

SPECIAL BOARD OF ADJUSTMENT NO. 928

AWARD NO. 227
NMB CASE NO. 227

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers

- and -

National Railroad Passenger Corporation

STATEMENT OF CLAIM:

Claim of Amtrak Passenger Engineer C. L. Cain for the rescinding of the discipline imposed of "[T]ermination from service from the National Railroad Passenger Corporation effective immediately" as stated in the decision letter of May 21, 1997 under the signature of General Manager-Intercity Western Business Group, Donald E. Cushine, and restoration to service with seniority and vacation rights unimpaired, with full compensation for time lost, full credit toward vacation entitlement, and health and welfare benefits during the period held out of work.

Outline of Alleged Offenses

Specification: On April 26, 1997 at approximately 8:29 a.m. (MDT), on the UPRR Caliente Subdivision at Kyle, Nevada, while working as Engineer on Amtrak Train No. 35, it is alleged that your train passed a block signal displaying a stop indication without stopping and proceeded through a dual control switch which was not lined for your movement.

Charge One: Your alleged failure to comply with the General Code of Operating Rules, 3rd Edition, Rule 5.16, which states in part: "Crew members in the engine control compartment must be alert to signals."

Charge Two: Your alleged failure to comply with the General Code of Operating Rules, 3rd Edition, Rule 1.1.1, which states: "In case of doubt or uncertainty, take the safe course."

Charge Three: Your alleged failure to comply with Union Pacific Railroad System Timetable #2, effective 10-29-95, Signal Rule 245D, which states in part: "Proceed prepared to stop before any part of train or engine passes the next signal."

Charge Four: Your alleged failure to comply with Union Pacific Railroad System Timetable #2, effective 10-29-95, Signal Rule 245Q, which states in part: "Stop before any part of train or engine passes a signal."

OPINION OF BOARD:

At the time this case arose, Claimant was a Passenger Engineer assigned to Train 35. On April 26, 1997, Train 35 passed a stop signal shortly before entering a tunnel where a Union Pacific Train was approaching from the opposite end. An investigation was held on May 12, 1997. On May 21, 1997, Claimant was notified of his termination from Carrier's service. The discipline was appealed on May 27, 1997, and subsequently progressed in the usual manner including conference on the property. The matter remains in dispute.

The Organization at the outset protests that Claimant was denied his due process rights when he was questioned by UPRR officers without being informed of his right to union representation. The record indicates, however, that the Carrier party to this Board (i.e., Amtrak) did, in fact inform Claimant of his right to representation. This Board has no jurisdiction to rule on the procedures of a carrier not party to this Board. Further, the Organization protests that Carrier erroneously withheld Claimant from service pending investigation. Under the circumstances, it was not unreasonable for Carrier to remove Claimant for passing a block signal displaying a stop indication. The potential for harm in such an alleged action is sufficient to warrant Claimant's being withheld from service until the facts of the case are determined.

With respect to the merits of the case, the Carrier maintains that Claimant failed to maintain safe conduct of his engine, resulting in a near collision with the oncoming UP train. It asserts that the sun was not in Claimant's eyes, and that his preoccupation with the sunscreen was a lapse in attention to duty. The Carrier argues that even if, arguendo, the sun visor was a

problem, Claimant should have warned his assistant engineer to keep a lookout for signals while the former adjusted his sunscreen. Finally, the Carrier insists that in view of Claimant's past record, dismissal was warranted despite his lengthy seniority.

The Organization contends that circumstances present in the locomotive at the time of the incident at issue mitigate Claimant's responsibility. It maintains that Claimant was making adjustments to a defective safety appliance (the sunscreen), and was not operating the locomotive at that time. Accordingly, the inadequacy of the equipment provided by Carrier precipitated the incident at issue. The Organization further notes that Assistant Engineer Rice did not see the single yellow signal, either. Moreover, the canyon walls along the curving stretch of track on which this incident occurred partially obscured the red signal as well until the engine was well upon it.

In addition, the Organization maintains that the penalty assessed is disparate and discriminatory. It points out that similarly situated UPRR employees have been assessed far less discipline (for example, a thirty-day suspension), for the same violation Carrier alleges was committed by Claimant. The Organization notes that, while Claimant's record is not spotless, he has only two operating violations in over ten years at Amtrak. Finally, the Organization notes that shortly after the Kyle incident a joint committee of the Carriers, the FRA and the Organization reviewed the signals at West Kyle. As a result of that review, an approach medium (double yellow) signal has been added at West Elgin when the switch at West Kyle is reversed.

