

**AWARD NO. 11
NMB CASE NO. 11**

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

And

MidSouth Rail Corporation (Kansas City Southern Rwy.)

STATEMENT OF CLAIM:

Claim of MidSouth Rail Engineer Reginal Scott for reinstatement to service with seniority and vacation rights unimpaired, with all notations pertaining to discipline assessed on September 2, 2009 expunged from his personal record and that he be compensated for all time lost from the date he was removed from service until the date he resumes service, plus out of pocket expenses for health & welfare and any other benefits which would be provided to him as a MidSouth Rail Engineer for allegedly violating Kansas City Southern Railway's General Code of Operating Rule 1.6 – Conduct in connection with allegedly providing false information on how he performed his duties after coupling into a cut of cars that resulted in equipment damage while working as Engineer on RJA421 on August 4, 2009 at approximately 9:50 p.m. at or near Mile Post 91, Jackson, MS.

OPINION OF BOARD:

At the time of the incident giving rise to this claim, Claimant Reginal Scott was an Engineer assigned on Road Switcher RJA421 at Carrier's Jackson, Mississippi Yard. On August 4, 2009, at about 9:45 p.m. the crew was pulling uphill out of the east end of

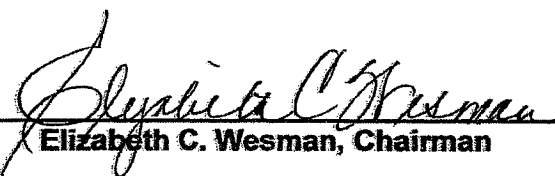
Jackson Yard and the head car and second car came uncoupled. Consequently, the cut rolled free backward down the hill colliding with another parked train. Seven cars derailed. The entire crew, including Claimant, were removed from service pending an investigation.

An investigation was held on August 21, 2009. Following the investigation, Claimant was notified by letter of September 2, 2009, that he had been found guilty as charged and was dismissed from Carrier's service as of that date. The discipline was appealed on October 5, 2009 and denied by the Carrier by letter of December 3, 2009. It was subsequently progressed according to the Agreement, including conference on the property, after which it remained unresolved. It is properly before the Board for adjudication.

The Board has carefully reviewed the transcript and documentary evidence in this matter. As in all discipline cases, the Carrier here bears the burden of persuasion. In this particular instance, we do not find that the Carrier met that burden. Accordingly, the present claim is sustained. Claimant shall be returned to work, following successful completion of the return-to-work protocol, and shall receive back pay for all time lost as a result of his dismissal. The Parties shall make a joint review of the Carrier's records to determine the amount of back pay due Claimant.

AWARD

Claim sustained.



Elizabeth C. Wesman, Chairman



Organization Member



Carrier Member

Dated JUNE 21, 2010

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

and

Kansas City Southern Railway Company (former MidSouth Railway)

STATEMENT OF CLAIM:

Claim of MidSouth Rail Engineer Curtis Stubblefield for reinstatement to service with seniority and vacation rights unimpaired, with all notations pertaining to discipline assessed on June 18, 2009 expunged from his personal record and that he be compensated for all time lost from the date he was removed from service until the date he resumes service, plus out of pocket expenses for health & welfare and any other benefits which would be provided to him as a MidSouth Rail Engineer for allegedly violating Kansas City Southern Railway's General Code of Operating Rules 8.15 – Switches Run Through, 1.6 – Conduct and Special System Instructions page 2, Item C – Speed restrictions in connection with allegedly failing to perform duties correctly by allegedly allowing his train to run through a switch resulting in damage and train delay and allegedly operating in excess speed when pulling out of Number 2 track at or near Mile Post 91.4, Jackson Yard at approximately 3:10 p.m. on May 30, 2009 while working as Engineer on Train L-JA111-30. (Carrier File No. MO109-9036)

OPINION OF BOARD:

At the time this claim arose, May 30, 2009, Claimant Curtis Stubblefield was assigned as the Engineer on Train L-JA111-30 at Carrier's Jackson, Mississippi Terminal, along with a Conductor and a Brakeman. Following attendance at two job briefings, the

crew was making the first move on their tour of duty to double forty cars from Number 2 track in the yard to make up a train on the Storage Track. The Claimant and the Brakeman were on the lead locomotive and the Conductor remained in the yard. In the process of executing the movement, which required them to proceed through "Switch 49" three cars derailed with one of them on its side and part of its lading on the ground.

