

PUBLIC LAW BOARD 6657

In the Matter of the Arbitration Between:  
WHEELING AND LAKE ERIE RAILWAY COMPANY

and

NMB Case No. 3  
Claim of M. Colvin  
30-Day Actual Suspension

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

**STATEMENT OF CLAIM:** Claim of Engineer M. Colvin that he be made whole for the period of time he was withheld from service and that any mention of discipline assessed him resultant of this formal investigation be expunged from his record with no mention of this incident remaining therein.

**FINDINGS OF THE BOARD:** The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the Parties, claim and subject matter herein, and that the Parties were given due notice of the hearing which was held on September 23, 2003, at Cleveland, Ohio. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a Collective Bargaining Agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Engineer's craft.

On August 1, 2000, at 11:30 p.m., through August 2, 2000, at 1:15 p.m., Claimant was an Engineer assigned to Train No. 734, together with Conductor Jeremy Knapp. During the course of this service they had occasion to perform industrial switching at Tara located in Sycamore, Ohio. Although Claimant was assigned as an Engineer, he was performing the Conductor's duties while Conductor Knapp, also a qualified Engineer, was operating the locomotive.<sup>1</sup> The crew attempted, but failed, to couple a car to locomotive 3102. Although they knew that the engine and the car were not coupled, they shoved the car with the locomotive. As a result, the drawbars

---

<sup>1</sup>Management did not object to this exchange in roles and it has no bearing on this grievance.

PLB 6657

Case No. 3, Claim of M. Colvin

Page 2

bypassed each other, the coupler knuckle on the car struck the brake pipe on locomotive 3102, and the brake pipe on the locomotive broke.

Because the locomotive could not be moved, it was set off and left at Tara, on a track protected by a derail, but the derail was not set in the derailing position and was not locked. The crew orally reported the incident to the Chief Train Dispatcher on duty at the time but did not provide a written report of the incident to Management.

By letter dated August 4, 2000 (Carrier Exhibit 1, p. 112), Claimant was directed to attend a formal investigation in connection with the following charge:

"[T]o ascertain the facts and determine your responsibility, if any, in connection with the alleged failures listed below while you were on duty as [a member] of the 734 train crew working in the vicinity of Tara at Sycamore, Ohio, when during your tour of duty from 2330 hours on August 1, 2000, to 1315 hours on August 2, 2000, you allegedly allowed draw bars on equipment to bypass resulting in a broken angle cock on engine 3102; you allegedly failed to put the derail back in the derailing position and lock the derail when leaving Tara at Sycamore; and you allegedly failed to complete a written report of the incident."

The specifically alleged failures included: "failure to perform switching efficiently and in a manner which will avoid damage to equipment"; "failure to know that cars or engines can be coupled and moved safely before coupling to or moving cars or engines"; "failure to keep a derail equipped with a lock locked when not in use"; "failure to keep a derail in the derailing position and locked when not in use"; "failure to promptly file a written report of an accident"; and "failure to obey all rules and instructions."

The hearing was postponed once by mutual agreement and on August 17, 2000, during which Claimant acknowledged (Carrier

Exhibit 1, pp. 70-79) that the car and the locomotive were not coupled, that he knew they were not coupled but he, nonetheless, asked for the car to be shoved and that is when the pipe broke, that there was a derail nearby but he did not put it on, and that he was not instructed to and did not make a written report about the incident.

By letter dated September 6, 2000, Claimant was notified that he was assessed with a 30-day actual suspension and in due course, the Organization presented the instant claim for Claimant's discipline to be expunged and for him to be made whole. As resolution of the matter could not be reached on the property, it was presented to the Board for disposition.

**POSITIONS OF THE PARTIES:** The Carrier argues that the record contains substantial evidence that Claimant shoved a car on which the couplers were misaligned with his locomotive, thereby damaging the locomotive, and that he set off and left the locomotive without setting the derail in the derailing position and locking it, thereby violating applicable rules. The Carrier further argues that Claimant admitted when he testified that he shoved the car with his locomotive, with knowledge that the car was not coupled, thereby damaging the locomotive.

