

PUBLIC LAW BOARD NO. 7194

AWARD NO. 5
CASE NO. 5

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees Division – IBT Rail Conference

vs.

Union Pacific Railroad Company

ARBITRATOR: Janice K. Frankman

DECISION: Claim sustained in part and denied in part

STATEMENT OF CLAIM:

1. The dismissal of Laborer Operator S.M. Wilson for violation of Union Pacific General Code of Operating Rule 1.6 (Conduct) Parts 1, 2 and 4 in connection with his failure to perform his duties to prevent the Hy-rail vehicle he was a passenger in from colliding with the rear car of Train UP5010 East on August 1, 2006 is based on unproven charges, unjust, unwarranted, excessive and in violation of the Agreement (Carrier's File 1465721D SPW).
2. As a consequence of the unjust dismissal, we respectfully request that Mr. Wilson be reinstated to the service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage and health benefit loss suffered by him since his removal from service and the alleged charge(s) be expunged from his record.

FINDINGS:

The Board, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute herein; and that the parties were given due notice of the hearing.

Claimant commenced service with Carrier on August 8, 2005, and holds seniority rights in various classes within the Track Sub-department, Indio District, Los Angeles Division. He was dismissed from his position for UPGRADE Level 5 violation of GCOR Rule 1.6 on September 22, 2006.

Claimant held a Labor Operator position at Beaumont, California, on the Yuma Subdivision. This incident happened in San Timoteo Canyon, Indio, CA. Under Carrier's Operating Rules employees must not be careless of the safety of themselves or others, negligent or dishonest.

Claimant was passenger in a Hy-rail, operated by a Track Inspector Supervisor on August 1, 2006, when the vehicle collided with UP5010, damaging the train and the Hy-rail and resulting in injury to him and the Track Inspector. They were following the slow moving train

and lost site of it when they stopped to inspect the track. At about Milepost 551.1, as the Hy-rail was traveling an ascending grade, Track Inspector accelerated and felt the throttle stick. He estimated they were traveling 25-30 MPH. He unbuckled his seat belt and attempted to manually release the accelerator, and told Claimant to watch for the train ahead of them. As they approached the train, Claimant told him that the train was just ahead, and Track Inspector told him to jump from the Hy-rail. Claimant kept his seatbelt on and refused to jump from the Hy-rail. Track Inspector did not apply the brakes, turn the ignition off or put the Hy-rail into neutral. The Hy-rail collided with the rear of the train at about Milepost 551.7. Five seconds before the collision, the Hy-rail was traveling at 14 MPH. The trainline pipe was broken and the train was leaking air causing it to go into emergency.

Track Inspector reported the accident immediately to his supervisor and the dispatcher. He reported the accelerator had become stuck, and admitted he panicked when he realized that the Hy-rail was approaching the train and there would be a collision. Claimant described the detail of the incident in the same way.

The Hy-rail was towed to Luther's Truck and Equipment Inc. for inspection and possible repair. The accelerator function was examined and a report was prepared. An event recorder was removed from the Hy-rail and data from it was downloaded. At the investigation hearing, Carrier witnesses reported that the inspection report and the event recorder data supported a conclusion that the accelerator had not malfunctioned causing the collision and was operating properly on inspection. A re-enactment of the events leading to the collision occurred on August 2, 2006. The Hy-rail used for the re-enactment, traveling 14 MPH, was stopped in .1 mile after brakes were applied. Organization objected to receipt into evidence of the inspection report and the event recorder data based upon lack of qualification of the witnesses to testify and lack of opportunity to cross-examine experts who had prepared the report and downloaded and reviewed the event recorder data.

Two other labor operators testified that they had had experience with the throttle sticking on the Hy-rail. They had not reported the malfunction, and there was no evidence of maintenance work on the accelerator. Claimant had operated the Hy-rail a few times and had never experienced the accelerator sticking. Track Inspector was the regular driver of the Hy-rail vehicle involved in the incident. He had not had any earlier problems with the accelerator.