During an investigation of the incident it was found that the event recorder on the lead locomotive indicated that the engine was exceeding the 10 mph limit during the switching operation. Moreover, a track inspector examined the switch involved and found it had been run through and damaged. The crew were then removed from service pending an investigation.

In a letter dated June 4, 2009 the crew were instructed to appear for a formal investigation as follows:

...to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on May 30, 2009, at approximately 3:10 p.m. While serving as a crew member of Train L-JA111-30, it alleged that you failed to properly perform your duties in a safe and proper manner when your train ran through the new/old main line switch causing a derailment, resulting in track damage, and train delay. It is also alleged that you were at excess speed when pulling out of number two track...

An investigation was held on June 12, 2009. By letter of June 18, 2009, the Carrier notified Claimant that he had been found guilty as charged and was dismissed from Carrier services as of that date.

The Organization filed a claim appealing the Carrier's assessment of discipline on

July 17, 2009. Among its other concerns, the Organization protested that the investigatory hearing was not fair and impartial. It argued that the use of the hearing officer in several capacities (investigating officer, hearing officer and prosecutor), prejudiced the hearing from the outset. Moreover, the Organization protested that the Carrier had not met its burden of persuasion, since there was no showing, according to the Organization, that the train in question was the only one that could have run through the switch.

The Organization's claim was denied on August 3, 2009. In that denial, the Carrier maintained that the charges against Claimant were proven on the record. It contended that the downloads from the engines supported the charges. With respect to the quantum of discipline assessed was in accordance with the Carrier's Discipline Policy Matrix and was warranted in light of Claimant's previous discipline record. The Organization appealed the Carrier's denial on September 21, 2009. The matter was subsequently progressed on the property, including conference on February 23, ²⁰¹⁰~~4010~~, after which it remained in dispute. It is properly before the Board for resolution.

The Board takes seriously the Organization's contention that the hearing was not fair and impartial. An examination of the transcript, however, does not indicate that the Hearing Officer deprived the Organization of mountain a full defense of the Claimant at the hearing. With respect to the merits of the claim, a careful review of the record before the Board fails to show any other possible cause for the accident at issue in this matter other than that Train L-JA111-30 ran through "49 Switch" thus causing the derailment and

subsequent damage to cars, track and lading. It is well established that in incidents of this nature, the crew normally share equally in the assessment of culpability. Quantum of discipline, however, may be another matter. The Board is in agreement with the Carrier that, given Claimant's poor record, accumulated over the relatively short period of slightly less than five years, the ultimate penalty of dismissal was not inappropriate in his case. Accordingly the instant claim is denied.

AWARD

Claim denied.


Elizabeth C. Wesman, Chairman


Organization Member


Carrier Member

Dated JUNE 21, 2010

**AWARD NO. 13
NMB CASE NO. 13**

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

And

MidSouth Rail Corporation (Kansas City Southern Rwy.)

STATEMENT OF CLAIM:

Claim of MidSouth Rail Engineer Michael S. Tyner for reinstatement to service with seniority and vacation rights unimpaired, with all notations pertaining to discipline assessed on August 28, 2009 expunged from his personal record and that he be compensated for all time lost from the date he was removed from service until the date he resumes service, plus out of pocket expenses for health & welfare and any other benefits which would be provided to him as a MidSouth Rail Engineer for allegedly violating Kansas City Southern Railway's Air Brake and Train Handling Rules & Instructions 102.4 – Locomotive Air Brake Test and 102.4.2 – Procedure for Light Locomotive Running Air Brake test in connection with alleged failure to conduct a light locomotive running air brake test after changing operating ends and moving light locomotives from the north end to the south end of the Shreveport Terminal yard tracks at or near MP 552.4, Shreveport, LA while serving as Engineer of Train IJALZ-24 at approximately 8:16 a.m. on July 25, 2009.

