashion in advance of the hearing to make known that it wanted Mr. Arce to be present and it also interposed timely objections throughout the hearing to the absence of SYO Arce. There is no evidence that the Organization was dilatory, or sleeping on its rights, and the Carrier was fully apprised of the Claimant's need and reason for the presence of Mr. Arce.

The Carrier's error in this case is that it denied the Claimant the contractually granted fair and impartial hearing, regardless of whether the Claimant in fact made an improper coupling. The alleged guilt or innocence of the Claimant is not a

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reason for denying him a fair and impartial hearing, both as a matter of contract or due process.

The Board finds in light of the Carrier's material procedural defect during the hearing, it is not necessary to reach the other issues in this case.

Award: Claim sustained.

Order: The Carrier is directed to comply with the Award, on or before January 25, 1996.

Jacob Seidenberg
Jacob Seidenberg, Chairman and
Neutral Member

January 23, 1996