

PUBLIC LAW BOARD NO. 6942

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION)	
)	
and)	NMB CASE NO. 10
)	AWARD NO. 10
)	
UNION PACIFIC RAILROAD CO.)	

STATEMENT OF CLAIM

Claim of Conductor M.C. Madison EID 0242122) for removal of a five day suspension and Level 2 discipline from his personnel record for an incident that occurred on December 2, 2004 in the vicinity of MP 350.84 on the Sharon Springs Subdivision.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved.

On the night of December 1-2, 2004, the Claimant was working as a member of Crew LDD-77-01. At approximately 2:00 in the morning, the crew was assigned to shove some cars onto an industry track. Because it was dark and there was snow on the ground, the Claimant got off the train to guide the engineer, who was up in the locomotive, over a crossing. As the movement was taking place, three cars derailed and struck a dock and overhang on an elevator building. The accident caused \$10,000 damage to the building and \$3,000 damage to one of the cars. After a hearing involving all three members of the crew, the Claimant was advised that he was guilty of failing to switch safely and efficiently, causing damage to railcars and customer property, and he was assessed with the penalty involved in this proceeding.¹

The principal claim of the Organization is that the Carrier committed a fatal procedural error by failing to comply with Road Schedule Rule 84, which provides in relevant part, "Hearings will be held as promptly as possible and within five days from the date charges are preferred...." The Organization also contends that the Claimant's representative was not advised of a postponement and that the Hearing Officer asked improper questions of the Carrier's witness and permitted him to make a statement at the end of the hearing. Finally, the Organization argues that the Carrier failed to establish that the Claimant violated any of its rules.

¹ The hearing record does not indicate whether any other members of the crew were also disciplined.

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The Board concludes that Rule 84 was not violated for several reasons. First of all, the rule is ambiguous in that it not clear whether the rule requires that the hearing must be scheduled within five days under all circumstances, or only "as promptly as possible". This hearing was scheduled within two weeks after the incident occurred, which is reasonably prompt. Secondly, even if there is a five day mandatory limit, the rule requires that the hearing must be scheduled within "five days from the date charges are preferred." The Organization claims that the five days must be measured from December 8, when the Claimant was sent a "Waiver of Hearing/Behavior Modification or Election of Hearing" form, giving him three days to decide whether to have a hearing or to elect to participate in the Behavior Modification Program. When he did not elect to participate in Behavior Modification, on December 13, he was sent a formal notice to report for a hearing on the matter on December 17. The Board concludes that charges were not "preferred" within the meaning of Rule 84 until December 13, and therefore the hearing was timely under any test. Finally, time was not of the essence in this case, because as soon as the hearing was scheduled, the Organization asked for a postponement.

The Organization's other procedural error claims also lack merit. Although the Claimant's representative contends that he did not receive notice of the postponement, it is clear that the Claimant himself did receive one and that the representative had been sent a timely copy of the notice in the regular mails. The question that the Hearing Officer asked of the Carrier's witness was a fair question under the circumstances and the fact that the Carrier's witness was allowed to make a statement at the close of the hearing was at most an insubstantial error.

On the question whether the Carrier established a rule violation, the Carrier based its conclusion primarily on the fact that the Claimant had initially told the engineer that it was safe for him to bring the train back six to eight cars even though the Claimant only had fifteen feet of visibility and that the physical data indicate the engineer was never told to stop when the derailment began and do not support the Claimant's testimony that he told the engineer to stop when that took place. The Carrier had substantial evidence consistent with its conclusion that the Claimant failed to carry out his duties safely and efficiently, which is all that is required.

AWARD

The claim of M.C. Madison for removal of the discipline assessed against him must be, and it hereby is denied.


NEIL N. BERNSTEIN, Neutral Member

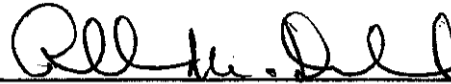
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R.A. HENDERSON, Carrier Member



RICHARD M. DRASKOVICH, Organization Member

Award Date: May 30, 2006