

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
)	Case No. 20
and)	
)	Award No. 20
UNION PACIFIC RAILROAD COMPANY)	
)	

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 1, 2009

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Assistant Foreman Cletus N. Compton, Jr. for violation of GCOR Rules 1.6, 136.3 and 136.3.1 in connection with failure to notify employees of a train in the Form B prior to giving them permission to set a hyrail on the track inside the Form B limits is unjust, unwarranted, based on unproven charges and in violation of the Agreement (Carrier's File 1496188).
2. As a consequence of Part 1 above, we respectfully request that Mr. Compton 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 benefit loss suffered by him since his removal from service and that the alleged charge(s) be expunged from his personal record."

FINDINGS:

Public Law Board No. 7258 upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Claimant was notified on November 12, 2007 to report on November 19, 2007 for an investigation and hearing in connection to the allegations that he, while the Employee in Charge ("EIC"), failed to notify an engineering supervisor and a track supervisor of a train cleared into the Form B before allowing them to set a hyrail inside the Form B limits, ultimately causing that train to come to an emergency stop. Claimant was charged with violation of GCOR Rules 1.6, 136.3 and 136.3.1. The investigation was held as scheduled and decision rendered November 30, 2007 to dismiss Claimant for violation of all rules cited. The Organization filed a claim on

January 22, 2008 that was denied on March 17, 2008. Appeal was sent by letter dated April 17, 2008 and denied June 17, 2008. The Claim was discussed in conference July 1, 2008.

It is undisputed that Claimant was the EIC over a section of track between mile posts 548 and 560 between 7:00 am and 5:00 pm on November 7, 2007. One group of employees (contractors) was preparing to work within the Form B limits picking up old ties behind the System Tie Gang. The record shows that the foreman in charge of that crew checked into Claimant's Form B at 7:00 am on that morning. That employee made a written statement that is a part of this record indicating that at approximately 10:35 am Claimant informed him that his crew would be able to get on the track after the "Z" train went by and that they would have an hour to an hour and a half to perform their work.

On that same morning, the foreman for another group that wished to repair hand rails on three bridges within Claimant's authority radioed Claimant to ask for permission to work within Claimant's limits. The record reflects that the crew was entered into Claimant's Form B at 10:07 am.

A third group of employees also contacted Claimant that morning to request permission to enter the limits of his Form B. An engineering supervisor and a track supervisor wished to put a hyrail on the track within Claimant's Form B limits and hyrail from Elko to Carlin. The record reflects that this verbal contact took place about 9:30 am. When the pair was informed that there would be a wait due to train traffic, they both testified that they left the area to retrieve a phone charger from the track supervisor's motel, returning shortly before 11:00 am. This is where the recollections of the witnesses and the Claimant take divergent courses.

Claimant testified that he had within his Form B a "Z" train, which has high priority, that arrived at Elko at 10:15 am, made a crew change in about 15 minutes and cleared the yard at Elko at approximately 10:35 am. Claimant testified that after learning that the train had cleared the yard that he contacted the foreman of the group preparing to gather ties to confirm that they were not fouling the track. Claimant asserts that the foreman responded that the engineering supervisor was with him and that they would await the passing of the "Z" train. The Claimant further stated that thereafter he contacted the foreman of the crew waiting to work on handrail who confirmed that his crew was in the clear. Only then, the Claimant testified, did he contact the "Z" train and clear it through the Form B limits at 10:39 am. Claimant states that at 10:44 am he contacted the foreman of the tie gatherers to let him know that the "Z" train was leaving Elko. Claimant further testified that he spoke also with the engineering supervisor at 10:44 am and told him that the "Z" train was leaving Elko, but did not give him permission to set on the track at that time.

The engineering supervisor, as well as the passenger in his hyrail, recall the events up until that point in time differently. The engineering supervisor testified that he arrived at the Tricon siding about 9:30 wishing to set on to track #1 and hyrail from Elko and Carlin. The supervisor recalled that he was informed that it would be about an hour wait. The supervisor recalled that just before 11:00 am he heard a conversation between Claimant and the dispatcher indicating that there was going to be an hour to an hour and a half shot on Track #1. The

supervisor asserts that he contacted Claimant and advised him that he intended to check into the Form B and hyrail westward to inspect a recent job. The supervisor recalled that Claimant asked his location and then checked him into the Form B. The supervisor related that after being checked into the Form B at 11:01 am that he informed Claimant that he would like to set on and that the Claimant responded "Okay, your checked in at 11:01." The engineering supervisor related that he proceeded to get on the track and placed the shunts on the track. At that time, the supervisor recalled, he and his passenger, who was flagging traffic, noticed the "Z" train approaching and jumped into the truck and proceeded westward. The track supervisor corroborated the engineering supervisor's testimony.

