

PUBLIC LAW BOARD NO. 6795

Case No. 1

Award No. 1

**PARTIES TO DISPUTE: BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AND TRAINMEN**

-and-

MERIDIAN SOUTHERN RAILROAD

STATEMENT OF CLAIM:

Claim on behalf of Engineer/Conductor Isiah Taylor for reinstatement to service with his seniority unimpaired; restoration of all benefits; and compensation for all time lost as a result of a formal investigation on April 29, 2004.

BACKGROUND

The Meridian Southern Railroad (hereinafter referred to as the Carrier or the Meridian Southern) is a shortline railroad with offices in Meridian, Mississippi. The Carrier services several consignees in and around Waynesboro and Quitman, Mississippi. It employs approximately 10 employees six of whom are operating employees represented by the Brotherhood of Locomotive Engineers & Trainmen (hereinafter referred to as the Organization or BLET).

On October 27, 2003, the Organization and Meridian Southern signed their initial Labor Agreement on behalf of the operating employees represented by the BLET. In that Agreement, both parties agreed that " . . . *the fundamental objective of the Carrier, its*

management and employees is to provide service to its customers in the most efficient manner. . . ."

The Labor Agreement provides, in pertinent part, as follows:

ARTICLE 7 Management Rights

It is recognized that the management of the business, the operation of the railroad, the right to place into effect any and all changes necessary to effect an efficient operation for the business are vested in the Carrier whose discretion and judgment shall control as to the selection of employees, the work and duties to which they are assigned, and terms and conditions of employment, so long as the same are not in conflict with the provisions of this Agreement and provided that no action may be taken for the purpose of discrimination against any employee because of his membership with the union.

ARTICLE 8 Hearings and Discipline

The parties recognize that it is in their mutual interests to adopt a uniform agreement supporting procedures to insure the fair and impartial administration of the company's discipline policy, therefore it is agreed. . . .

B. Employees will not be disciplined in a manner which will require him to be absent from work or held out of service without first being given a fair and impartial investigation, in which they are allowed to be represented by an employee representative of their choice, he is allowed to be present during the investigation, allowed to question all witnesses and allowed to have witnesses testify on their behalf. Employees may be held out of service pending an investigation for serious violations.

Employees will be notified, in writing, within ten (10) days of the time of the violation or within (10) days of the time a company officer with authority to call investigations becomes aware of, or should have become aware of the alleged violation. Such notification will be via U.S. mail or hand delivered. The notice of hearing will contain information sufficient to apprise the employee of the act or

occurrence to be investigated. It will also include the time and location of the investigation. The employees will have sufficient time to prepare a defense and request witnesses to testify on their behalf at the investigation. . . .

- L. If discipline assessed is not sustained either through the appeal process or a decision of a board of adjudication the employee, if suspended or dismissed, will be returned to service (if out of service at the time) and paid for all lost time, including time out of service prior to investigation (if any) and time spent at the investigation.

On or about January 7, 2002, the Carrier adopted several General Code of Operating Rules (GCOR) that it believed were applicable to its operations. Operating employees were given a copy of the Rules that the Carrier adopted. One of the Rules adopted by the Meridian Southern was GCOR Rule 6.5, which requires a crew member to take an easily seen position on the leading car or engine, or be ahead of the movement to provide protection where cars or engines are shoved and conditions require.

The Carrier also adopted GCOR Rule 6.32, which requires a crew member to be on the ground at a crossing to warn traffic when cars are shoved over road crossings at grade. Rule 6.32 does not apply when crossing gates are in the fully lowered position or it is clearly seen that no traffic is approaching or stopped at the crossing.

Additionally, the Carrier adopted GCOR Rule 6.32.6 that requires a standing train or switching movement to avoid blocking a public crossing longer than 10 minutes, if possible. Apparently, this is also state law in Mississippi.

The Claimant, Isiah Taylor, was hired by the Carrier as a Conductor/Engineer on November 6, 2002. He had previously worked as a Locomotive Engineer for the Illinois Central Railroad for approximately six years.

On Friday, February 13, 2004, Claimant was working as the Conductor on Train MDS-1. Kenneth Joe Sullivan was the Engineer on this assignment. That afternoon, Train MDS-1 was shoving 8 or 9 cars of wood south on the main track at Quitman, Mississippi. These cars were being delivered to the Hankin Lumber Company. Some of these loads were in front (south) of the engine. Train MDS-1 had to cross Industrial Road, a public road, to deliver the cars. The Carrier contends that this is a busy public crossing. There is a school located approximately one-half mile from the crossing and school busses frequently traverse it.

