

BEFORE
PUBLIC LAW BOARD NO. 7353
CASE NO. 69
AWARD NO. 69

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND)
TRAINMEN) PARTIES TO THE
vs.) DISPUTE
CSX TRANSPORTATION, INC.)

STATEMENT OF CLAIM:

"Claim on behalf of Locomotive Engineer M.W. Montgomery, ID #239408, requesting reinstatement to active service as a Locomotive Engineer with seniority unimpaired, compensation for all lost earnings since being removed from active service October 14, 2011, restoration of all employment related benefits, including Railroad Retirement benefits, vacation and personal leave entitlement, and to have record expunged of all charges relating to the incident made the subject of the hearing held on October 20, 2011 at Cincinnati, Ohio."

FINDINGS:

The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated October 16, 2009, as amended, that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings.

After a thorough review of the record, the Board concludes that on October 11, 2011, the Claimant worked as a Locomotive Engineer on the Louisville subdivision. While operating a train that day, the Claimant occupied the limits of a maintenance crew, without authority. The investigation hearing was scheduled and held on October 20, 2011.

Following the close of the disciplinary investigation, on November 15, 2011 the Carrier dismissed the Claimant from service for violating CSX Transportation Operating Rule 89.

This Operating Rules states:

"89. Work Limits

1. Entering and Moving Within Work Limits

A train holding a Dispatcher Message Form "W" or EC-1 instruction, in effect, must not proceed beyond the point designated or make an initial movement within the limits until the Engineer is given permission by the roadway worker in-charge..."

Carrier's Position:

The Carrier says that the testimony of the Claimant confirms that the incident occurred as charged. The Claimant got on the train in a yard. At the time he was on track number 1. The Claimant admits that he went through a crossover. He, however, says that he did not realize

that in going through the crossover he went from track number 1 to track number 2. In addition, the Claimant did not see the red board posted by the Track Foreman.

With respect to the quantum of discipline, the Carrier says that the Claimant caused extreme risk to life and property and had an apparent lack of awareness of where his train was while operating over a large section of track. They say that the discipline assessed was clearly within the terms of its IDPAP.

Organization's Position:

The Organization says that the Claimant testified that he was not familiar with the location when he took control of the train. Prior to departing, the Claimant contacted the Trainmaster to determine what track he was starting out from. The Claimant admits in the statement given the day of the incident, that he and the conductor were not fully sure of where they were. He goes on to say that the crew was wondering about their path of travel and discussed their concerns. The Conductor said they were both unsure of their location.

They say that the Carrier witness said that the crew seemed unsure even after they were told what track they were on to begin with. The Organization suggests that the Carrier should then have taken steps to ensure the crew knew what they were doing.


Result:

There is no question that the Carrier has met its burden of proof based on the testimony of all witnesses at the disciplinary investigation, including the Claimant. Therefore, the only remaining issue for this Board is the quantum of discipline.

It seems to this Board that if the Claimant was so unsure of where he was and his proposed path of travel, he had a duty to ask further questions to make sure he understood. This would have avoided the extreme risk his actions posed to the maintenance workers repairing the track in question. His failure to do so is, in the view of this Board, an exacerbating circumstance. As a result, this Board sees no reason to interfere with the discipline assessed by the Carrier.

AWARD

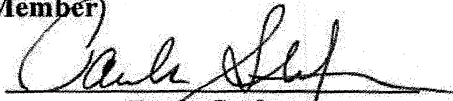
The claim is denied.



Roger K. MacDougall
Chair and Neutral Member



GN Gore
Vice-President
Organization Member
Dissent Attached



Paula Stefan
Director Labor Relations
Carrier Member

Dated: 01/29/2013

At: Chicago, IL

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DISSENT OF ORGANIZATION MEMBER

The Organization must strongly dissent to the Majority upholding the permanent dismissal of Claimant Montgomery. It is unconscionable that the Majority has ignored Claimant's tenured thirteen (13) year career.

In Public Law Board Nos. 6264 and 6265, Referee Kasher found that Carriers have certain rights to promulgate policy. However, he qualified that right by recognizing that such policies, when challenged, must pass a test of reasonableness. He stated in pertinent part:

"It is well-established that an employer in exercising its management rights to publish and enforce rules of conduct is obligated to ensure that those rules meet the test of reasonableness,"

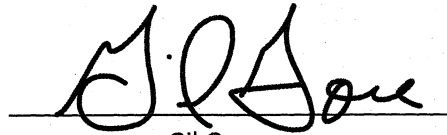
In Davis Fire Brick Co., 36 LA 124, 127 (Dworkin, 1960), the arbitrator ruled:

"Inherent in the contractual provision that an employee may be disciplined for just cause, is the fairness and reasonableness of the penalty. While the basis for discipline may be clearly established, unless the penalty is reasonably commensurate with the improper conduct of the employee, then "just cause" is wanting in regards the penalty imposed."

The Organization has long been on record that this Carrier's unilaterally imposed "one and done" discipline policy (IDPAP) linked to a single rule offense is anything but reasonable. It is outrageous when compared to the mandatory sanctions imposed by the industry's safety regulator for the five most serious operating infractions a locomotive engineer can commit [Sec 49 C.F.R. § 240.117 (e) (g)]. With the stroke of its "Policy" pen, the Carrier has added these operating rule violations to its so called "major" category. For the offense committed by Claimant Montgomery, the FRA Engineer Certification Regulations mandate only a thirty (30) day suspension of his locomotive engineer license as noted in the November 15, 2011 notification of dismissal and decertification Claimant received from CSX (Carrier Submission Exhibit 3). A second similar offense within twenty-four months results in only a six (6) month suspension under the regulations. A third similar offense under the regulations results in only a one year suspension. While CSXT alleges their IDPAP provides numerous opportunities for employees to improve and grow, missing from the record used by the Majority to decide this case is any validated record of prior misconduct. Claimant Montgomery's thirteen (13) year career makes the Majority decision in this case even more egregious. Claimant has been treated by the Majority in this case as if he, with reckless abandon, climbed on the engine in unfamiliar territory moving forward without any regard to the safety of himself, his crew and the general public. The facts of the case indicate that he made contact with his Trainmaster before departing to determine what track he was starting out on. The Majority decision completely ignores the responsibility of the Trainmaster who, once contacted by an engineer unsure of what track he was currently occupying, did not stop all movement immediately

and provide assistance to insure the safety of all concerned. The decision of the Majority in this case condones the Carrier's ability to randomly pick and choose who will survive and who will not. The result is termination for one, Claimant Montgomery in this case, but no discipline for the Trainmaster who ignored a clear safety alarm that should have triggered action on his part. Gone are the checks and balances that would otherwise insure that employees are not treated disparately. Instead, the Carrier wields the ultimate penalty of dismissal at its whim, creating an employment environment with unequal terms and conditions that mimic an at will setting. Missing from this case are the collectively bargained checks and balances that require each and every case to be considered on its own facts and merits ensuring that employees are not disciplined in an arbitrary or capricious manner. When the level of discipline is challenged by the Organization, the Carrier simply falls back on its "Policy" to defend what are in essence, indefensible actions. Just cause is obviously wanting and reduced to "just words" when arbitrary and excessive discipline as in the instant case is allowed to stand only because the Carrier proclaimed it "just" via its policy.

For these reasons, I respectfully dissent to the findings of the Majority of this Award.

A handwritten signature in black ink, appearing to read "G. Gore", written over a horizontal line.

Gil Gore

Organization Member

January 29, 2012