SPECIAL BOARD OF ADJUSTMENT NO. 1127

AWARD NO. 10
CASE NO. 10

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Union Pacific Railroad Company
(Former Southern Pacific Transportation Company-Western Lines)

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained in accordance with the Findings.

DATE. August 23, 2002

DESCRIPTION OF CLAIM:

Claimant R. Williams was dismissed as a result of his actions on August 23, 2001 when the ballast regulator he was operating collided with a parked ballast tamper and caused an estimated $50,000 damage to both pieces of equipment. The collision happened at the end of the work day as Claimant was moving his machine into its parking position for the night. The force of the collision moved the Jackson 6700 tamper some two feet.

At the time of his dismissal, Claimant had just over five years of service with no previous similar incidents.

The Claim in this dispute seeks to overturn the discipline and make Claimant whole for all losses.

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees 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, and that the parties were given due notice of the hearing.

Additional background information about the collision is necessary to establish the nature of the critical issues involved in this dispute. A post-collision review of the circumstances disclosed that the ballast regulator was mechanically sound at the time of the collision. Its braking system was fully functional and able to stop the machine well within the stopping distance Claimant had available to him as he moved into Pit No. 3 for the night. All four wheels of the regulator had dual brake shoes, which were found to be within maintenance specifications. The tandem operator seats in the cab each had a brake pedal in the floor in front of the operator positions. However, the post-collision investigation revealed no evidence that Claimant had attempted to apply the machine's brakes prior to the collision.

The Carrier had also implemented a new Training, Testing & Machine Operator Qualification Policy ("Policy")on September 9, 1999. It was a product of the joint efforts of the FRA, the Carrier,

and the Organization. It had been in effect for nearly two years at the time of the collision. Its stated goal was to establish "... a systematic approach to qualifying new machine operators and [ensure] the participation by both management and the operator candidate in this process."

The Policy provided for two kinds of training: Mandatory and optional. It mandated the minimum amount of training that a new operator was to receive before being released on his own to gain experience. The Policy specified 40 hours of "Introduction/Beginner" training on a ballast regulator as part of the mandatory training matrix appended to the Policy as page 3 of 8. In addition, the Policy provided a Qualification Checklist for Ballast Regulator Operator that required the trainee to demonstrate the ability to perform a brake test as well as inspect the brakes for adjustment and wear.

Optional training was to be made available upon request to employees who wanted to enhance their promotional opportunities by acquiring skills in advance of the time when their seniority might allow them to attain a bid position.

It is undisputed in this case that Claimant was entitled to the mandatory training on the regulator as a result of bidding on the position; it provided him with an opportunity to qualify on the machine. Accordingly, the Policy mandated that Claimant's Track Supervisor or his applicable Manager-Work Equipment were required to meet with him "... as soon as possible to review what is expected during the qualification process; deliver and explain the Qualification Checklist; and address questions or concerns of the employee." (Underscoring supplied)

Claimant's testimony at the investigation squarely placed in controversy whether his supervisors had complied with the Policy. Odd as it may appear, Claimant testified that the braking system was never pointed out to him. Although he was aware of the presence of the two floor pedals, he did not know they were brake pedals. Moreover, he said he had never seen the checklist mandated by the Policy before the collision. Instead, the thrust of his testimony was to the effect that he was given a superficial type of on-the-job training on his first day by an employee whose name he did not know. That employee did not seem to know much about the operation of the machine and did not point out the brake pedals. Instead, the other employee incorrectly told him to stop the machine by moving the travel direction lever back through the neutral position and then enough in the opposite direction to stop the machine. Carrier provided no evidence to the contrary.

It is undisputed that Claimant operated the machine on his own after the first day. The collision occurred at the end of his fourth workday.

The transcript of the Rule 45 investigation hearing reveals several concerns about the conduct of the hearing. The Organization objected to the citation of Rule 136.7.5, entitled Safe Traveling Distance Between Machines. It is apparent from its own context as well as its references to Rule 42.8 and 42.9 that it applies to following a *moving* train or other on-track equipment. It is undisputed that the collision in question did not involve other moving equipment. The regulator crashed into a tamper that had been parked sufficiently in advance of the collision that the tamper operator had already set out safety cones around it. Nonetheless, the hearing officer determined there was substantial evidence that warranted sustaining all charges against Claimant. His decision letter included a citation to Rule 136.7.5 among the rules violated.

The Board's review of the record compels it to overturn the violation of Rule 136.7.5. For the reasons stated, it was not shown to be applicable to the incident in question.

The hearing officer also repeatedly admitted testimony, over the Organization's objections, that dealt with Claimant's previous disqualification as the operator of other track machines. Rule 45 requires that an employee be advised of the "... specific charges made against him ..." in advance of the hearing so that a defense may be prepared. The notice of charges in this case clearly did not provide notice that events outside of August 23, 2001 would be scrutinized at the hearing. Being thus outside the scope of the notice of hearing, the Board has, as it must, excluded such evidence from its review of the record.

