

PUBLIC LAW BOARD 6155

Case No. 49
Award No. 49
Carrier's File No. 1136891
Organization's File No. 98056
NMB Code 106
Claimant Engineer W. E. Bostick

PARTIES TO THE DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

AND

UNION PACIFIC RAILROAD COMPANY

Statement of Claim:

Appeal of the Upgrade Level 1 Discipline assessed to Engineer W. E. Bostick 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 July 16, 1998.

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 the jurisdiction of the parties and over the dispute involved herein.

By certified letter dated June 26, 1998, the Claimant was notified that he was being offered a Waiver of Hearing for an alleged violation of Carrier Rules 70.1, 1.1, 1.1.1, and 1.1.2, effective April 10, 1994. The letter stated that if the Claimant did not want to sign the waiver, he would be required to report for an Investigation on July 1, 1998, at the office of the Manager of Yard Operations in Seattle, Washington. The charges centered around the allegation that the Claimant failed to perform his duties in an alert and attentive manner, which resulted in a personal injury. The rules cited read as follows:

Rule 70.1 Safety Responsibilities

Employees are responsible for their personal safety and are accountable for their behavior as a condition of employment. Employees must make every precaution to prevent injury to themselves, other employees, and the public. Employees must report any dangerous condition or unsafe practice.

Employees must be aware of and work within the limits of their physical capabilities and not use excessive force to accomplish tasks. Good judgement is required in fulfilling job responsibilities safely.

Past practices which do not conform to the rules are unacceptable.

Rule 1.1 Safety

Safety is the most important element in performing duties, obeying the rules is essential to job safety and continued employment.

Rule 1.1.1 Maintaining the Safe Course

In case of doubt or uncertainty take the safe course.

Rule 1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves and others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

According to the Report of Personal Injury or Illness filed by the Claimant on the day he was injured, he was employed as an Engineer that day on Train YSE70, Unit UP 2034. At one point, he was applying the hand brake to the engine. On his final lifting stroke the brake was harder to apply and he felt a strain on his lower back. He felt discomfort in his back when he dismounted the engine, walked on the ground or bent down. He filed the injury report as required by rule and was cited for the above mentioned rule violations.

The hearing was postponed until July 16, 1998. After reviewing the evidence adduced at hearing, the Carrier determined

the Claimant was guilty of violating the cited rules and assessed a Level 1 Discipline, which was a Letter of Reprimand.

The Organization appealed the discipline through the appropriate channels and it is currently before this Board for review.

CARRIER'S POSITION

The Carrier maintains that approximately 10% of all the handbrakes set by the Claimant since he became an Engineer were of the type he applied on the day he was questioned. They argue that the Claimant had never injured himself before when setting this type of handbrake. Moreover, they say, the Claimant did not report any defects with the brake nor were any found in a subsequent mechanical inspection. They contend these facts provide evidence that the Claimant was not attentive or alert when he was applying the handbrake. They assert the discipline assessed was in keeping with the Upgrade Policy and was appropriate under the circumstances.

ORGANIZATION'S POSITION

The Organization argues that the Carrier is attempting to get information about the Claimant's injury to which they are not entitled under the Federal Employer's Liability Act. They insist the Carrier's actions are merely to place the blame on the Claimant for an injury which was not his fault, but, the result of a design flaw in the handbrake. They insist the Carrier and the manufacturer of the handbrake were well aware of the flaw since there have been numerous personal injuries, not only to engineers but, to mechanical personnel and anyone else required to operate this particular brake.

They maintain the subsequent inspection of the brake was inadequate and the report filed contained no written comment from the mechanic. They contend this may show that the Carrier is

trying to avoid potential liability. Moreover, they assert, if the brake worked properly for the mechanic, it may well be that the chain on the brake mechanism kinked and the difficulty in pulling the brake may have only occurred intermittently. The Organization maintains that a long list of Engineers would testify to that possibility. They insist it was the Carrier's responsibility to consider all of these possibilities before assessing the Claimant any discipline.

The Organization finds it interesting that of all the rules the Claimant was cited with violating, he was not charged with violating Rule 81.17, Application and Release of Handbrakes. Therefore, they believe the Carrier determined in its preliminary investigation that the Claimant had not violated the one rule most applicable to the charges.

The Organization further claims that the Claimant did report the brake as being malfunctioning when he reported his injury. This they say, prompted the Carrier to inspect the brake. They insist the Claimant had no reason to report the brake as malfunctioning before he became injured while using the brake.

DECISION

The question for the Board is whether there is sufficient evidence to demonstrate that the Claimant violated the cited rules. Clearly, he was injured and there is no contention that he was not injured while engaging the handbrake on Unit UP 2034. The only witness to this injury was the Claimant himself. He testified that he operated the handbrake in the same manner as he had on previous occasions. According to the charging officer, the Claimant would have operated such a lever handbrake on 1 out of 10 engines he had operated during his tenure. One can arrive at one of two or possibly three conclusions. Either the Claimant did not operate the handbrake in the manner he normally did, therefore injuring himself; or, the Claimant was not alert on this occasion or was working with a malfunctioning brake.

This Board is charged with making a determination based on the evidence presented. The inspection of the brake immediately after the incident, leads one to believe the brake was not malfunctioning. Although possible, it seems unlikely the brake would have malfunctioned while being operated by the Claimant, but, would have been all right subsequently. Furthermore, the Claimant testified that the incident occurred at the top of his last pull. That being the case, it is unlikely the chain kinked, as suggested by the Organization. Therefore, it seems unlikely to the Board that the brake malfunctioned.

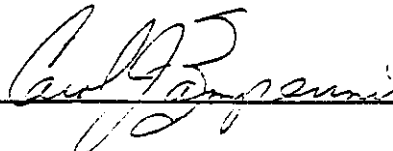
That leaves the Board to consider the other two possibilities. In listening to the Claimant's testimony, the Board does believe the handbrake may be awkward to operate, however, he has done so off and on for over four years. It is apparently possible to engage the handbrake without injuring yourself. It is easy to see why his injury is suspect after all this time.

All that being said, however, the fact is the human body is not a machine. It does not always perform with the same flexibility. Our muscles may be supple one time and less supple another time. Absent proof that the Claimant performed his work improperly or unsafely, it is only conjecture to say that the Claimant did not operate the handbrake in a safe and attentive manner. There is no such proof. The Claimant was the only witness. The fact he strained his back is not, in and of itself, evidence of culpability.

AWARD

The claim is sustained.

The Carrier will comply with the Award within thirty (30) days of its receipt.



Carol J. Zamperini, Impartial Neutral

Submitted this 23rd day of August, 2000.