The Carrier further argues that the transcript of the investigation (Carrier Exhibit 1) clearly illustrates all of Claimant's "due process" rights as provided for under applicable rules of the Agreement were fully protected and the hearing was conducted in a fair and impartial manner. It contends that Claimant was given proper notice of the charges, sufficient time to prepare a defense, the opportunity to produce and examine witnesses and evidence, and that he was timely notified about the imposition of discipline. In addition, Carrier argues that the Organization's allegations regarding violations of Article 19 (Discipline and Investigation) of the Agreement (Organization Exhibit B) are

without merit. It maintains that, although commencement of the investigation was delayed a few hours, the delay was mutually caused by two prior investigations taking longer than was originally anticipated and was not the result of Carrier misconduct. It contends that, while it did not cite the rule numbers that Claimant allegedly violated, it did provide direct excerpts from the rules in its notice to him. It maintains that Claimant's discipline was issued by a letter of discipline, not, as the Organization contends, by a telephone call from the crew dispatcher, and that, in accordance with Article 19(g) which permits discipline, in cases involving "serious acts or occurrences," to be effective upon receipt of notice, it did not have to give 15 days' written notice to effect the discipline.

The Carrier concludes that it met its burden of proof with regard to Claimant's culpability in connection with his allowing draw bars to bypass resulting in damage to engine 3102; his failure to put the derail in the locking position and lock it when leaving the engine at Sycamore, Ohio; his failure to complete a written report of the incident; and his failure to be familiar with and obey all rules and instructions. As such, Carrier asserts that Claimant's conduct warranted a 30-day actual suspension and asks the Board to deny the claim.

The Organization argues that Carrier failed to provide Claimant with a fair and impartial investigation, as manifest in the issuance to Claimant to the excessive discipline of 30 days' actual suspension. It asserts that the notice of investigation was inadequate, in that it did not, as required by Article 19, Paragraph (d) (1), of the Agreement, give a "description of the act or occurrence which is the subject of the investigation, stating alleged rules involved without prejudging employee, but used as a format to prepare the defense," and clearly handicapped Claimant and his representative in their preparation of an adequate defense. Additionally, the Organization argues that the Hearing Officer

posed leading questions and attempted to direct the testimony of subordinate officer. It contends that Carrier failed to meet the applicable time limits when it did not convene the investigation at the specified time - 1:30 p.m. on August 17, 2000 - but rather postponed the start of the investigation, unilaterally, until 5:15 p.m. on that date without the concurrence of Claimant or his representative. It maintains that Carrier's citation (Carrier Exhibit 4; Organization Exhibit C, pp. 9-10) of Safety Rule 450 for the first time in response to the General Chairman's appeal is untimely and deprived Claimant of the ability to defend himself.

The Organization further argues that the investigation was concluded on August 17, 2000, yet the letter of discipline was not issued until September 6, 2000, some 20 days later, thereby creating a statutory bar against the assessment of discipline. It further contends that, while the letter of discipline was issued September 6, 2000, the 30-day actual suspension began on September 9, 2000,<sup>2</sup> thereby violating Article 19, Paragraph (g), which requires at least 15 working days' notice. Paragraph (g) states:

The written notice will be issued at least fifteen (15) working days prior to the date on which the discipline is to become effective except that in cases involving serious acts or occurrences, discipline may be effective upon receipt of the notice of discipline.

The Organization maintains that the suspension should not have commenced, at the earliest, prior to September 21, 2000, and rejects Carrier's claim that it was past practice to implement suspensions immediately.

The Organization further argues that, since the incident was reported orally to the Chief Train Dispatcher and Claimant was not

---

<sup>2</sup>Employee's Brief, p. 5, inadvertently states that the suspension began on "September 30, 2000"; the letter of September 6, 2000 (Organization Exhibit A; Carrier Exhibit 2) clearly states that the suspension commences on September 9, 2000.