Organization has challenged the discipline procedurally and on its merits. It contends Carrier violated its UPGRADE Discipline Policy when it exacted "onerous and excessive" discipline. It argues that Claimant was honest in describing the incident and, as passenger, had no responsibility for the operation of the Hy-rail. It argues that Claimant was denied a fair and impartial hearing due to lack of opportunity to cross examine expert witnesses; apparent disregard for Organization's testimony with regard to prior experience with Hy-rail accelerator failure; and bias demonstrated by the Conducting Manager at hearing. It suggests that Conducting Manager inappropriately supported Carrier's case with questions concerning the inspection and event recorder reports and that he overlooked "coaching" of witnesses by Carrier outside the hearing room after his admonition to not discuss the case while sequestered.

Organization argues that Carrier has failed to prove any of the charges brought against Claimant, that it has not met its burden to demonstrate with substantial evidence that Claimant was dishonest, negligent or careless to support his dismissal. It argues that even if Carrier's evidence is accurate, it does not support a conclusion that Claimant was dishonest in reporting the accelerator failure.

Carrier argues Claimant was provided a fair and impartial hearing and that it has provided substantial evidence in support of its action. It argues there is no basis for leniency, that Claimant was dishonest in choosing to support Track Inspector's report that the accelerator had malfunctioned, that he was equally responsible with Track Inspector for operation of the Hy-rail and was both negligent and careless in performing his work. It points to the actual and potential damage to company equipment and to the injuries which were and which could have been sustained as a result of the collision.

Although Conducting Manager appeared to lead Carrier witnesses to some degree, there is no evidence that the documentation or evidence that resulted from his questions would not have been provided without his prompting. The investigation record, developed at joint hearing for Claimant and Track Inspector, included the exchange outside the hearing room between Carrier Management and another labor operator who testified for Organization. Their brief conversation was procedural in nature, and although strictly prohibited, was not damaging to Claimant's case. Organization had full and fair opportunity to provide evidence and testimony. Conducting Manager did not limit its case presentation in any manner or prevent development of a full and complete record for consideration by the General Superintendent who imposed the discipline.

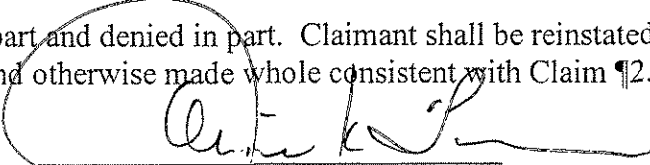
Organization was not provided an opportunity to cross examine experts who conducted the vehicle examination and produced event recorder results. However, there is no evidence that the reports were unreliable or inaccurately depicted. Moreover, Organization had an opportunity to challenge the findings directly and did not.

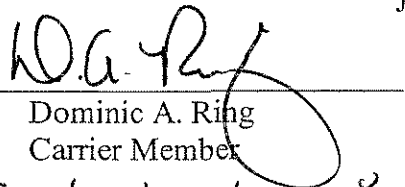
Carrier has not provided substantial evidence that Claimant was dishonest when he reported accelerator malfunction. His reporting of the detail of the incident was identical to that of Track Inspector. Track Inspector had admitted to panicking and failing to take any evasive action to avoid the collision. It is unrefuted that had the brake been applied when Track Inspector became concerned, the Hy-rail would have stopped short of collision with the train. Claimant was not responsible for operation of the Hy-rail.

Safety is a priority in the rail industry. Its employees are formally charged with responsibility to perform their work in a safe and responsible manner. Claimant was a one year employee who followed his supervisor's direction with the exception of jumping from the Hy-rail as they approached the train just before the collision. Carrier has not provided substantial evidence that his performance was careless and negligent.

AWARD

Claim sustained in part and denied in part. Claimant shall be reinstated to the service without pay for time lost, and otherwise made whole consistent with Claim ¶2.


Janice K. Frankman, Chairperson
Neutral Member


Dominic A. Ring
Carrier Member


Timothy W. Kreke
Organization Member

September 4, 2008

Sept. 4, 2008