Claimant has admitted not seeing the yellow signal prior to passing the red signal. He admits he was distracted by trying to get the sunscreen to stay in place. He has also acknowledged that he was "sleep deprived" prior to taking his position on Train 35. Although he

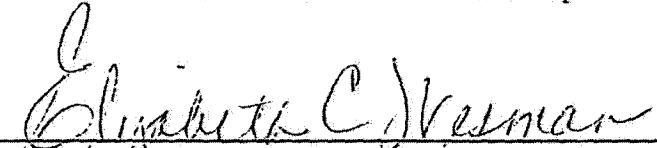
was not in control of the train at the time of the incident at issue, innumerable awards on this and other boards have found that he nonetheless shares responsibility for the safe conduct of the engine. Moreover, the UPRR supervisor testified at the hearing that he had duplicated Train 35's run, and did not find the sun to be "blinding" at the time of day when the incident giving rise to this grievance occurred. On the other hand, it is clear that the crew's alertness when it ultimately saw the red signal prevented a serious accident.

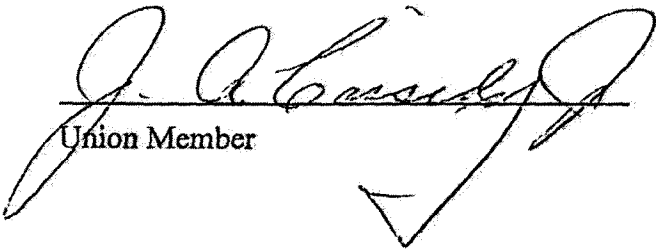
Claimant's discipline record reflects he passed a red 'flag' a little more than 6 months before the incident in question. Further, that resulted in a thirty-day suspension which means he had been at work less than five months when the instant violation occurred. He clearly should have been more conscientious with respect to watching for signals instead of allowing himself to become preoccupied with the sunscreen and therefore cannot be excused for this lapse of attention to duty. However, Claimant is an employee with an otherwise good record and more than 20 years of service with the Carrier. Moreover, it is apparent from the "post event" reconfiguration of the signals in question, the Carriers involved recognized a problem with the original set up. For his October 1996 failure to stop at a signal, Carrier assessed a thirty day actual suspension. Under the circumstances, the Board finds that a 120-day actual suspension is sufficient discipline to impress upon Claimant the gravity of his actions.

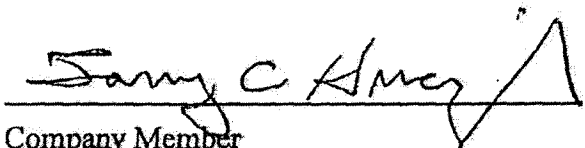
Accordingly, his discipline of dismissal shall be reduced to 120 days. He shall be restored to service and receive back pay less any outside earnings for the remainder of his time out of service.

AWARD

Claim sustained to the extent set forth in the above opinion.


Elizabeth C. Wesman, Chairman


Union Member


Company Member
I DISSENT.

Dated at 7-7-00

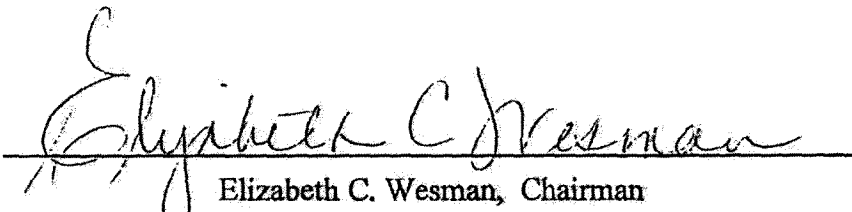
INTERPRETATION:

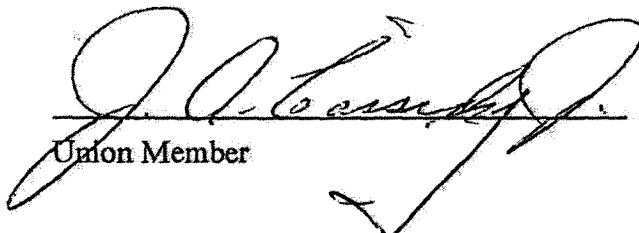
In executive session on this case, the Organization raised a concern that, despite the Claimant's reduced discipline, he was still not allowed to return to work in a timely manner. The Carrier did not return him to work his regular assignment until he was permitted by the Union Pacific Railroad Company to operate on its trackage.

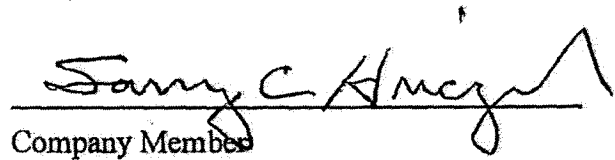
The Board has taken notice of this problem at length in our Awards 146 and 176. While we are sympathetic with the dilemma created by the disqualification by a rail carrier other than

Amtrak, the Board has no jurisdiction to compel a carrier not party to this Agreement to return Claimants to work. Nor has the Organization shown that the Claimant was qualified to work another route between the time his discipline expired and the time he was reinstated to his position by the Board.

Accordingly, the claim remains sustained only to the extent set forth in the original Opinion.


Elizabeth C. Wesman, Chairman


Union Member


Company Member

Dated at 2-7-00