The Claimant was protecting the movement over the Industrial Road crossing. There are no gates at this crossing. Conductor Taylor was approximately 150 to 200 yards south of the crossing. He was on the main track at a switch leading to the Hankin Lumber Company holding a red flag. He contacted Engineer Sullivan on the radio and instructed him that the crossing was clear and that he could proceed across it. Train MDS-1 proceeded through the crossing at very low speed without experiencing any problems.

On Tuesday, February 17, 2004, two Meridian Southern track employees, Mickey Waters and Larry Giles, reported to General Manager Rickey Jacobs that they had observed Conductor Taylor make an unsafe movement across the Industrial Road crossing at Quitman the afternoon of February 13, 2004. The two track employees advised the General Manager that Mr. Taylor was standing a good 200 feet from the crossing and could not tell whether or not the crossing was clear.

The Claimant insisted the he could clearly observe the Industrial Road crossing from where he was positioned. He said that he gave Engineer Sullivan a signal to

proceed across the crossing since there were no vehicles at the crossing. General Manager Jacobs prepared a report of this incident.

On Monday, February 16, 2004, Train MDS-2 was assigned to switch several industries in the Waynesboro Industrial Park. Claimant was the Conductor on this assignment. There is only one public road into this industrial park, the Quitman Industrial Road. The Carrier's lead track in the industrial park crosses this public road. After switching several industries in the Waynesboro Industrial Park, Train MDS-2 proceeded north on the lead track with between 40 and 50 empty cars.

At around 5:15 p.m. on February 16, 2004, a manager at Marshall Durbin, one of the consignees in the Waynesboro Industrial Track serviced by the Meridian Southern, contacted General Manager Rickey Jacobs and complained that the public road in the industrial park had been blocked by a Meridian Southern train since around 4:25 p.m. He said that employees leaving Marshall Durbin and Odom Industry, a chemical plant in the industrial park, were backed up because the road was blocked.

General Manager Jacobs contacted the Claimant by radio to determine what was happening. He asked the Claimant how long the crossing had been blocked. According to Mr. Jacobs, Conductor Taylor said the road had been blocked for 10 minutes. He denied that the crossing had been blocked for an hour.

On February 17, 2004, an employee of Odom Industries telephoned General Manager Jacobs and complained that she and several other employees were detained approximately one hour between 4:25 p.m. and 5:25 p.m. on February 16 because a train was blocking the road. She advised Mr. Jacobs that employees of Odom Industries change shifts at 4:30 p.m. and they were stuck at the road crossing for an hour after their

shift ended. Mr. Jacobs prepared a report of this incident and requested that disciplinary action be taken against Conductor Taylor.

Conductor Taylor estimated that the public grade crossing in the Waynesboro Industrial Park was blocked for about 30 to 40 minutes on February 16, 2004. He explained that it was difficult to pull the train up the hill at the industrial park because it lacked sanders. He said that he could have doubled the train up the hill but this would have taken longer to depart the industrial park.

On March 1, 2004, Claimant was the Conductor on Train MDS-2. General Manager Rickey Jacobs reminded the Claimant that he was required to complete his customer report and fax it to the Kansas City Railroad before leaving the property. The Claimant was also instructed to complete his Time Sheet/Time and Delay Report during his trip to Waynesboro. When General Manager Jacobs arrived at the Waynesboro Depot after the crew of MDS-2 went off duty, Conductor Taylor's paperwork was not there. The Claimant completed his Time and Delay Report on March 10, 2004, but evidently never filed the customer report.

On February 21, 2004, General Manager Rickey Jacobs, acting as a Carrier investigating official, notified Conductor Taylor to attend an investigation on March 2, 2004. The Claimant was charged with:

- 1) Permitting and causing a reverse movement across a public crossing without proper protection in violation of MDS operating and safety rules while working as the Conductor of Train MDS-1 on February 13, 2004, and
- 2) Permitting and causing a public grade crossing in the Wayne County Industrial Park to be blocked for approximately one hour in violation of MDS operating rules while working as the Conductor of Train MDS-2 on February 16, 2004.

On March 10, 2004, General Manager Jacobs, again acting as a Carrier investigating official, notified Conductor Taylor to attend an investigation on April 15, 2004. He was charged with:

- 1) Failing to complete his necessary and required reports on March 1, 2004, as directed.

Because of this violation, the Carrier removed the Claimant from service pending his investigation.