OPINION OF BOARD:

Prior to his dismissal, Claimant M. S. Tyner was employed in Carrier's Train and Engine Service. On July 25, 2009, the date of the incident giving rise to this claim, he was assigned as the Engineer on Train IJALZ-24 operating from Jackson, Mississippi to

Shreveport, Louisiana. At or about 8:16 a.m. the train arrived in the Shreveport Yard. After yarding the train, the crew was directed to operate its light locomotive consist back to the opposite end of the yard. At approximately 9:14 a.m. the Manager of Operating Practices performed a routine download of the event recorder on the locomotive on train IJALZ-24.

On August 3, 2009, Claimant was notified to appear for a formal investigation into the following charge:

...While serving as an Engineer of Train IJALZ-24, it is alleged that you failed to perform your job in a safe and proper manner by failing to conduct a light locomotive running air brake test after changing operating ends and moving light locomotives from the north end to the south end of the Shreveport Terminal yard tracks....

A hearing was held on August 21, 2009. Following that hearing, by letter of August 28, 2009, Claimant was notified that he had been found guilty as charged and was dismissed from Carrier's service as of that date.

The Organization filed a claim on Claimant's behalf on September 14, 2009. In that claim the organization maintained Claimant had been singled out for discipline, while other crew members were not disciplined at all. It also protested that there was no cause to hold Claimant out of service pending his formal investigation. The Organization asserted in addition that Carrier's chief witness did not have first-hand knowledge of the situation, since he was relying only on the downloaded event tapes and not on contemporaneous interviews with the Claimant and his crew. Finally, the

Organization insisted that the quantum of discipline was excessive, given Claimant's prior discipline record.

The Carrier denied the claim on October 5, 2009, and the claim was subsequently progressed in accordance with the Parties Agreement, including conference on the property on February 23, 2010. It is thus properly before the Board for resolution.

The Board has reviewed the record in this case carefully. We do not agree with the Organization that the Carrier had no basis upon which to remove Claimant from service pending the formal investigation. In light of the fact that the violation alleged was a serious safety matter, the Carrier had a reasonable basis for holding Claimant out of service until the charges could be considered and a defense presented. Moreover, we find no indication that Claimant was singled out for discipline. This was a situation in which it was Claimant's clear responsibility to make the air brake test. Other crew members were occupied with other duties, and there is no indication on this record that they were complicit in, or responsible for the Claimant's completion of, or failure to complete, his tasks.

The Board also does not agree that the downloaded event records constitute inadmissible, or at least questionable, hearsay evidence. There is no indication that the event recorder in this case was in any way faulty, either in its calibration or in its ability to properly record what it was supposed to. The documents essentially speak for

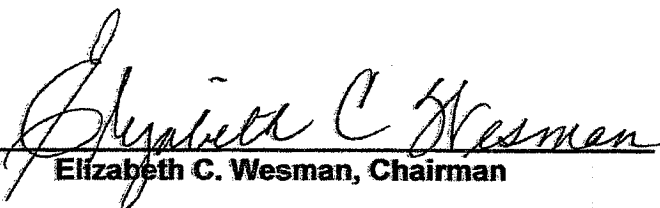
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themselves and the testimony of the Manager of Operating Practices' is material only for the fact that he stated that he downloaded the records at the time and that the records at the hearing were the same ones he downloaded.

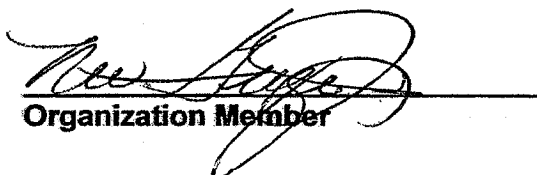
Finally, with respect to the quantum of discipline, we have reviewed Claimant's prior discipline record and, in the final analysis, we find no basis for overturning Carrier's assessment of discipline in this case.

AWARD

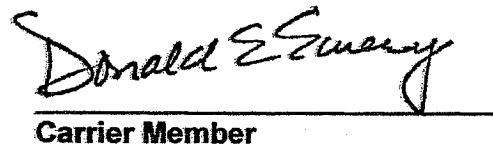
Claim denied.