PLB 6657

Case No. 3, Claim of M. Colvin

Page 6

asked or directed to submit a written report, Claimant did not violate the provisions of Rule E, which states:

Accidents, defects in tracks, bridges or signals, or any other unusual condition which may affect the safe and efficient operation of the railroad, must be reported by the first means of communication. Written report must follow promptly when required.

The Organization further argues that no hazard existed by any alleged failure to apply the derail in the derailing position since the equipment was not able to roll toward the derail or the Main Line, that the damage was minimal and occurred only because the equipment was on a curve, making the coupling movement difficult and that the discipline assessed was excessive, with no showing of previous discipline involving a similar incident.

The Organization urges that a sustaining Award be issued.

DISCUSSION AND ANALYSIS: Following careful consideration of the record, the Board concludes that there is substantial credible evidence to support Carrier's action. The Board is convinced that Claimant did, in fact, knowingly shove an uncoupled car by locomotive, thereby damaging the locomotive, and then set off and left the locomotive without setting the protecting derail in the derailing position and locking it, thereby violating Carrier rules. However, while the Board is also persuaded that the Carrier protected Claimant's due process rights, Carrier did not wait the requisite fifteen days to initiate the discipline.

Claimant and Conductor/Engineer Knapp were jointly responsible for the safety and protection of their train and the observance of the rules. The Organization concedes, and Claimant testified, in the hearing, that he shoved the car with his locomotive, with knowledge that the car was not coupled, thereby damaging the locomotive. With one exception, the Board is persuaded that Claimant violated each of the rules for which he was charged. The

exception is Rule E, "failure to promptly file a written report of an accident." The evidence indicates that "the first means of communication" of the incident was made orally to the Chief Train Dispatcher. There is no indication that he, or anyone else directed or even requested that the crew make a written report of the incident. Thus, it cannot reasonably be said that a written report was "required"; and, thus, Rule E was not violated.

The Board notes the Organization's objection to Carrier's citation of Safety Rule 450. However, Claimant was not charged with violating this rule; it was cited to identify what steps he should have taken because he could not successfully couple the equipment.

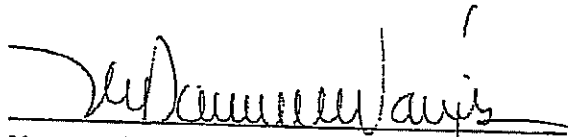
The Organization contends that the Carrier twice violated Article 19, Paragraph (g), first, because the investigation was concluded on August 17, 2000, yet the letter of discipline was not issued until September 6, 2000, which it contends is some twenty days later, and, second, because the 30-day suspension began on September 9, 2000, instead of September 21, 2000, at the earliest, thereby providing just three days' notice instead of the requisite fifteen days. The Board is persuaded by the latter argument but not by the former. The letter of discipline was issued within fifteen working days and, thus, complied with that portion of Paragraph (g). However, to provide Claimant with the required notice of discipline, the Carrier should not have commenced his 30-day suspension until at least September 21, 2000. The Carrier presented no evidence of contrary interpretation or practice between the Parties that permitted earlier implementation. A contractual bar exists against that portion of the suspension served prior to September 21, 2000, and Claimant shall be made whole for the period September 9 through September 20, 2000.


As to the penalty imposed, the Board is not persuaded that a 30-day actual suspension was excessive. However, as a result of the Carrier implementing the suspension before the fifteen-day


notice period had elapsed, the 30-day actual suspension must be reduced by the twelve days for which Claimant did not receive the required notice. The Award so reflects.

AWARD: The Organization's claim is sustained in part and denied in part. The Carrier proved Claimant guilty of the charges against him. The 30-day actual suspension is not arbitrary or excessive. However, Claimant shall be made whole for the twelve days of wages and benefits lost because the suspension was implemented earlier than the governing Agreement allows.

Dated this 27<sup>th</sup> day of May, 2004.

  
M. David Vaughn, Neutral Member

  
Paul Sorrow, ~~Carrier~~ Member  
Employee

  
Joseph Burley, ~~Employee~~ Member  
Carrier