The investigation was held on April 29, 2004. The Carrier was represented by outside counsel at the investigation. The Claimant was represented by the BLET. The investigation was transcribed by a certified court reporter. The transcript consists of 352 pages of testimony and exhibits. Seven witnesses testified and twenty-three (23) exhibits were introduced.

On May 7, 2004, Meridian Southern's Executive Manager notified the Claimant that his employment was terminated effective March 1, 2004, for his conduct on February 13, and 16, 2004. He was given a 90-day suspension without pay for failing to submit company documents on March 1, 2004.

On May 28, 2004, the Organization appealed Conductor Taylor's discipline to Eric Lee, Chief Executive Officer of Meridian Southern. On June 25, 2004, Mr. Lee upheld the May 7, 2004 discipline in its entirety and denied the appeal. The matter was subsequently appealed to this Board pursuant to the parties' Labor Agreement and the Railway Labor Act. The Board held a hearing in Boston, Massachusetts on December 10, 2004. The Organization and the Carrier appeared at that hearing and offered arguments in support of their respective positions.

FINDINGS AND OPINION

This Board upon the whole record and all the evidence, finds as follows:

That the parties were given due notice of the hearing;

That the Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Board has jurisdiction over the dispute involved herein.

There are two significant procedural issues that this Board must address:

- 1) Whether the Carrier had the right to hold the Claimant out of service pending his investigation.
- 2) Whether the Claimant was given a fair and impartial investigation as required by Article 8 of the Labor Agreement.

If the Claimant was given a fair and impartial investigation, we must then determine:

- 3) Were any of the three charges sustained and, if so, was the discipline assessed the Claimant on May 7, 2004, warranted.

I. Claimant held out of service.

Article 8 of the Labor Agreement allows the Carrier to hold an employee out of service pending an investigation for serious violations (underscoring added). The Agreement does not define the term "*serious violations*." Nor does it give examples of what might constitute "*serious violations*" for which employees may be held out of service. Absent such guidance, this Board believes that a rule of reason must be applied to Article 8.

It must be noted that Conductor Taylor was not held out of service for causing and permitting a shoving movement across a public grade crossing without proper

protection on February 13, 2004. Nor was he held out of service for causing and permitting a grade crossing to be blocked for an hour on February 16, 2004.

Depending on the circumstances, either of these charges could be of such severity that it would be permissible for the Carrier to hold an employee out of service pending a disciplinary investigation.

On February 21, 2004, the Claimant was charged with causing and permitting a grade crossing to be blocked for approximately one hour on February 16, 2004, and causing and permitting a shoving movement over a public grade crossing without proper protection on February 13, 2004. He was allowed to continue in service until on or about March 2, 2004.

On March 10, 2004, Conductor Taylor was charged with failing to complete his necessary and required reports on or about March 1, 2004, as directed. That notice of investigation stated that:

"As a result of the foregoing [failure to complete reports as directed], the Company exercised its option to remove the employee, Isiah Taylor, from service for the above violation pending investigation" [underscoring added].

This was the sole reason why Conductor Taylor was removed from service.

Based on the circumstances extant in this case, the Claimant's failure to complete a customer report and/or a Time Sheet/Time and Delay Report timely did not involve a serious violation, in this Board's opinion. The Carrier has not shown that its operations were adversely impacted by this delay. Moreover, the Claimant did complete his Time Sheet/Time and Delay Report, albeit 10 days after he was directed to complete it. This was not a serious violation, in this Board's opinion. Therefore, the Carrier violated Article 8 of the Labor Agreement when it removed the Claimant from service pending his

investigation into the charge that he failed to complete his necessary and required reports on or about March 1, 2004.

II. Fair and impartial investigation.

Article 8 of the parties' Labor Agreement guarantees employees that they will not be disciplined nor held out of service "*without first being given a fair and impartial investigation.*"

The fair and impartial standard does not require a disciplinary investigation to be flawless, in this Board's opinion. However, fundamental due process requires that the hearing be a neutral forum at which the facts are determined. It is an opportunity to develop the facts and determine whether they support the charge(s) for which the hearing is being held. The hearing must be dispassionate and objective. In this Board's opinion, the Claimant's April 29, 2004 hearing failed this test.

In our view, General Manager Jacobs served too many roles to ensure the Claimant an objective review of the facts that ultimately resulted in his discharge. For instance, in his role as General Manager, Mr. Jacobs prepared incident reports of the February 13 and February 16, 2004 incidents.

