

PUBLIC LAW BOARD NO. 6885

PARTIES TO THE DISPUTE:

UNION PACIFIC TRANSPORTATION CO.  
(WESTERN LINES)  
[Formerly Southern Pacific Transportation Company]

-and-

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and TRAINMEN

STATEMENT OF CLAIM:

Claim of Los Angeles Hub Engineer C.E. Hastings, for reinstatement to the service of the Company with full seniority and all other employment rights restored and that he be compensated for all time lost in connection with Claimant's assessment of an "UPGRADE LEVEL 5", PERMANENT Dismissal, on October 20, 2004. Further, Claimant's annual vacation rights should be restored, and he should be compensated accordingly. In addition, Claimant's personal record should be completely expunged of any notation or record pertaining to this case. (Claimant was returned to service with the Carrier in August 2005. Therefore, the claim is for time lost between October 20, 2004 and until returned to service in August 2005.)

OPINION OF BOARD: Engineer C.E. Hastings ("Claimant") established a seniority date with the Carrier as a Fireman on May 24, 1967 and as an Engineer on December 28, 1970. Claimant was working in the latter capacity on October 5, on duty at 9:00 AM to work as the Engineer on the LOH38 local freight assignment in an industrial switching area at Chino, California. Working with Claimant was Conductor W.A. Sloan and Brakeman T. R. Kiemele with the Claimant operating locomotive UP 1683. During the course of their duties, as the crew set out two (2) cars to track 775 from their train, Conductor Sloan positioned himself to protect public road crossings while Claimant and Brakeman Kiemele set out the two (2) cars to track 775.

The subsequently developed record shows that after reaching the east end of track 775, Claimant detached his unit within a four (4) second period from the two (2) cars and moved his locomotive away from the cars without ensuring the air in the brake system was equalized. Consequently, the air brakes were neither set nor released, which would have verified to the Claimant that his Brakeman had tightly secured the handbrakes before he detached his unit. In fact, Brakeman Carnal only tied one (1) set of hand brakes on one (1) car and failed to even physically check whether the handbrakes on the second car were properly secured. The crew then took the remainder of their train, twenty-six (26) cars and their locomotive, UP 1683, and tied it down at or near Schaefer Avenue where they completed this last move at approximately 12:30 PM.

Because the two (2) cars were left standing on the track without properly ensuring they were secured and tied down with handbrakes, those cars began to roll free approximately forty-five (45) minutes later. Proceeding down a .7 % descending grade, the free-rolling cars reached a speed of approximately 33 mph; through public street crossings and a customer facility parking lot. After rolling free for approximately 1.5 miles the two (2) cars crashed into a bumping post at the end of the track and flew off the track into a block wall and metal gate, before coming to rest approximately 40-45 feet from a public road. There was extensive damage to property and equipment but, mercifully, there were no human injuries or fatalities as a result of this catastrophe. However, in addition to property and equipment damage, the runaway resulted in adverse publicity and damage to the Carrier's reputation in widely reported media coverage, .

On the date of the incident, Manager of Train Operations (MTO) B. Cooper and Manager of Operating Practices (MOP) K. Garcia were notified of the accident and conducted a preliminary on-the-ground investigation, which included downloading the computerized event data recorder from

Claimant's locomotive, UP 1683. The event recorder showed that Unit 1683 made the reverse movement while those two cars were cut off but made no full stop while they were cut off, but simply pulled away in the other direction; for a total time expenditure of just four (4) seconds. In short, it was a physical impossibility that the Claimant had complied with Air Brake & Train handling Rules, revised July, 2004, which require an equalization of the brakes before release and test of the handbrakes.

As it turned out, the hand brakes on one of those cars in fact had not been set at all. As established through undisputed testimony at the subsequent formal investigation of the incident, Messrs. Cooper and Garcia, along with a Mechanical inspector found no defects on the cars. However, they did find no handbrakes were secured on one of the cars, *i.e.*, the hand grips for the brakes were in the release position, the brake chains were completely let out loose and there was no tension in the chains. (Brakeman Kiemele, who tested positive for marijuana in the post-accident drug screen, subsequently admitted that he simply failed to tie the hand brake because he "assumed" it was already set).

