

**PUBLIC LAW BOARD NO. 7194**

AWARD NO. 2  
CASE NO. 2

**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 denied

**STATEMENT OF CLAIM:**

Request on behalf of D.Brown, for removal of UPGRADE Level 5 discipline, assessed for Level 5 violation of the Union Pacific General Code of Operating Rules 1.6 , Parts 1, 2 and 4 effective July 3, 2005, for his alleged failure to stop the Hy-rail vehicle he was operating before colliding with the rear car of the UP5010 East while employed as Track Supervisor (Inspector) with the Union Pacific Railroad on August 1, 2006, resulting in damages to the Hy-rail vehicle and the rear car of the train and that Claimant be paid for all time lost, with all seniority, vacation, and all other rights restored unimpaired. Action taken following formal investigation on August 24, 2006. (System File 1464936)

**FINDINGS:**

The Board, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee 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 19, 1996, and had worked six or seven years as a track inspector when he was dismissed from his position for UPGRADE Level 5 violation of GCOR Rule 1.6 on September 22, 2006.

Claimant held a Track Supervisor position at Beaumont, California, on the Yuma Subdivision. The 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 operating a Hy-rail, accompanied by a Labor Operator on August 1, 2006, when he failed to stop the vehicle before it collided with UP5010, damaging the train and the Hy-rail and resulting in injury to him and the Labor Operator. They were following the slow moving train and lost sight of it when they stopped to inspect the track. At about Milepost 551.1, as the Hy-rail was traveling an ascending grade, Claimant 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 the Labor Operator to watch for the train ahead of

them. As they approached the train, the Labor Operator told him that the train was just ahead, and Claimant told Labor Operator to jump from the Hy-rail. Claimant panicked. He 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.

Claimant 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. The dispatcher instructed the train Engineer to not move the train to avoid potential derailment.

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 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 for a "misdemeanor" offense. 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 Claimant simply panicked, and that Carrier 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 reporting that the accelerator had malfunctioned 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

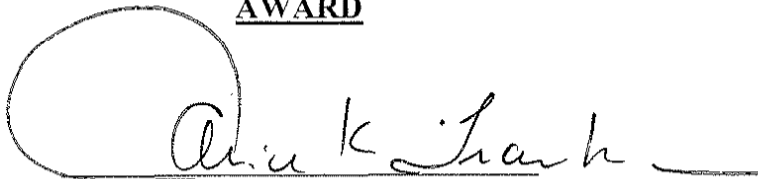
have been provided without his prompting. The investigation record included the exchange outside the hearing room between Carrier Management and labor operator who testified for Organization. Their brief conversation was procedural in nature and although strictly prohibited, was not damaging to Claimant's 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.

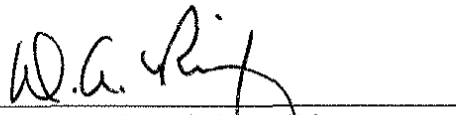
Carrier has not provided substantial evidence that Claimant was dishonest when he reported accelerator malfunction. Claimant admitted to panicking and failing to take any evasive action to avoid the collision. It is unrefuted that had the brake been applied when Claimant became concerned, the Hy-rail would have stopped short of collision with the train. 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 ten year employee with six to seven years of experience inspecting track and driving the Hy-rail. Carrier provided substantial evidence that his performance was careless and negligent and cause for his dismissal consistent with express provisions of GCOR and UPGRADE.

AWARD

Claim denied.

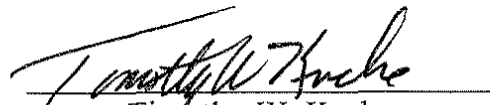


Janice K. Frankman, Chairperson  
Neutral Member



Dominic A. Ring  
Carrier Member

September 4, 2008



Timothy W. Kreke  
Organization Member

Sept. 4, 2008