

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6198

JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
T. M. STONE, CARRIER MEMBER
DON M HAHS, ORGANIZATION MEMBER

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
SLSW, GENERAL COMMITTEE

and

UNION PACIFIC RAILROAD COMPANY
(FORMER ST. LOUIS SOUTHWESTERN RY. CO.)

Award No. 15
Case No. 15
Engineer W. M. Goodson
Level 4 - 30-day Suspension

Date of Hearing - May 1, 2000
Date of Award - July 31, 2000

Statement of the Issue

The Chairman and Neutral Member, after review of the entire record, has determined that the issue before this Board is:

Was Carrier justified in assessing Claimant Engineer W. M. Goodson Level 4 discipline of thirty (30) days actual suspension in connection with his alleged failure to comply with a Light Out efficiency test while operating Train IFWMQ-09 on September 9, 1999?

FINDINGS:

Public Law Board No. 6198, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein.

Before this Board, the parties present a dispute arising from the 30-day suspension of Claimant Engineer Goodson subsequent to his alleged failure to stop short of a dark signal while operating road freight assignment IFWMQ-09 between Fort Worth and Mesquite, Texas on September 9, 1999. According to facts *not* at issue in this case, Claimant went on duty at approximately 10:15 p.m. on that date, and, as required by Carrier prior to departure, conducted a job briefing during which both he and Conductor

McGaughey acknowledged their lack of operating experience in the Fort Worth-Mesquite corridor. For that very reason, Conductor McGaughey requested and was granted a conductor pilot at the time he was called, and all three crew members agreed in the course of their briefing that an additional measure of caution would be warranted during their trip. (The Board notes that the episode at bar occurred just 8 days after Carrier implemented the September 1, 1999 Dallas/Fort Worth Hub Agreement effectively combining UP/SSW crews. Claimant, in possession of 33 years of incident-free service on the SSW, had only been through the Tower 55 area where the alleged incident took place on three previous occasions.) The record indicates that subsequent to the departure of IFWMQ-09, Claimant encountered an approach signal at Milepost 246.4, to which he responded appropriately by slowing his train to "restricted speed" in anticipation of an upcoming stop indication. Unknown to the crew, however, three Carrier Officers were conducting a Light-Out efficiency test at the succeeding signal, Control Point Signal 246 (a tri-pod dwarf signal) in the Tower 55 complex. The red aspect of which the Officers conducting the test had intentionally obscured with a piece of dark foam rubber. Claimant failed to observe the "dark" signal, and did not stop his train before passing it. The Carrier Officers administering the test observed the run-by and immediately contacted Claimant by radio and instructed him to stop his train. Claimant complied, halting his 84 car train just one and one-half engine-lengths past the signal that was covered with a piece of foam.

Subsequent to the incident, Claimant's entire crew was removed from service pending investigation, and, by letter dated September 14, 1999, they were directed to attend a formal hearing in connection with the following charge:

Please arrange to report to the General Superintendent's Conference Room, Room 200 Crest Building, Centennial Yard, Fort Worth, Texas at 9:00 A.M., Wednesday, September 22, 1999, for formal investigation and hearing.

The purpose of this investigation is to develop the facts and determine responsibility, if any in connection with the events leading to the alleged failure to comply with signal indication at MP 245.4 on the Dallas Subdivision and failure to stop short of signal displaying dark indication at CPT 246, requiring you stop (sic) before any part of your train passes the signal, while working as crew members on the IFWMQ-09 at approximately 11:52 P.M., September 9, 1999.

Rules 9.4 and 9.2.5, the foundation for Carrier's charge above, state in pertinent part:

9.4 - Improperly Displayed Signals or Absent Lights

Except as shown in block, cab and interlocking signal aspects in the signal instructions, if a light is absent or a white light is displayed where a colored or lunar light should be, regard a block or interlocking signal as the most restrictive indication that the signal can give. However, when the semaphore arm position is plainly seen, that aspect will govern.

9.2.5 – Approach

Proceed prepared to stop before any part of train or engine passes the next signal.

Freight trains exceeding 30 MPH must immediately reduce to 30 MPH.

A hearing into the matter commenced on September 28, 1999 and concluded on September 30, 1999, after which Claimant was notified by Certified Letter that he had been assessed Level 4 discipline (30 days actual suspension) under Carrier's UPGRADE Discipline Policy. The propriety of Carrier's response to the record of events as they were presented during the investigation is now before this Board for full and final disposition.

