

PUBLIC LAW BOARD 6155

Case No. 44
Award No. 44
Carrier's File No. 1048994
Organization's File No. 97023
NMB Code 106
Claimant Engineer C. Sotomayor

PARTIES TO THE DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

AND

UNION PACIFIC RAILROAD COMPANY

Statement of Claim:

Appeal of the Upgrade Level 4 Discipline assessed to Engineer Ms. C. Sotomayor and request the expungement of discipline assessed and pay for any and all time lost with all seniority and vacation rights restored unimpaired. Action taken as a result of formal hearing held February 25, 1997.

Findings:

Upon the entire record and all the evidence this Board finds the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction of the parties and over the dispute involved herein.

The Claimant was first hired in 1977. In 1980, she was promoted to Conductor and became an Engineer in 1995.

By certified letter dated February 21, 1997, the Claimant was directed to appear at a formal Investigation to be held at the office of the Superintendent, Los Angeles, California. The purpose of the hearing was to determine if the Claimant was responsible for violating Carrier rules on February 20, 1997,

when, while serving as an Engineer on LAYR-20, she allegedly failed to comply with Track Bulletin, Form B #5213 and the instructions of the Foreman in charge, at approximately 4:15 p.m. The Claimant was advised that if found guilty she would be in violation of Carrier Rules 6.31 and 15.2. Rule 15.2 reads as follows:

Rule 15.2 Protection by Track Bulletin Form B

Display yellow-red flags as Specified in Rule 5.4.3
(Display of Yellow-Red Flag).

When trains are within the limits during the time stated in track bulletin Form B, they must:

- * Move at restricted speed.
- * Stop short of a red flag.

However, trains do not need to comply with the above requirements if instructed otherwise as stated below, or if the entire train has passed a green flag or cleared the limits.

Before entering track bulletin limits, a crew member must attempt to contact the employee in charge by radio to avoid delay and report the train's location and the track being used.

A. Verbal Permission

When granting verbal permission, use the following words:

"Foreman (Name) (Of gang No. Using track bulletin No. Line No. between MP and MP on Subdivision.

1. To permit a train to pass a red flag without stopping, add the following:

"(Train) may pass red flag, located at MP without stopping."

The train may pass the red flag at restricted speed without stopping.

2. To permit a train to proceed at other than restricted speed, add the following:

" (Train) may proceed through the limits at ____ MPH (or a maximum authorized speed)."

The train may move through the limits at the speed specified, unless otherwise restricted.

3. To require the train to move at restricted speed, but less than 20 MPH, add the following:

" (Train) must proceed at restricted speed but not exceeding ____ MPH." (Specify distance if necessary.)

B. Repeat Instructions

A crew member must repeat the above instructions, and the employee giving the instructions must acknowledge them before they can be followed.

C. Stop Column

When "STOP" is written in the Stop column, a red flag must be displayed at the beginning of the limits. The train must not enter the limits until authorized by employee in charge.

On the day of the incident, the Claimant's train was operating over the Santa Fe Railroad when they approached an area of track covered by a Form B Bulletin 5213. The Conductor of the LAYR-20, was in communication with the Foreman in charge of the Form B Bulletin. According to the tape provided at hearing, the following exchange took place:

FOREMAN: UP 9433 East - Do you copy? Over

WELLS: UP 9433 East. Over

FOREMAN: Foreman Dulmage of Gang #1, your track bulletin Form B #5213, line number 1, mile post 46.8 to 50.4 all tracks on Cañon Subdivision. (Inaudible)

UP 9433 to pass the red flag located at mile post 50.4 without stopping. And 10 mph from mile post 50.0 to 49.6. Over.

FOREMAN: Did you copy that UP94-?

COMPUTER: Mile Post 64.11 (inaudible) track. No defects.

WELLS: Track Bulletin Form B #5213, Line Number 1 between mile post 49.6 and mile post 50.4 on Sub-Cajon Subdivision. Gives UP 9433 permission to pass red flag located at 49.6 without stopping. (Inaudible) for men and equipment. Over.