Regarding the February 16, 2004, incident, Mr. Jacobs concluded that the crossing in the Waynesboro Industrial Park had been blocked nearly one hour. His opinion was that this violated GCOR Rule 6.32.6. It must be stressed that this was one of the issues that was to be determined at the Claimant's investigation. Yet the hearing officer who presided at the Claimant's investigation had already reached a conclusion that a public crossing had been blocked for nearly an hour and that this constituted a

violation of Rule 6.32.6. In his incident report, General Manager Jacobs recommended that disciplinary action be taken against Conductor Taylor because of this violation.

In his incident report regarding the February 13, 2004, movement across the public grade crossing at Industrial Road, Mr. Jacobs concluded that this was a violation of Rule 6.5 of the General Code of Operating Rules. Once again, he requested that an investigation be convened for possible disciplinary action against Conductor Taylor.

It is also noteworthy that it was General Manager Jacobs who had instructed the Claimant to complete his customer report and Time and Delay Report on March 1, 2004. In the memorandum Mr. Jacobs prepared regarding this incident, he wrote "this was an example of Conductor Taylor's defiance to management" (underscoring added). Thus, Mr. Jacobs had concluded prior to the April 29, 2004 investigation that the Claimant had been defiant to management when he did not complete his paperwork on March 1, 2004 as he [Mr. Jacobs] had directed.

In his capacity as investigating official, Rickey Jacobs brought the three charges against Conductor Taylor. He then served as the hearing officer at the April 29, 2004 hearing into these charges. Arguably, for a Carrier officer to prepare incident reports in which he concluded that Operating Rules had been violated; then prefer the charges against the accused as investigating officer; then preside at the accused employee's hearing as the hearing officer would alone deprive an employee of the objective and neutral disciplinary hearing guaranteed him by fundamental due process. But Mr. Jacobs became further involved by testifying as a witness at Conductor Taylor's hearing.

At the April 29, 2004 investigation, the Carrier's advocate called hearing officer Jacobs as a witness. Over the Organization's vehement objection, Mr. Jacobs agreed to

offer testimony while retaining his responsibility as hearing officer. Mr. Jacobs ruled on objections while he was a witness and ruled on the admissibility of documentary evidence. He overruled several objections raised by the Organization.

During his testimony, Mr. Jacobs offered the following about Conductor Taylor:

- That he violated GCOR Rule 6.5, Rule 6.32 and Rule 6.32.1 on February 13, 2004.
- That he violated GCOR Rule 6.32.6 on February 16, 2004.
- That these were serious violations.
- That Meridian Southern had the right to hold Conductor Taylor out of service pending an investigation.
- That there was no way Conductor Taylor could see the public grade crossing from where he positioned himself on February 13, 2004.
- That there was no reason to block the crossing in the Waynesboro Industrial Park on February 16, 2004.
- That Meridian Southern had the right to terminate Conductor Taylor's employment.

Additionally, Mr. Jacobs acknowledged that he helped two witnesses (Larry Giles and Rickey Waters) prepare their written statements concerning Train MDS-1's movement over the public grade crossing at Quitman on February 13, 2004. He also acknowledged that he discussed the case with the Carrier's advocate during the April 29, 2004 hearing.

After Mr. Jacobs testified about the Claimant's culpability on February 13 and 16, 2004, he resumed his role as hearing officer. As observed previously, a hearing officer who presides at a disciplinary hearing must be neutral, objective, nonpartisan and

uninvolved. It is difficult for this Board to understand how Mr. Jacobs could meet this due process standard in view of his extensive involvement in the charges against Conductor Taylor.

This Board is not unsympathetic to Meridian Southern's conundrum. We understand that as a small shortline operation with very few employees, management personnel must assume multiple responsibilities and duties. Nevertheless, having agreed to provide its operating employees with a fair and impartial investigation before imposing discipline, the Carrier is obligated to fulfill that commitment, notwithstanding its limited resources.

This Board does not find that the Carrier willfully violated Conductor Taylor's right to a fair and impartial investigation of the charges that led to his termination. Nevertheless, for the reason expressed herein, that is what occurred.

Article 8 L of the Labor Agreement sets forth the remedy for the Carrier's failure to provide Conductor Isiah Taylor with a fair and impartial investigation prior to imposing discipline. In accordance with Article 8 L, Mr. Taylor must be returned to service and paid for all time lost, including time out of service prior to the April 29, 2004, investigation as well as time spent attending the investigation.

AWARD: Claim sustained.

Carrier is directed to make the within Award effective on or before thirty (30) days from the date hereof.

Robert M. O'Brien
Robert M. O'Brien, Neutral Member

Paul Wingo
Paul Wingo, Employee Member

The Carrier dissents.

Eric Lee
Eric Lee, Carrier Member

Dated: 2/18/05