

PUBLIC LAW BOARD 6159

Case No. 82
Award No. 82
Carrier's File No. 1239328
Organization's File No. 1422-57-5604D
NMB Code: 106
Claimant Conductor R. A. Evans

PARTIES TO THE DISPUTE:

UNITED TRANSPORTATION UNION

AND

UNION PACIFIC RAILROAD COMPANY

Statement of Claim:

Request of Conductor R. A. Evans, Los Angeles Service Unit,
for:

- 1) Removal of a Level 3 discipline assessment from his personal record, with seniority unimpaired,
- 2) Replacement of his wage loss and vacation credits resulting from Mr. Evans' suspension from service for five days, commencing July 10, 2000 through July 14, 2000, and
- 3) Replacement of his wage loss and vacation credits for attending formal investigation on June 22, 2000.

Findings:

Upon the entire record and all the evidence, this Board finds the parties herein to be 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 by the Carrier on June 1, 1968, as a Brakeman at the Los Angeles Service Unit. On May 22, 2000, he was assigned as Conductor on Train ILVDA-20 which was operating eastbound out of Los Angeles to Yuma. Near 675.00, his train was directed into a siding near Iris in order to allow a

westbound train, Train FRAT-10 to pass. Manager of Train Operating Practice (MTO), Darrell Smith, was on board Train FRAT-10, which operated once a year out of Yuma. The train was a single self propelled car, specially equipped to measure defects in the track while operating at speeds as high as 79 mph. The MTO was on the train in order to accompany FRA officials who were traveling through the district.

According to the testimony of the MTO, as the FRAT-10 passed Train ILVDA-20 sitting in the siding, he fully expected someone from the diverted train to conduct a roll-by inspection of his train. However, as they passed the siding, he saw no one on the ground conducting the inspection. After they passed the siding, he called the crew and inquired about the Conductor. He was told the Claimant was the Conductor of Train ILVDA-20. When he asked the Road Engineer why the Conductor was not on the ground to roll-by Train FRAT-10, the Engineer allegedly indicated he did not know.

The MTO testified that the FRA officials were critical of the fact the Conductor (Claimant) from the diverted train was not on the ground inspecting the FRAT-10.

By letter dated May 23, 2000, the Carrier directed the Claimant to attend a formal Investigation to be held in the Superintendent's Conference Room, Bloomington, California, on June 5, 2000. The purpose of the hearing was to ascertain through evidence whether the Claimant violated Rule 6.29.1 of the General Code of Operating Rules, effective April 2, 2000, when on May 22, 2000, he allegedly failed to disembark his train in order to conduct a roll-by inspection of a passing train. The cited rule reads as follows:

Rule 6.29.1 Inspecting Passing Trains

Employees must inspect passing trains. If they detect any of the following conditions, they must notify crew members on the passing train by any available means:

- Overheated journals
- Sticking brakes
- Sliding wheels
- Wheels not properly positioned on the rail
- Dragging equipment
- Insecure contents
- Signs of smoke or fire
- Headlight or marker improperly displayed
- Any other dangerous condition

When possible, employees inspecting the passing train must advise crew members of the condition of their train.

When possible, a crew member on the engine of the train being inspected must notify a crew member on the rear of the train when the train is being inspected by other employees.

Ground Inspections

When a train is stopped and is met or passed by another train, crew members must inspect the passing train. The trainman's inspection must be made from the ground if there is a safe location. If safe to do so, a trainman must cross the track and inspect the side of the passing train opposite the stopped train.

Trackside Warning Detectors and Inspections

Crew members must be aware of trackside warning detectors and signals from persons inspecting their train. Stop the train immediately for an inspection when any of the following conditions exist:

- A crew member receives a stop signal.
 - A trackside warning detector indicates a train defect.
 - or
 - A crew member is notified of a dangerous condition.
- Movement must not proceed until it is safe.

The hearing was postponed twice and held on June 22, 2000. After reviewing the evidence adduced at hearing, the Carrier determined the Claimant culpable of the rule violation. By certified letter dated July 5, 2000, the Claimant was told of the Carrier's decision and assessed a Level 3 discipline under the Carrier's UPGRADE Discipline Policy. The discipline included a five-day suspension.

The Organization took exception to the discipline and appealed the assessment through the proper channels. It is now before this Board for review.

CARRIER'S POSITION

The Carrier asserts there was substantial evidence provided at hearing to demonstrate the culpability of the Claimant. They say such evidence is sufficient to meet their burden of proof in this matter. They reference the testimony of Carrier Officer Smith who verified that the Claimant did not perform a roll-by inspection of Train FRAT-10, as required by Rule 6.29.1. They point out that the rule does not provide for exceptions. They contend the Conductor is responsible for conducting the inspection and does not indicate the Engineer can conduct the inspection in lieu of the Conductor.