Elizabeth C. Wesman, Chairman



Organization Member



Carrier Member

Dated JUNE 21, 2010

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

And

SouthRail Corporation (Kansas City Southern Rwy.)

STATEMENT OF CLAIM:

Claim of SouthRail Engineer Oliver Black for reinstatement to service with seniority rights unimpaired, with all notations pertaining to discipline assessed on October 23, 2009 expunged from his personal record and that he be compensated for all time lost from the date he was removed from service until the date he resumes service, plus out of pocket expenses for health & welfare and any other benefits which would be provided to him as a SouthRail Engineer for allegedly violating Kansas City Southern Railway's General Code of Operating Rules 1.47 – Duties of Crew Members and 6.32.2 A – Automatic Warning Devices Malfunctioning – amended by Special Instructions effective July 1, 2009 in connection with allegedly failing to perform his duties in a safe and proper manner by allegedly occupying the main track or a segment of the main track without proper authority or permission at or near MP 189.6, College Street Crossing in Shuqualak, MS at approximately 3:51 p.m. on Thursday, September 24, 2009 while working as Engineer on Train LAR201-24.

OPINION OF BOARD:

The basic facts in this case are not in dispute. Claimant Oliver Black is an Engineer with approximately twenty (20) years' seniority. On September 24, 2009 Claimant was operating as the Engineer on Train LAR201-24. On that date the Train Dispatcher had

issued a Form C instruction to all trains operating on the Artesia Subdivision (which would include Claimant's train) for a possible Stop and Flag requirement at a public road crossing at grade on account of a malfunctioning warning device. At approximately 3:51p.m., Claimant's train went through the crossing without stopping to flag. When interviewed following the incident, both the Conductor and the Claimant acknowledged that they had the Form C instruction and that they had not stopped to flag the crossing.

On September 29, 2009, Claimant was notified to appear for a formal investigation in connection with the incident as follows:

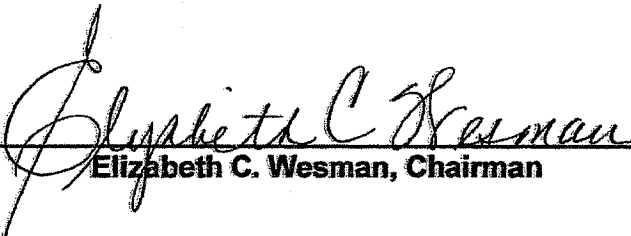
...to ascertain the facts and determine your alleged responsibility, if any, in connection with an incident that occurred on September 24, 2009, at approximately 3:51p.m....it is alleged that you failed to properly perform your duties in a safe and proper manner by failing to comply with the Kansas City Southern Railway's General Code of Operating Rules 6.32.2A – Automatic Warning Devices Malfunction, therefore occupying main track or a segment of main track without proper authority or permission, at or near milepost 189.6....

An investigation was held on October 14, 2009. Following that investigation, by letter dated October 23, 2009, Claimant was notified that he had been found guilty as charged and was dismissed from Carrier's service as of that date. The Organization appealed Claimant's discipline on November 12, 2009. That appeal was denied by the Carrier on December 10, 2009. The claim was subsequently progressed up to and including conference on the property, after which it remained in dispute. It is thus properly before the Board for resolution.

A careful reading of the transcript of the investigation indicates that a primary, first-hand witness was not present at the investigation. The Signal Supervisor, on site at the crossing in question at the time of the incident leading to this case, was not called by the Carrier. Testimony by both the Claimant and his Conductor suggest that the Signal Supervisor had some role – although not entirely clear on this record – in the Claimant's failure to flag the crossing in question. In the absence of the Carrier's key witness against the Claimant, we do not find that the Carrier has shown that Claimant's actions – or inactions – warrant the severe discipline assessed. We note that Claimant was honest when confronted about the incident, and we also note that he has more than twenty years' tenure with the Carrier. Under the circumstances, therefore, the Board finds that the penalty shall be reduced to a 60-day suspension, and that Claimant shall be returned to work with back pay for the time out of work, excepting the 60-day suspension. The Parties shall make a joint examination of Carrier's records to determine the proper amount of back pay owing.