At the outset, we note serious material inconsistencies contained in the record of that hearing with respect to the specific manner in which the Light-Out efficiency test at issue was administered. The Board considers these inconsistencies significant, as the *quality* and *fairness* of the test had direct and unavoidable impact upon its outcome. Specifically, testing Carrier Officers Alvarado, Bullock, and Perry all testified that only the uppermost aspect of the tri-pod dwarf signal (the aspect which otherwise would have been red) had been obscured by dark foam rubber (thereby leaving the other two lenses and the stand itself in plain view). In important contrast, Conductor McGaughey testified repeatedly that the entire signal apparatus was completely camouflaged by the same material.

The record does, however, contain clear evidence that Claimant proceeded past the approach signal at MP245.4 in a manner indicative of his anticipation that the next signal would be red (or possibly dark), but due to his unfamiliarity with the territory, was uncertain as to precisely where the next signal was (Transcript of investigation at pages 210 and 219). (The Board is convinced of this fact less from Claimant's potentially self-serving assertion, but more from the downloaded event recorder tapes revealing that he passed CP 246 at a speed of under 5 MPH, and was able to stop his 80-plus car train, after being instructed to do so, *before the second unit in his engine consist had completely passed it.*) Because there is simply no getting around the fact that Claimant operated his train past an "improperly displayed" signal without proper authority on September 9,

1999, his fate in this case now unavoidably turns on whether or not he could *reasonably* have been expected to stop under the conditions contrived by Carrier during its efficiency test. Therein, as they say, lies the rub.

We note as significant, the fact that this incident took place in an area of Fort Worth Terminal complicated by numerous turnouts and dwarf (short) signals, many of which were not specifically designated on schematics routinely provided train crews prior to this incident. In fact, Carrier witness Alvarado, the chief testing officer on whose territory the test was conducted, testified at page 111 of the transcript that even *he* does not know the exact location of each and every signal in the Tower 55 area containing CP 246. In light of that testimony, we find, then, the *visibility* of that signal on the night in question to be pivotal in our decision. Was it reasonable for Carrier to expect Claimant to stop short of CP 246? Yes, but only if he could reasonably have been expected to *see* it. Since we are unable to ascertain the exact manner in which Carrier officers obscured the red aspect of CP 246 due to pointed conflict on the subject in the record, we are forced to come to a somewhat subjective conclusion on this critical dispute in facts.

We are compelled to point out that it is within the providence of this Board to determine the weight, relevancy and authenticity of all the evidence in distinguishing that which is credible from that which is self-serving. In this case, unfortunately, both parties have significant interests to protect; Carrier defends both its right to conduct the efficiency test and its method in doing so, while the Organization cries "set-up". Did the foam rubber cover only the red lens as Carrier asserts, or did it hide the entire signal from the ground up as the Organization has alleged? The long and short of it is that from the record, we cannot tell. Therefore, we are directed by Arbitrator R. W. Fleming's following observation:

Arbitrators are not equipped with any special divining rod which enables them to know who is telling the truth and who is not where a conflict in testimony develops. They can only do what the courts have done in similar circumstances for centuries. A judgment must finally be made, and there is a possibility that that judgment when made is wrong." (General Cable Co., 28 LA 97, 98, 99 [1957])

Upon the whole of the record in this case, and guided by the above, we have no choice but to find in favor of the Claimant in this case. Carrier has not satisfied its burden to prove to this Board that he was remiss or negligent in the handling of his train on the night in question; in fact the record reflects just the reverse. Claimant openly acknowledged his lack of experience in the Fort Worth-Mesquite corridor, and testified of his intent to proceed through the Tower 55 complex with extreme care (Transcript of investigation at page 228). That assertion is bolstered by locomotive event recorder evidence showing that, beyond a doubt, he was actively searching for a red signal. It is probable that this profound alertness on Claimant's part would have resulted in his

detection of the signal if only the red aspect was concealed as Carrier claims. Conversely, if the entire signal was concealed then the foam would look like a piece of debris in the yard.

Likewise, the other crew members testified that they, too, were on the lookout for a signal, yet they failed to note the presence, much less the indication of, CP 246 (Transcript of investigation at pages 242, 246, 268, and 269). We must conclude, therefore, that CP 246 was not reasonably visible. Thus the test was flawed.

This Board both understands and supports Carrier's right to conduct safety efficiency tests for their stated purpose; '[To] eliminate accidents caused by human error, to improve and maintain alertness of employees, to determine the degree of compliance with the rules and improve compliance, and to focus attention on rules and areas where there is a need to improve employee knowledge...' (BLE Exhibit 9), but admonishes Carrier of its additional obligation under published guidelines to conduct such tests 'in a fair and impartial manner, keeping in mind that one of the greatest benefits is the educational value' (BLE Exhibit 9).