The Carrier also failed to call three potentially key witnesses to testify. One was the only eyewitness to the collision other than Claimant. This was the tamper operator. It is clear from the record that Claimant's supervisor knew of the identity of the eyewitness but chose not to have him testify. According to Claimant's testimony, this witness could have corroborated Claimant's frantic but unsuccessful efforts to stop the machine as he approached the parked tamper. This would have been crucial testimony because Claimant was also charged with not being alert and attentive in violation of Rule 1.1.2. Given the circumstances surrounding the Carrier's non-production of this witness, Claimant is entitled to the adverse inference that the witness would have corroborated Claimant's testimony. Accordingly, the determination that Claimant was not alert and attentive must be overturned for lack of evidentiary support.

The second missing witness was the Manager-Work Equipment for Claimant's gang. The Policy places joint responsibility upon this position and the Track Supervisor to go over the Qualification Checklist with new operators as soon as possible. The testimony of the Track Supervisor concedes that he did not so meet with Claimant before the collision. The testimony of the Manager-Work Equipment, therefore, was indispensable for the Carrier to establish compliance with the mandatory requirements of its Policy. Given the circumstances surrounding the Carrier's non-production of this witness, Claimant is entitled to the adverse inference that the witness would have corroborated Claimant's testimony to the effect that no pre-collision Qualification Checklist discussion with Claimant had taken place.

Our review of the record fails to reveal any evidence whatsoever that Claimant's supervisors provided him any sufficient familiarization training on the ballast regulator before releasing him to unsupervised operation of the machine. Nor is there any evidence that Claimant was provided the mandatory 40 hours training class (PINS Code ES14) before being allowed to commence operation of the machine.

Finally, Carrier did not produce for testimony the employee who provided the on-the-job training that Claimant described. Once again, this failure leads to the adverse inference that the witness would have corroborated Claimant's description of the superficial, incomplete, and incorrect training he received.

Given the foregoing circumstances, it must be determined that the Carrier did not comply with the mandatory pre-operation training requirements of its Policy. Moreover, there is no proper basis in the record for discrediting Claimant's testimony that he was never shown how to stop the ballast regulator with its on-board braking system.

Despite the foregoing discussion, the Board does not find Claimant to be blameless in this matter. He acknowledged that he did violate the Carrier's seat belt rule. However, the record shows that Carrier had not required consistent use of the seat belts in the ballast regulator by operators for

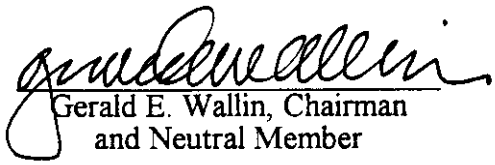
quite some time. The belts were found tied behind the operator seats, and there is no evidence that Claimant had been the person that tied them. Moreover, this violation played no role in causing the collision.

Claimant's culpability for the collision is passive and not active. The Carrier's rules require an employee such as Claimant to look out for his own safety. In this regard, it is clear from the record that Claimant had prior experience operating other pieces of track machinery. It is also abundantly apparent from the photographs in the record that the ballast regulator had a braking system with two opposing shoes for each of its four track wheels. The shoes and their lever mechanisms are not hidden from view by cowlings or the like: they are open and should be obvious to an employee with any meaningful prior machine operating experience. Moreover, Claimant admits that he was aware of the brake pedals in front of the two operator seats, yet he would have the Carrier believe that he never thought to ask what they were for or how they functioned. Given all of the relevant circumstances of this dispute, the Board finds that Claimant was careless of his own safety and negligent by his failure to inquire about the proper operation of such open and obvious control mechanisms before risking his own neck operating the machine; common-sense requires him to have done so.

As previously noted, however, Claimant's culpability is passive and arises out of his ignorance. This culpability is substantially lessened by what the record shows to be the Carrier's unmitigated failure to abide by the mandatory training requirements of its own Policy. Had the Carrier complied with the pre-operating requirements of its Policy, the record strongly suggests the $50,000 collision would never have occurred.

Given the foregoing discussion, the Board finds the penalty of permanent dismissal to be excessive; it must be set aside. Instead, Claimant should be offered reinstatement to his former employment status, with seniority and other rights of that status unimpaired, but without back pay. If he accepts reinstatement, his time out of service shall be converted to reflect a disciplinary suspension for just cause.

AWARD: The Claim is sustained in accordance with the Findings.



Gerald E. Wallin, Chairman
and Neutral Member

SPECIAL BOARD OF ADJUSTMENT NO. 1127

AWARD NO. 10
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PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Union Pacific Railroad Company
(Former Southern Pacific Transportation Company-Western Lines)

RESPONSE TO REQUEST FOR INTERPRETATION

ARBITRATOR: Gerald E. Wallin

DATE: May 15, 2003

FINDINGS OF THE BOARD:

Award No. 10 of this Board required that Claimant be offered reinstatement to his former employment status, with seniority and other rights of that status unimpaired, but without back pay. The Award also directed that Claimant's time out of service be converted to reflect a disciplinary suspension for just cause. Claimant was returned to service on or about September 23, 2002 accordingly. The Carrier also removed the dismissal reference from Claimant's disciplinary record and, instead, treated Claimant has having Level 3 status in Carrier's UPGRADE program for the administration of discipline. The net effect of this Level 3 placement appears to be twofold: First, future discipline of Claimant, if any, will be assessed at a higher level than might otherwise be the case; and, second, Claimant will remain in this Level 3 status until the expiration of an 18-month retention period that began August 23, 2001.