AWARD

Claim sustained to the extent set forth in the foregoing Opinion.


Elizabeth C. Wesman, Chairman


Organization Member


Carrier Member

Dated June 21, 2010

**AWARD NO. 15
NMB CASE NO. 15**

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

And

MidSouth Rail Corporation (Kansas City Southern Rwy.)

STATEMENT OF CLAIM:

Claim of MidSouth Rail Engineer J.R. Francis for the removal of the thirty (30) day suspension consisting of five (5) days active and 25-day record suspension for the alleged violation of Kansas City Southern General Code of Operating Rules 8.2 – Position of Switches and 8.15 – Switches Run Through for allegedly failing to perform his duties in a safe and proper manner which allegedly resulted in a run through switch at Mile Post 0.5, Gulfport, MS causing track damage while working as Engineer on Train RGP302-13 with all notations of discipline expunged from his personal work record and compensation for all time lost, including loss of earnings due to attending the June 1, 2009 investigation. (Carrier File No. M0109-9022)

OPINION OF BOARD:

Claimant J.R. Francis is an Engineer, first employed in Carrier's Train and Engine Service on August 7, 1990. On May 13, 2009, the date of the incident giving rise to this claim, he was working as an Engineer on Train RGP302-13, at Gulfport, Mississippi, with a crew of a Conductor and one Brakeman. The facts leading up to the incident are not in dispute. At approximately 4:30 p.m., the crew was returning to the

yard from the pier through Track No. 3 in order to switch the cars. The Brakeman lined switches on the lead and the Conductor was at the south end of the head preparing to make cuts in the car. Neither man was in a position to see the alignment of the main track switch. Claimant was then given the go-ahead to proceed toward the main track switch. He was about one-half car length from the main track switch when he saw that the target was red – indicating that the switch was lined against him. He put the train into emergency braking, but was unable to stop the train until it had run through the main track switch about half the length of the engine.

On May 21, 2009, the crew were notified to attend a formal investigation as follows:

...to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on May 13, 2009, at approximately 4:30 p.m. It is alleged that while serving as a crewmember of Train RGP302-13, you failed to properly perform your duties in a safe and proper manner when your train ran through a main track switch causing track damage....

A hearing was held on June 1, 2009. Following that hearing, by letter of June 11, 2009, Claimant was notified that he had been found guilty as charged and was assessed a thirty (30) day suspension consisting of a 5-day actual suspension and a 25-day record suspension "which will not be served, but will be recorded in your personnel file as an actual suspension."

The Organization filed a claim on Claimant's behalf on July 8, 2009. In that

claim the Organization protested Carrier's use of a hearing officer who had also been the investigating officer. It argued that the hearing was unfair and that the Carrier's officer was pre-disposed to a guilty verdict. The Organization also insisted that it was unreasonable to place the entire blame for the incident on Claimant's shoulders. Rather, it contended, with the other two crew members assigned specific duties including aligning the switches, it was clear that aligning them was not Claimant's responsibility.

The Carrier denied the claim by letter of August 6, 2009, and that denial was appealed by the Organization on August 25, 2009. The matter was subsequently progressed up to and including conference on the property on February 23, 2010, after which it remained unresolved. It is properly before the Board for adjudication.

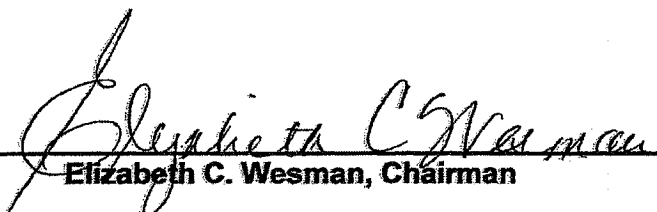
At the outset the Board must consider the Organization's procedural objection to the "many hats" worn by the hearing officer. We have reviewed the transcript of the hearing in this case and do not find that he was particularly biased in his conduct of the hearing; nor did he inhibit the Organization from mounting a full and thorough defense on Claimant's behalf.

