

PUBLIC LAW BOARD 6155

Case No. 50  
Award No. 50  
Carrier's File No. 1141533  
Organization's File No. 98061  
NMB Code 106  
Claimant Engineer J. W. Shook

PARTIES TO THE DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

AND

UNION PACIFIC RAILROAD COMPANY

Statement of Claim:

Appeal of the Level 2 Discipline assessed to Engineer J. W. Shook 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 August 13, 1998.

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.

By certified letter dated August 7, 1998, the Claimant was offered a Waiver of Hearing provided he accept a Level 2 Discipline for allegedly performing his duties in an unsafe manner which caused him to sustain a personal injury. If he chose not to sign the Waiver of Hearing, the same letter advised him to report for a formal Investigation to be held at the Union Pacific Railroad DTO's conference room, on Thursday, August 13, 1998. The purpose of the hearing was to determine whether his injury was the result of his working in an unsafe manner in

violation of cited Rules 70.1, 1.3.1, 1.1 and 1.1.2, in addition to 1.3.1, Item 10 Rule Supplements and Amendments, Page 22 of the UPRR Revised System Special Instructions. The cited rules 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 take 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 that 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 1.1.2      Alert and Attentive

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

Rule 1.3.1

Safety Rules. Employees must have a copy of, be familiar with, and comply with all safety rules issued in a separate book or in another form.

. . . . .

System Special Instructions Effective 0001 Monday, June 1, 1998. Item 10

When there is a conflict, Subdivision and Special Instructions takes precedence over Division and System

Special Instructions; Division Special Instructions takes precedence over System Special Instructions when they are in conflict.

The Carrier reviewed the evidence and concluded that the Claimant was guilty of the cited rules. He was assessed a Level 2 Discipline under the Upgrade Policy. The discipline was "Up to a one day or one round trip alternative assignment with pay to develop a Corrective Action Plan to Modify behavior. Pay will be in accordance with Employee Involvement Guidelines."

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

On the day the Claimant injured his knee he was serving as the Engineer on Train CLVGR-33, on the Portland Subdivision No. 434. At the end of his shift, he was tying down the handbrake on Unit SP9774. He subsequently claimed that as he was dismounting his unit, he hit his knee on a protruding bolt which was on a plate covering the chains of the handbrake. The injury occurred around 8:30 a.m. The Claimant reported the injury and was taken to the hospital. He was given some pain medication and subjected to a urine test, which was negative.

#### CARRIER'S POSITION

The Carrier argues the Claimant could have avoided injury if he had been more attentive and alert. They contend the mechanic who inspected the unit after the Claimant was injured did not take exception to either the length or protrusion of the bolts in question. They maintain that while the plate and bolts in question are within the walkway area they do not protrude into the walkway. They say the mechanic took no exception to them in this regard.

The Carrier submits that the Claimant was guilty of the cited rule violations and his penalty was consistent with the Upgrade Policy for the rules violation involved.

#### ORGANIZATION'S POSITION

The Organization asserts the burden of proof in this case rests with the Carrier. They insist the Carrier has to provide either eye witness testimony or physical evidence as proof that the Claimant is guilty of the rule violations. They maintain the Carrier has failed to meet its burden. The Organization goes on to cite two Board Awards in support of their contention in this regard.

The Organization also objects to the Investigation. They say the Carrier was attempting to obtain information about the Claimant's personal injury to which they are not entitled under the Federal Employer's Liability Act. They accuse the Carrier of bringing charges against employees who suffer on-the-job injuries in an attempt to lessen their liability. They claim it is the Carrier who has not learned the lessons of the safety assurance and compliance process that has been in place over the last year and a half.

They insist the Claimant should be exonerated of all charges returned to work and paid for all time lost.

#### DECISION

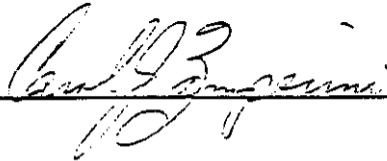
The Board has reviewed this matter carefully. It is true that employees have an obligation to appreciate the complexities and dangers of the equipment they work with daily. Normally this Board would be inclined to hold the employee accountable for not being aware of obstructions on an engine which could cause injury. However, the Board concurs with the Organization that the Carrier had the burden of proof in this case. They had an opportunity to present either a more thorough inspection report

of the unit involved or direct first hand testimony regarding the location of the cover plate and bolts which the Claimant alleged were in the walkway of the locomotive. The Carrier failed to establish that the bolts were so innocuous, the Claimant had to have been careless to be injured by their presence. Therefore, the Board does not find adequate proof that the Claimant was guilty of the cited rules.

AWARD

The claim is sustained.

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

A handwritten signature in cursive script, appearing to read "Carol J. Zamperini", is written over a horizontal line. Below the signature, the number "110" is handwritten.

Carol J. Zamperini, Impartial Neutral

Submitted this 24<sup>th</sup> day of August, 2000.