It is undisputed that at the point that the hyrail set up on the track, the approaching "Z" train was forced to make an emergency stop.

The Organization first argues that the Claimant did not receive a fair and impartial hearing because the charge letter was vague in citing specifically what section of Rule 1.6 Claimant was being charged with violating, that the Hearing Officer showed pre-judgment in the questions he asked and opinions he stated at hearing and because Carrier failed to call witnesses with relevant information that could have shown that other employees within the Form B limits were warned of the approaching train.

Our careful review of the record does not find bias on the part of the hearing officer and the Claimant was afforded all due process as required by the Agreement. Moreover, the Organization was asked at hearing if it had any witnesses and stated that it did not, but reserved the right to request other witnesses. The Organization did not, on this record, request additional witnesses, but now asserts that the hearing was unfair because the Carrier did not call witnesses that the Organization contends may have helped its case. We find that it was not the Carrier's obligation to call witnesses that were not requested and that if the Organization wanted to call additional witnesses with pertinent information that could have aided Claimant's defense, it certainly had the opportunity and right to do so, but chose not to. In short, if the Organization knew of witnesses with information that could have exculpated the Claimant, it was the Organization's obligation to call them. Further, we find that the Carrier's Charging Letter as well as preliminary matters discussed at the hearing concerning what specifically Claimant was being charged with afforded sufficient specificity to enable Claimant to prepare a defense.

Turning to the merits, the resolution of this dispute hinges on credibility. Two witnesses testified that the Engineering Supervisor was given permission to place his hyrail on the track within Claimant's Form B limitations and Claimant states emphatically that he did not grant permission. To the extent that there is a conflict in the testimony, we defer to the credibility assessments made on the property. Because of this Board's appellate function, we do not enjoy the ability to weigh the demeanor of witnesses testifying at hearing. Thus, we will not disturb the decision made as to whose testimony to credit.

While we do recognize that the error here made was of the most serious kind, violation of safety rules that put fellow employees in serious jeopardy, we also find that Claimant's

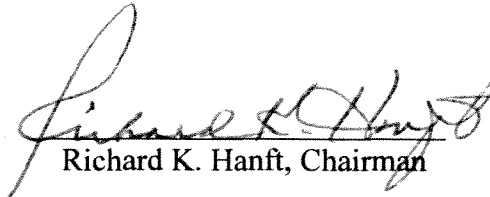
exemplary record, his usual fastidious attention to detail on his Form B responsibilities and years of unblemished service mitigate against Claimant's dismissal for a misunderstood communication. We note that the foreman overseeing the crew gathering ties clearly understood, according to his written statement, that the window of opportunity to get on the track existed only after the "Z" train passed. We therefore order that Claimant be returned to the service of the Carrier with seniority unimpaired but without back pay for time out of service.

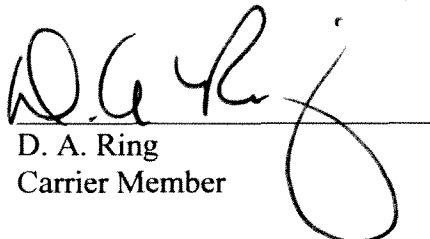
AWARD

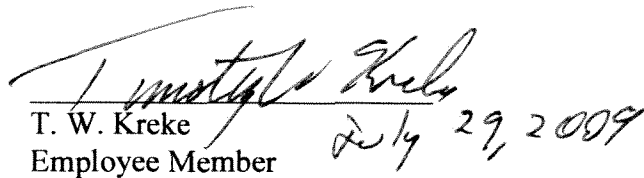
Claim sustained in accordance with the findings.

ORDER

The Board, having determined that an award favorable to the Claimant be entered, hereby orders the Carrier to return Claimant to service with seniority unimpaired, but without back pay effective within thirty (30) days following the date two members of the Board affix their signatures hereto.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member
July 29, 2009

Dated at Chicago, Illinois June 30, 2009

7-29-09