With respect to the quantum of discipline, however, we are essentially in agreement with the position of the Organization, that singling out Claimant for discipline, in light of the Carrier's distribution of the crew's duties on the date in question, is not entirely reasonable. We are sympathetic with the Carrier's concern for safety, however,

and it is apparent from the testimony on the record that if Claimant had been more vigilant with respect to what was happening along the track in front of the train, rather than checking the clearance of the cars behind him – as he admitted during the investigation – the incident might have been avoided entirely. In light of that fact, the Board finds that the Claimant's discipline should be reduced to a letter of reprimand, the thirty-day suspension should be removed from his personnel file and he should be reimbursed for the five days' actual suspension served.

AWARD

Claim sustained only to the extent set forth in the foregoing Opinion.


Elizabeth C. Wesman, Chairman


Organization Member


Carrier Member

Dated June 21, 2010

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

and

MidSouth Rail Corporation (Kansas City Southern Rwy.)

STATEMENT OF CLAIM:

Claim of MidSouth Rail Engineer J.R. Francis for the removal of the sixty (60) day suspension consisting of thirty (30) days active and 30-day record suspension for the alleged violation of Kansas City Southern General Code of Operating Rules 15.1 – Track Bulletins amended by Kansas City Southern Railway’s System Special Instructions, effective July 1, 2009, pages 24-25, 15.10 – Retaining Track Bulletins and 15.12 – Relief of Engineer or Conductor During Trip in connection with an incident that occurred on July 23, 2009 at approximately 2:01 P.M. pertaining to allegedly failing to perform his duties in a safe and proper manner when his train departed Mile Post 63.26 without verifying same from the Train Dispatcher if additional track bulletins were needed t at our near Mile Post 63.26, Hattiesburg, MS while serving as Engineer of Train LGP101-23 – with all notations of discipline expunged from his personal work record and compensation for all time lost, including loss of earnings due to attending the September 4, 2009 investigation. (Carrier File No. M0109-9022)

OPINION OF BOARD:

At the time of the incident precipitating the instant claim, Claimant J. R. Francis was assigned as an Engineer on Train LGP101-23. In addition to Claimant, the crew comprised a Conductor and a Brakeman. On July 22, 2009, the train was to be moved

between Gulfport and Hattiesburg, Mississippi. However, on that day, the crew was unable to reach Hattiesburg under the Hours of Service and tied down the train just short of Hattiesburg. After they had tied down the train, the Conductor reported to the Dispatcher that the train had failed to reach Hattiesburg and was tied down at MP 63.26. It is undisputed on the record that the crew did not surrender or void the Train Bulletin they had received at Gulfport when it tied up short of Hattiesburg.

On the following morning, July 23, 2009, the crew returned to the train and operated it into Hattiesburg, apparently without first checking with the Dispatcher regarding whether any new Track Bulletins were needed for operating on the Main Track. After the crew finished up some work in the yard, the Conductor contacted the Dispatcher to void the northbound track authority and obtain authority to operate the train back south to Gulfport. At that point the Carrier became aware that the crew had operated the train into Hattiesburg on July 23rd without obtaining an updated Track Bulletin.

On July 31, 2009, the Claimant and the other two crew members were notified to attend a formal investigation regarding the matter as follows:

...to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on July 23, 2009, at approximately 2:01 p.m. It is alleged that while serving as a crew member of Train LGP101-23, you allegedly (*sic*) failed to perform your duties in a safe and proper manner when your train departed Milepost 63.26 with[out] verifying from the Train Dispatcher if additional Track Bulletins were needed....

An investigation was held on September 4, 2009. Following the investigation, Claimant was notified by letter of September 18, 2009 that he had been found guilty as charged and was dismissed from Carrier's service. By letter of January 6, 2010, however, the Carrier reinstated Claimant and converted the discipline to a 60-day suspension (30-day actual and 30-day record). Claimant was paid for lost earnings for the time beyond the 30-day actual suspension and his reinstatement. The Organization filed a claim regarding the original discipline and that claim was denied. Carrier's denial was appealed and the claim was subsequently progressed according to the Parties' Agreement including conference on the property. Following the Carrier's reinstatement of Claimant, the Organization preserved its claim regarding removal of any discipline regarding the incident of July 23, 2009 from Claimant personnel file. The matter is therefore properly before the Board.

