

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 928**

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
) Case No. 433
and)
) Award No. 433
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK))

Martin H. Malin, Chairman & Neutral Member
M. B. Kenny, Employee Member
L. C. Hriczak, Carrier Member

Hearing Date: December 12, 2003

STATEMENT OF CLAIM:

Claim of Amtrak Passenger Engineer D. L. Greider (Claimant) for the rescinding of the discipline imposed of "DISMISSED IN ALL CAPACITIES" as stated in the decision letter dated August 14, 2003, under the signature of General Superintendent-Mid-Atlantic Division Daryl K. Pesce, and with full compensation for time lost, full credit toward vacation entitlement, health and welfare benefits during the period held out of work, and clearing of Claimant's personal record of any reference relative to the alleged violation.

FINDINGS:

Special Board of Adjustment No. 928, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On June 11, 2003, Claimant was directed to report for an investigation on June 13, 2003. The notice charged Claimant with four violations. Charge 1 alleged a violation of Air Brake and Train Handling Rules and Instructions, Rule 2.4.1, Paragraph A. Charge 2 alleged a violation of Air Brake and Train Handling Rules and Instructions, Rule 4.2.4, Paragraph A.3. Charges 1 and 2 specified that after taking charge of Engine 523 on June 6, 2003, Claimant failed to perform a running brake test during the initial movement and subsequently failed to perform a running brake test while operating with cars. Charge 3 alleged a violation of NORAC Operating Rule 100 and specified that on June 6, 2003, Claimant failed to perform a stop while shoving equipment onto the rear of Train No. 41, resulting in four passengers being transported to a medical facility. Charge 4 alleged a violation of NORAC Operating Rule 711 and specified that Claimant failed to stop within one-half the last distance specified and subsequently failed to stop immediately due to the absence of further instructions.

Following postponements, the hearing was begun on July 31, 2003, and concluded on

August 7, 2003. At the beginning of the hearing, Charges 1 and 2 were withdrawn. On August 14, 2003, the Hearing Officer found that Charge 3 was not proven. However, he found that the Charge 4 was proven. Based on these findings, Carrier advised Claimant that he had been dismissed from service.

The incident giving rise to the charges occurred when Claimant was shoving a string of cars to couple with Train 41. Claimant was receiving radio instructions from the Conductor. There was a hard coupling. Claimant allegedly violated NORAC Operating Rule 711 by failing to stop within half the distance from the last instruction given.

The tapes of the radio transmissions reflect a count from the Conductor of ten cars and no further car counts. Claimant testified that he received car counts of five and three car lengths as well. The Hearing Officer characterized "the alleged radio instructions of 5 cars and then 3 cars very suspect, since they do not appear on the radio tape as the 'ten more to a safety,' is recorded." However, the hearing officer made no specific finding as to whether the five and three car counts were given.

If the finding of guilt on Charge 4 is based on a finding that the five and three car counts were not given, we hold that such finding is not supported by substantial evidence. The only evidence supporting a finding that the five and three car counts were not given was the absence of those car counts on the radio tapes. However, the Manager Train Operations testified that the ten car count appeared on the tape at 16:34. There was radio interference on the tape from 16:34 to 16:35. At 16:35:30, there was a profanity uttered. The MTO testified that the use of such a profanity during such moves was extremely rare. A reasonable inference is that the profanity was a reaction to the hard coupling.

The presence of the interference substantially inhibits the drawing of an inference from the absence of the five and three counts on the radio tape. On the other hand, Claimant testified that he received five car and three car counts from the Conductor. The Conductor's written statement indicates that he gave five car and three car counts. Most significantly, a Car Inspector who was in the engineer's seat on the head end of Train 41 testified that he heard the Conductor give a three car count over the radio. Based on this record, the only finding that could be supported by substantial evidence is that a three car count was given.

The Hearing Officer found that if the three car count had been given, Claimant failed to stop within half the distance, i.e. one and a half car lengths. He based this finding on the fact of the hard coupling itself. He wrote:

Even if the "three more to go", was transmitted by Conductor Reading as he and you stated, it is crystal clear that the train movement was not stopped within half the distance (1-1/2 car lengths) due to your own admission that the coupling was harder than you would have liked, coupled with Conductor Reading's statement that it was harder than normal.

The Hearing Officer then discussed evidence of the severity of the coupling and concluded, "The aforementioned clearly shows that a full application of the brakes and an immediate stop was required at one and one-half car lengths, and that merely throttling back was insufficient to stop the train immediately as required by Rule 711."

After careful review of the record as a whole, we find that the inferences drawn by the Hearing Officer from the hard coupling are not supported by substantial evidence. First we note that the speed tape reflected that the engine was proceeding at between one and two miles per hour. Claimant testified that the brakes were already applied at such a level that idling would have as immediate an effect in stopping the train as applying additional brake. When he did not hear further instructions after the three car count, he reduced the throttle which, he testified without contradiction, would have the same effect as applying additional brake. Most significantly, the Car Inspector testified that the hard couple occurred within seconds following the three car count. However, given an average car length of eighty-five feet, at one to two miles per hour, it would have taken approximately two minutes to travel three car lengths. The Car Inspector's testimony that the coupling occurred seconds after the Conductor called three cars strongly suggests that the Conductor's three car call was in error and that the engine and cars being shoved were much closer to the train. In light of all of the above evidence, a reasonable person could not conclude that Claimant failed to stop within one and a half car lengths of the three car length call. The evidence makes it at least as likely that the Conductor erred in calling three car lengths and that the Conductor's errors, to the exclusion of Claimant's conduct, were responsible for the hard couple.

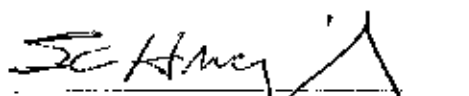
AWARD

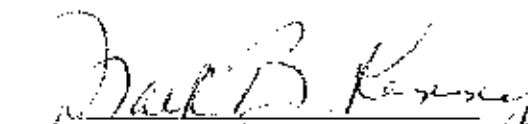
Claim sustained.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Martin H. Malin, Chairman


L. C. Hriczak, 2-25-04
Carrier Member


M. B. Kenny, 2-19-04
Employee Member

I DISSENT.

Dated at Chicago, Illinois, February 7, 2004.