

PUBLIC LAW BOARD NO. 5681

Parties: Brotherhood of Locomotive Engineers  
and  
Union Pacific Railroad Company

Statement of Claim:

Claim of Engineer P.N. Neeley of Kansas City for pay for all time lost and all entries of this discipline (15 day suspension) be removed from his personal record.

Background:

The Claimant Engineer with a 1977 seniority date, was assessed a 15 day suspension on May 12, 1993, after a duly noticed Investigation, for his participation in an incident on April 30, 1993.

On the day in question, the Claimant was working as the Engineer on Train NPKCNS-29 and he was charged and found guilty of the improper handling of a power switch in CTC territory in Muncie, Kansas at approximately 2:30 AM. The Claimant was working this assignment with Conductor T.L. Baker.

As the Investigation MOP Jeff Jones, Kansas City, Kansas, testified that at 3:00 AM, the Dispatch Center directed him to investigate an incident of Train NPKCNS taking the switch off the power at the east end of Muncie. Manager Jones testified that when he questioned the crew Mr. Baker told him that when the train pulled up to the west end of Muncie and made a cut of eight cars and pulled over a yellow signal at the east end of Muncie. They went over the switch and past the signal and into the siding. Conductor Baker stated that he took the switch off power and shoved

past the red signal into the siding. The crew made their set out in the siding and when they came back out on the main line past the red signal the Dispatcher told him to stop where they were and ordered MOP Jones to investigate what was occurring.

Conductor Baker told Manager Jones and repeated it at the Investigation that he took the switch off power without authority.

Manager Jones took the crew for the requisite drug and alcohol tests and then took them out of service.

After the May 7, 1993 Investigation both Conductor Baker and the Claimant were assessed 15 day suspensions.

#### Carrier's Position

The Carrier stated that the Claimant had a degree of culpability for his improper handling of this train wherein it passed at red signal and went into the siding and then reentered the main line. In view of the seriousness of this infraction the 15 day suspension reflected the Claimant's share of his responsibility for committing a serious offense.

The Carrier asserts there is no dispute that the Claimant operated his train with the switch off power without ascertaining whether permission had been granted to make this move out of the siding onto the main line. The Claimant attempted to operate his train past a red light to enter siding and re-enter the main line from the siding past a red light without determining whether he has permission to make such moves. The Claimant's responsibility as an

Engineer demanded of him that he be sure it was proper for him to make this move rather than on relying on what the Conductor had told him could be done. There was no indication that the Claimant had conferred with the Dispatcher as to propriety of his moves. Nor did the Claimant ask his Conductor whether he had discussed his move with the Dispatcher.

#### Organization's Position

At the Investigation the Claimant interposed a procedural objection to the fact that he was not allowed to have a representative of his own choosing, i.e., a UTU representative and be compelled to have a BLE representative especially one who was not experienced in representing employees at Investigations.

The Organization maintains there was no valid basis to discipline the Claimant because he was not guilty of any rule breach. The Claimant asserts that he was told and believed that his Conductor, Mr. Baker, had been given permission to take the power off the switch in question. The Claimant stressed that he was not in a position to see the ground members of the crew at all times. He could not monitor their conversation with the Dispatcher be it either by mobile telephone or ground line conversations. The Claimant emphasized it was impossible for him to know whether the Dispatcher has given verbal permission to a member of the ground crew to make the move in question.

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The Claimant asserted that he was given radio signs to make the necessary moves to complete the work. During the radio signs, he asserted he was told by Conductor Baker that he had the power off the switch and to come back. The Claimant stated all the testimony showed that he functioned under the understanding that the power was on the switch and it was alright to make the set out in the siding and return to his train.

The Organization maintains that Conductor Baker stated at the Investigation that he was the employee in charge of the switches and took full responsibility for taking the switch off power without getting permission and the Carrier did not produce any witnesses or evidence that contradicted Mr. Baker's voluntary statements.

The Organization states the Hearing Officer ignored its procedural objections; the Carrier failed to meet its burden of proof to show any rule violations and in any event assessed discipline that was harsh and unfair. It is in light of all of these factors, the Organization asserts it is incumbent upon the Board to sustain the claim.

#### 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.

The Board finds that, while the Claimant was not the principal wrongdoer, nevertheless he is not completely free from fault or blame. It is true that the Conductor misled the Claimant by inferring that he had received authority or permission to take the power off the switch, but nevertheless the Claimant had the responsibility to make an independent inquiry of either the dispatcher or a crew member whether the proposed move was permissible or authorized. The responsibility vested in a road engineer does not permit him to make or move past a stop signal unless he is certain that such a move is authorized. The Board finds that the Claimant did not exercise the degree of caution or prudence required of a responsible engineer.

The Board, however, believes that if the Carrier concluded the Conductor, as the principal wrongdoer, should receive a 15 day suspension, that it was disparate treatment to impose the identical discipline on the Claimant, since the degree of culpability was not the same for both men. In light of all these facts, the Board finds it unreasonable to assess the same penalty on both men, and therefore concludes that the Claimant's discipline should be reduced to a five (5) day suspension.

The Board finds there is no merit to the Claimant's procedural objection regarding proper representation. Since the BLE holds the representation rights for the craft of engineers on this property,

it is the authorized agent to process all claims under the Contract for which it is the certified bargaining agent. The Claimant had no right under recognized and accepted labor law to have a member of another craft represent him in a claim arising under a contract to which the Claimant's purported representative was not a party thereto, regardless of the Claimant's contractual choice to select a representative of his own choosing at an Investigation.

Award: Claim disposed of in accordance with the Findings.

Order: The Carrier is directed to comply with the Award, on or before June 11, 1995.

Jacob Seidenberg  
Jacob Seidenberg, Chairman  
and Neutral Member

May 10, 1995