Moreover, this Board is confident that Carrier, with its vast technological and material resources, could indeed have constructed a sound and fair test at CP 246 using the customary track shunts and/or the assistance of signal personnel, but it elected, at its own peril, to use the instant highly questionable, albeit convenient, methods instead. And, it makes no difference to this Board that the device relied on may have been approved by FRA officials as appropriate. The test must be administered fairly, and Carrier must establish that it was administered fairly. That has not been done in this case.

This Board therefore determines that the efficiency test conducted on Claimant's train on September 9, 1999 was improperly administered, and its outcome was, as a byproduct, fatally flawed. The discipline assessed as a result will not be allowed to stand, and the claim will be sustained. Carrier is hereby directed to remove the Level 4 discipline and all references to the events of September 9, 1999 from Claimant's service record, and compensate him for all time lost as a consequence.

AWARD

The issue before this Board:

Was Carrier justified in assessing Claimant Engineer W. M. Goodson Level 4 discipline of thirty (30) days actual suspension in connection with his alleged failure of a Light Out efficiency test while assigned to Train IFWMQ-09 on September 9, 1999?

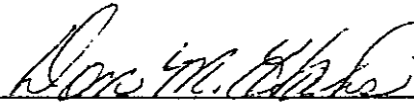
is answered in the negative, "No." Claim is sustained as set forth in the findings.

ORDER

Carrier is directed to comply with this Award within thirty (30) days of the date indicated below, and make any payments that may be due Claimant within that time period.



John C. Fletcher, Chairman & Neutral Member



T. M. Stone, Carrier Member

Don M Hahs, Organization Member

Dated at Mount Prospect, Illinois., July 31, 2000

Carrier's Dissent to Award 15 of PLB 6198

The claimant was the Engineer on a crew that was subject to a dark signal test by a team of three Carrier officers. The crew passed an approach signal, and then failed to stop short of a pot signal that had the red aspect blocked by a piece of foam rubber.

The Board determined that the case hinged upon whether the efficiency test was properly and fairly conducted by the three Carrier officers, as the Board stated, "Did the foam rubber cover only the red lens as Carrier asserts, or did it hide the entire signal from the ground up as the Organization alleged?"

The three crew members stated that they did not see the signal as they went past it. Immediately after the crew passed the dark signal they were advised to stop their train. The Conductor pilot and Conductor walked back to observe the pot signal in question. During the investigation the Conductor Pilot alleged the entire signal was covered by the foam rubber. The Conductor, stated that he didn't remember whether the whole signal was covered by the foam rubber, or just the red aspect. Therefore, only one crew member stated that the entire signal was covered by the foam rubber. The three Carrier officers that conducted the test repeatedly stated that only the red aspect was covered. The Board was also furnished with a statement from the hearing officer that took the piece of foam to the signal in question, and found that the foam would not cover the signal as alleged by the one crew member.

The Board has elected, in it's attempt to weigh the facts and evidence, to accept the self serving statement of one crew member over the statements and testimony of four Carrier officers, finding that the efficiency test was flawed.

The Board has failed to observe the basic principles that have been adopted by PLB, SBA and every Division of the NRAB, wherein the Board states that it is not their function to substitute their judgement for that of the Carrier when weighing the evidence and determining credibility.

PLB 1900, Award 47, Referee Edwards:

"Many decisions of Special Adjustment Boards, Public Law Boards, and of the First Division have firmly laid down the rule that it is not the function of a Board such as this to substitute its judgement for that of the Carrier in matters of Discipline."

PLB 474, Award 17, Referee Seidenberg:

"The Carrier is a liberty to adopt its version of the facts rather than the version related by the Claimant, provided that the version it has adopted is supported by substantial competent evidence."

PLB 1459, Award 53, Referee Weston:

"In line with well established Railway Adjustment Board principles and practice, we will not disturb Carrier's findings since they are supported by detailed and clear, though controverted evidence."

Second Division Award 8952, Referee Suntrup:

"It is not the role of the Board, which serves as an appellate function, to resolve issues of credibility, nor to substitute its judgement for that of Carriers in discipline cases; its role, as noted above, is to determine if there is substantial evidence to sustain findings of guilt."

With three Carrier officers stating that the entire signal was not covered by the piece of foam rubber, and a fourth Carrier officer stating the foam could not have covered the entire signal, it defies the imagination as to how the Board could accept the self serving statement of one crew member. It is obvious that the hand of justice, fairness, and logic were not on these scales.

T.M. Stone