The Organization questioned the propriety of Carrier's placement of Claimant in Level 3 and requested an interpretation of Award No. 10.

Because their Public Law Board agreement provided for such requests, the Carrier apparently joined in the effort and a submission schedule was established. The interpretation issue stated by the Organization is as follows:

> Was the Carrier's decision to return Claimant Williams to service with an UPGRADE disciplinary status of Level 3 appropriate?

In support of its position, the Organization made a number of contentions. Prominent among them was the contention that the Carrier's action amounted to additional discipline beyond what was directed by Award No. 10.

The Carrier also advanced several contentions in support of its action. Chief among them was the assertion that Claimant had been handled consistent with other employees whose discharges were overturned by an arbitration award on a leniency basis. The UPGRADE policy specifically provides that such employees will be placed in Level 3 status.

For the reasons to follow, it is not necessary to recite all of the other contentions raised by

the parties.

After thorough review of the submissions of the Organization and Carrier as well as Carrier's rebuttal submission, the Board's response to the interpretation issue posed is that we presently lack the authority to answer it; the answer to the issue is solely within the province of subsequent review panels that may be convened to review future disciplinary action involving Claimant, if any.

Certain undisputed facts and well established principles of just cause compel the foregoing conclusions. First, it is clear that the parties' Public Law Board agreement both grants and limits the Board's authority. While Section 8 of the agreement recognizes the Board's authority to modify discipline, it also mandates that the Board's "... disposition of the dispute shall be based on valid material suppled under Sections 6. and 7." The Carrier's UPGRADE policy is not among the materials permitted under Section 6 nor was it provided to the Board with Carrier's transmittal letter of November 26, 2001 that supplied those materials.[1]

Second, Claimant's reinstatement was not made on a leniency basis. He was reinstated because the investigation contained significant procedural irregularities such as exceeding the scope of the charges and failure to require the presence of key witnesses within Carrier's control. Carrier failed to properly prove active misconduct by Claimant. Finally, the circumstances were substantially mitigated by the Carrier's failure to comply with its own training policy. The Carrier's UPGRADE policy does not appear to cover a reinstatement resulting from these factors.

Thus, this Board could not have imposed a Level 3 UPGRADE status and an 18-month retention period upon Claimant even if we had been inclined to do so, which we were not. Rather, our modification of Claimant's discipline was merely an exercise of the limited flexibility inherent in a traditional just cause review.

At this point, some brief discussion about certain just principles may provide meaningful guidance to the parties even though it cannot directly answer the pending interpretation issue.

Unless the parties have bargained to remove that jurisdiction from the reviewing tribunal, the reasonableness of a disciplinary penalty is always one of the issues reviewed in a just cause analysis. No such removal of jurisdiction has been noted in the parties' Agreement here. Accordingly, in a traditional just cause review, the analysis seeks to determine whether there has been prior discipline for the same or similar conduct in relatively close proximity to the penalty under review. If there is, then more severe discipline for a repeated offense will usually be found to be warranted and will be sustained. If there is no previous related misconduct, or if there is but it is too remote in time, then an employee will generally be treated as having a previously clean record as to that form of misconduct. In such a case, accelerated discipline will usually will be found to be unreasonably harsh and will be adjusted downward. The key point is that the significance of the existing disciplinary record is a question of fact to be determined by a future tribunal when it is convened to analyze the propriety of a future disciplinary penalty.

By placing Claimant in Level 3 with an 18-month retention period, what the Carrier is really saying is that, for a period of 18 months, it does not intend to treat Claimant as having a clean slate if he engages in future misconduct. Rather, it intends to treat Claimant as a repeat offender and

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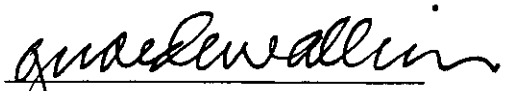
[1] Section 7 of the Public Law Board agreement is not applicable in this case. The parties waived their right to provide written submissions or make oral arguments in the original dispute.

discipline him accordingly. However, the reasonableness of this approach is ultimately a question of fact to be determined by a future review tribunal upon consideration of all of the relevant circumstances existing at the time, including the status of Claimant's existing disciplinary record. That tribunal may agree with the Carrier or it may disagree. It may agree that Level 3 treatment for a period of 18-months is reasonable or it may determine that such treatment was unreasonably harsh. The one fact that is clear at this point, however, is that is premature for this Board to make that determination.



Gerald E. Wallin, Chairman
and Neutral Member