FOREMAN: Yeah, the red flag is at mile post 50.4 but yeah that's okay on the repeat and I'm (inaudible) high as soon as your clear. Over.

WELLS: Okay - the red flags at 50.4 and you will high ball it. Over.

FOREMAN: That's correct. You guys have a safe trip.

The crew continued through the restricted area initially at 10 MPH. However, within the restricted area the speed of their train did get up to about 31 MPH. As the train was going by the Foreman, he radioed them and asked what happened to the 10 MPH. The Claimant immediately reduced the speed of her train, but, the Manager of Yard Operations was called and advised the crew had committed a Form B violation. The crew was interviewed and subsequently were cited.

By certified mail dated March 3, 1997, the Claimant was notified that the Carrier determined she had violated the cited rules and she was being issued a Level 4 Discipline, which, when coupled with her discipline status under the Upgrade Policy resulted in a Level 4 Discipline, which was a thirty (30) day suspension without pay, as well as, the requirement she pass the necessary annual operating rules or equivalent examination before she could return to work. As a result of the discipline, the Claimant no longer met the qualifications requirements for the

position of Locomotive Engineer as specified by the Federal Railroad Administration in 49 CFR 240.

The Organization appealed the Carrier's actions through the appropriate channels and the case is now before this Board for review.

CARRIER'S POSITION

The Carrier claims the Claimant violated the cited rules when she operated her train through the Form B in excess of the 10 MPH speed restrictions ordered by the Foreman in charge of the track. Furthermore, the Carrier points out that the Claimant's train traveled in excess of 31 MPH over the track involved. They maintain that the infraction warrants a Level 4 Discipline under the Upgrade Policy, which when combined with her Disciplinary status resulted in a Level 4, thirty (30) day suspension without pay.

ORGANIZATION'S POSITION

The Organization raises the procedural argument that the Offer of Waiver should not have been sent with the charge letter. They contend the inclusion of both should be considered a fatal flaw since it is in violation of the Upgrade Policy.

As to the merits, the Organization maintains that the rule requires the Foreman should be held accountable in this matter. They point to the tape of the conversation between the Conductor and the Foreman wherein the Conductor repeated the Foreman's instructions without reiterating the 10 MPH speed limit. They say if the Conductor's response was incorrect, the Foreman should have corrected the misunderstanding. They contend that is the main reason to repeat the instructions. They claim there was a lot of radio traffic that day and when the Conductor did not repeat the 10 MPH instruction, the Foreman should have realized

the possibility that the Conductor had not heard it, which was the case. In any case, they say the Foreman was the one who erred when he okayed the repeat and only corrected the red flag location.

Furthermore, the Organization insists the term "high ball" has the specific meaning of going ahead at full authorized speed. They say when the Foreman used the term and the crew had not heard the 10 MPH restriction, they had every reason to believe they were authorized to proceed at their authorized speed which was 40 MPH.

The Organization maintains the Foreman's faulty instructions, especially when absent a correction of the Conductor's repeat, should negate the discipline issued to the Engineer who was merely following the instructions heard and repeated by her Conductor.

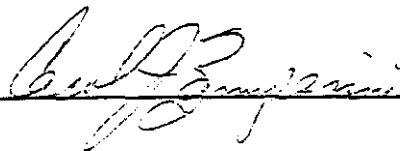
DECISION

This Board agrees with the Organization's contention that the intent of the rule requiring the crew member to repeat the instructions issued by the Foreman are designed to ensure the instructions were transmitted in their entirety and heard as issued. The crew can hardly be held accountable for not hearing the complete instructions. While there is no question the Foreman issued the 10 MPH speed limitation, there is considerable doubt as to whether the Conductor heard the speed limit. Regardless, the Foreman was at least equally responsible for not correcting the Conductor when he did not repeat the speed limitation, otherwise, what is the purpose of the repetition.

When the Foreman's failure to correct the Conductor's repeat is coupled with the Foreman's affirmative response from the Conductor to "highball" their train, the Board believes the discipline issued the Claimant was unfair and unjustified.

AWARD

The claim is sustained.



Carol J. Zamperini, Impartial Neutral

Submitted this 10th day of August, 2000.