After being taken out of service pending the outcome of the investigation, the Claimant was served a Notice of Charge reading as follows:

While employed as a Crew Member on the LOH38-05 at Chino, California, near Milepost 5.8, at approximately 1256 hours, on October 5, 2004, you allegedly failed to conduct a proper Job briefing and allegedly failed to secure rail cars or properly cut away from cars, resulting in an uncontrolled movement of two cars This is in possible violation of Rule 1.6 (Conduct), Rule 7.6 (Securing Cars or Engines), as contained in the General Code of Operating Rules, effective April 2, 2000, Rule 32.1.2 (Securing an Unattended Train, as contained in the Air Brake & Train handling Rules, revised July, 2004, and Item 17 (Job Briefing) as contained in the Revised System Special Instructions, effective April 1, 2004.

Following a consolidated hearing at which all crew members appeared with Union representation, Carrier found each one culpable in some measure for the runaway car incident. Conductor Sloan was

assessed a Level 3 Discipline UPGRADE (5 days suspension) for his lesser responsibility in the incident but Claimant and Brakemen Kiemele each were assessed a Level 5 (Permanent Dismissal).

The record shows that Brakemen Kiemele subsequently was allowed to retire and that the on December 21, 2004, Claimant was offered a "leniency" reinstatement, effective April 5, 2005, *i.e.*, a six (6) months; suspension and a record Level 3. He declined that offer, among other reasons, because it was conditioned upon withdrawal of his timely appealed grievance claim that he was without fault and had been unjustly disciplined. About 5 ½ months later, after he had served three hundred and sixteen (316) days actual time in suspension without pay, Carrier unilaterally reinstated the Claimant to service at a Discipline UPGRADE Level 3. That reinstatement was without prejudice to his right to appeal the instant claim of unjust disciplinary action to final adjudication by this Board.

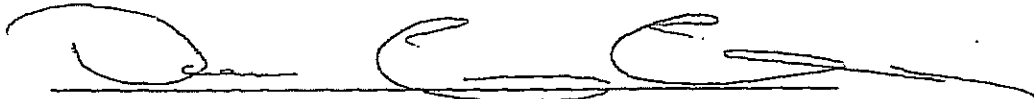
On a threshold issue, we find no fatal procedural defect in the removal of the Claimant from service pending the formal investigation of these extremely serious safety rule violation charges. On the issue of culpability, our review of the record evidence persuades us that even though he was not the primary offender in this incident, the Claimant cannot avoid his measure of responsibility for those inadequately secured cars rolling free. Carrier presented persuasive evidence that the Claimant could have and should have made the air equalization test to check the adequacy of the hand brake set before pulling away from the two cars. His failure to do so as a safety check of the Brakeman's failure to set the brakes made him also liable to an appropriate measure of disciplinary action in this case. Since the event recorder showed that he worked in accordance with Air Brake & Train handling Rules on all his other moves that day, his belated plea that those rules were not really applicable to the set-out of those two cars has no credible resonance.

Although this Claimant cannot escape his fair share of culpability, the Board finds that the imposition of the ultimate penalty of Permanent Dismissal for his secondary role in the incident was unreasonably excessive. Indeed, given his secondary responsibility for the incident, his nearly four decades of service and his relatively clear personnel record, we find the 10-month suspension without pay he eventually served unreasonably harsh and disparate treatment. The record shows that following a discipline conference on November 30, 2004 between Regional Vice President T. F. Jacobi and BLET General Chairman D. W. Hannah, Claimant was offered a conditional reinstatement at Discipline UPGRADE Level 3, after serving a six (6) month suspension without pay for time lost. Under the terms of that "leniency" offer, Claimant's six (6) months suspension would have ended on April 5, 2005; but that offer was rejected because of the condition that Claimant abandon the instant appeal of his claim. Even though the Carrier met its burden of proof on the issue of Claimant's contributory negligence, we reduce the period of suspension without back pay. On that basis, the present claim is denied in part, but sustained for the period between June 1, 2005 and the date of the Claimant's eventual reinstatement in mid-August 2005.

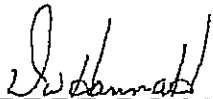

AWARD NO. 13  
NMB CASE NO. 13  
UNION CASE NO. E-29685-32-21(g)  
COMPANY CASE NO. 1407781

AWARD

1. Claim denied in part and sustained in part, as indicated in the Opinion.
2. Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.
3. Jurisdiction is retained for the sole purpose of resolving any disputes over the interpretation or implementation of this Award.



Dana Edward Eischen, Chair

  
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Union Member  
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Company Member

May 9, 2007