The Carrier directs the Board's attention to the fact the FRA representatives aboard the FRAT-10 were extremely critical of the fact no roll-by inspection was conducted. They maintain the Carrier takes such criticism seriously, especially since the Carrier's operations are closely monitored following a number of mishaps, some involving fatalities.

The Carrier insists the Claimant was well aware of his responsibilities under the rule. They submit he should have contacted the Dispatcher to ascertain when the next train would pass before he absented himself from the lead locomotive. They further assert the Claimant could have made arrangements for one of the other crew members to roll-by the train if his absence was necessary.

The Carrier discounts the Organization's suggestions that Train FRAT-10 was nothing more than a hy-rail vehicle or truck. They maintain it is an extremely heavy piece of equipment 87 feet long and 87 tons in weight. They assert the car is more like a locomotive and requires a qualified locomotive engineer.

Further, they reveal, the car runs on traction motors and unlike a hy-rail, it can only be operated on rail.

The Carrier claims the discipline assessed was reasonable and in keeping with the Carrier's UPGRADE Discipline Policy. They insist the Board should ignore the Claimant's excuse that he was using the restroom and unavailable to do the roll-by inspection. They point to Award 50 of PLB 4561, wherein the Board found the Claimant erred when he left the cab of the lead locomotive before it reached the red signal block. The Award went on to assert both crew members in a two-man crew had to "live up to the full measure of {their} responsibilities." The Carrier references other Awards which have upheld discipline when proper roll-by inspections were not conducted.

The Carrier argues the Board is without authority to disturb the discipline assessed unless there is substantial evidence the Carrier abused its discretionary authority. Absent such a showing, the Board can only decide if the Carrier proved by substantial evidence that the Claimant was culpable. The Carrier maintains they not only demonstrated the Claimant's responsibility in violating the rule, but, in view of the Claimant's personal record, the discipline assessed was not unreasonable or harsh.

Finally, the Carrier contends there were no procedural errors which warrant voiding this discipline.

ORGANIZATION'S POSITION

The Organization argues the Claimant was denied his hearing rights. They point to the Carrier's assertion any witnesses the Claimant wished to call had to be produced at his expense. They say the Carrier had an obligation to call the Student Engineer and the Engineer since they were material witnesses. They insist the failure of the Carrier to provide these witnesses prevented the Claimant from developing a full and meaningful defense. The

absence of these two witnesses meant the Claimant was denied a full, fair and impartial Investigation. The Organization references several Board Decisions which held the Carrier erred when they did not produce material witnesses at Investigation. These Awards point to the Hearing Officer as a trier of facts, not a prosecutor. The Organization claims the Awards demonstrate the obligation of the Carrier to produce all witnesses who have material evidence. Moreover, they assert, Boards must rely on the Carrier to produce all material evidence at the Investigation since the system of arbitration in the industry is an appellate system. They maintain Board decisions are based on the evidence presented at the Investigation.

The Organization insists the charging officer made a determination to discipline the Claimant at the time he was criticized by the FRA officials when the rail detector car was not given a roll-by inspection. They assail the fact the charging officer proceeded to cite the Claimant without a preliminary investigation. They submit the charging officer never even questioned the Claimant before sending him the charge letter. Moreover, they contend, the crew was not questioned prior to the citation.

As to the merits of this case, the Organization claims the detector car did not constitute a train as defined by rule. The Organization maintains that if the car involved is not a train by Carrier definition, the rule for which the Claimant has been disciplined is not applicable and the discipline assessed cannot be upheld.

The Organization further contends the Claimant had no opportunity to comply with the cited rules since he was using the restroom in the second unit when the FRAT-10 approached. They argue that the so-called train passed the Claimant's train at 60 mph without notifying the Claimant's train beforehand that they were approaching. The Organization asserts, this is a common courtesy extended by Conductors of approaching trains,

they admit, this train had no Conductor. In addition, they contend the Claimant in response to the charging officer's query as to why he did not do an on-the-ground roll-by inspection of the train, said "I don't know" simply because at that point he did not know what the charging officer was talking about. He did not realize the detector car had passed the siding. They contend the Claimant's response was from confusion, not from a lackadaisical or indifferent attitude towards his job.

The Organization raises other points in their submission. They argue that if the head lights on the detector car were visible for six miles, the other two crew members should have seen them while the Claimant was in the restroom and warned him of the approaching "train". They did not, despite the fact they are jointly responsible for safe operation and rule compliance. The fact the Engineer and Student Engineer were not charged or questioned or called by the Carrier as material witnesses demonstrates the Claimant was prejudged.

DECISION

In its defense of the Claimant, the Organization has raised three questions this Board must address. The first was whether the other crew members somehow share the blame for not doing the roll-by inspection of Train FRAT-10. The Board recognizes that the operation of a train is a shared responsibility. None-the-less, there are duties which are particular to Conductors. One of those is conducting roll-by inspections of passing trains. This Board would be receptive to the Organization's assertions about the shared responsibility of this duty, had there been any evidence the Claimant asked the other crew members to cover his duties while he went to the restroom. Moreover, the Claimant could have contacted the Dispatcher to ascertain with some certainty when another train was scheduled to pass. In addition, it is not acceptable, in the Board's view to expect a student engineer to assume the job of the Conductor in the absence of the Conductor.

The second issue is whether the Claimant should have been in the lead unit to cover a passing train or whether there was no way for him to know the train was approaching. We concur he could not have seen the train if he was in the second unit restroom. However, as indicated above, the Claimant knows his duties as well as anyone. If he had to use the restroom, which we have no reason to doubt, he should have contacted the Dispatcher to see when would have been a good time. If it was an emergency he could have communicated that to the Dispatcher and arranged for the other crew members to cover.

During the hearing, the Organization objected to the Carrier's statement within the charge letter that the Claimant could provide witnesses at his own expense. Although there may be times when this Board would concur with such an argument, we are not convinced the Carrier failed to provide material witnesses. We may have felt differently if the Carrier had disputed the Claimant's contention he was in the restroom when the detector car passed. However, there was no such claim by the Carrier.

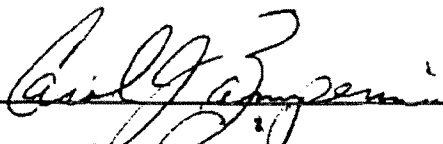
Another issue raised by the Organization was whether the rail detector car constituted a train by rule. The definition of a train within the rule is, "one or more engines coupled, with or without cars, displaying a marker, and authorized to operate on a main track. A term that when used in connection with speed restrictions, flag protection, and the observance of all signals and signal rules also applies to engines." There is no question the car in question is self-powered and only rides rails. However, there is some question as to whether it constitutes a train under the definition. It doesn't appear to be classified as an engine. In any case, it does not occupy the track frequently, running through the district only once a year. Carrier Exhibits describing the car do not refer to the car as an engine. Furthermore, there was no evidence that employees were ever told the car was to be classified as a train. The Claimant and the crew may have been uncertain, although, to be on the safe

side someone from the crew should have conducted a roll-by inspection.

All this aside, the Board's decision in this case rests with the actions of the charging officer. Although the Claimant has not been a model employee, his record cannot be used to prove the rule infraction here. Moreover, he is still entitled to the procedures outlined in the UPGRADE policy and the due process protections afforded by contract. FRA officials believed the car should have been inspected and conveyed their feelings to the charging officer. The charging officer almost blindly responded to this embarrassing situation. Rather than conduct a preliminary investigation before citing the Claimant, the charging officer went forth with the charges. This not only violated the Claimant's right to present his side of the story before charges were instituted, it violated the formal discipline guidelines. It is important to note, that even though the Claimant says he talked to the charging officer over the radio on the day of the incident, the charging officer testified he had talked only to the engineer. This is a clear indication the charges were driven by the FRA officials and their criticism of the charging officer instead of a valid preliminary investigation. We don't know if the results would have been the same. Perhaps there would have been a discussion about the very issues raised by the Organization in their submission before the charging officer cited the employee. Perhaps the charging officer would have become more receptive to the explanations provided by the Claimant. We simply do not know. The one thing we do know, is the charging officer was determined to discipline the Claimant and never looked back. In this case, we do believe there was a rush to judgement.

AWARD

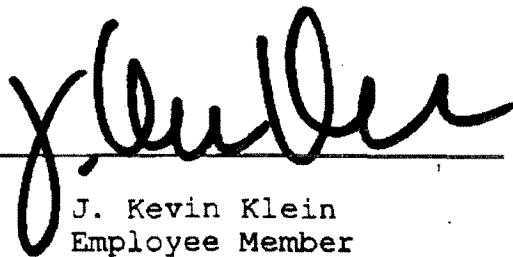
The claim is sustained.



Carol J. Zamperini
Impartial Neutral and Chairperson



Robert A. Henderson
Carrier Member



J. Kevin Klein
Employee Member

Submitted this 12th day of March, 2001.