It is the position of the Carrier that the charges were sufficiently proven on the record. They contend that, particularly because they made the correction in Claimant's discipline (following a sustaining award from another Public Law Board in a case involving the Claimant), the resulting discipline was fair and appropriate, given the safety considerations attendant upon the rule requiring that crews have up-to-date Track Bulletins.


The Organization disputes the Carrier's characterization of the events. It points out that on July 22, 2009, the Conductor contacted the Dispatcher and notified him that

they were tying up at Mile Post 63.26 and would finish their run the next day. The Organization notes that the Dispatcher at that time did not mention anything about train LGP101-23 needed a new Track Bulleting when it resumed its progress to Gulfport. Thus, the entire crew was within its rights to rely on the original Track Bulletin in completing its trip on the 23rd.

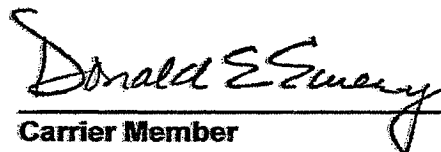
The Board has reviewed the record in this case. It is undisputed on the record that the Conductor notified the Dispatcher on July 22, 2009 that the crew was forced to tie up because of the Hours of Service restrictions. The record is unclear regarding whether the Conductor also contacted the Dispatcher on the 23rd. There is apparently no hard-copy record or recording of his doing so. It was perhaps reasonable for the Claimant to assume that, since the Conductor had attended to the contact with the Dispatcher on the 22nd, he would also do so on the 23rd. We are in agreement with the Carrier that Claimant should have been more vigilant with respect to his authority to proceed on the 23rd. However, we do not find that the assessment of a 30-day actual and 30-day record suspension is reasonable under the circumstances of this case. Accordingly, we find that the penalty shall be reduced to a 5-day actual suspension and a 25-day record suspension (for a total of 30 days) and that Claimant shall be paid for time lost for the 6th to 30th day of his former 30-day actual suspension (25 days' back pay).

AWARD

Claim sustained only to the extent set forth in the Opinion.


Elizabeth C. Wesman, Chairman


Organization Member


Carrier Member

Dated JUNE 21, 2010

**AWARD NO. 17
NMB CASE NO. 17**

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

And

MidSouth Rail Corporation (Kansas City Southern Rwy.)

STATEMENT OF CLAIM:

Claim of MidSouth Rail Engineer Joel Sugg for the removal of the thirty (30) day suspension consisting of five (5) days active and 25-day record suspension for the alleged violation of Kansas City Southern General Code of Operating Rules 2.21 – Required Radio Communication (Shoving, Backing or Pushing Movements) in connection with an incident that occurred on June 23, 2009 at approximately 9:58 a.m. when he allegedly failed to perform his duties in a safe and proper manner by failing to repeat or acknowledge distance of more than four car lengths while shoving cars at or near Mile Post 91.5, Jackson, MS while working as Engineer on Train RJA121-23 with all notations of discipline expunged from his personal work record and compensation for all time lost, including loss of earnings due to attending the July 14, 2009 investigation. (Carrier File No. M0109-9066)

OPINION OF BOARD:

Claimant J. Sugg is an Engineer on the former MidSouth Railway portion of the

Kansas City Southern Railway Company. At the time of the incident leading to his discipline, June 23, 2009, he was assigned as the Engineer on Train R-JA121-23 at the Carrier's Jackson, Mississippi Terminal. By letter of July 3, 2009, Claimant was notified to report for a formal investigation. That notice read in pertinent part as follows:

A formal investigation will be held to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on June 23, 2009, at approximately 9:58 a.m. While serving as Engineer of Train RJA121-23 it is alleged that you failed to properly perform your duties in a safe and proper manner by failing to repeat or acknowledge distance of more than four car lengths while shoving cars. This incident occurred at or near Milepost 91.5, Jackson, MS.

An investigation was held on Tuesday, July 14, 2009. Following the investigation, Claimant was notified by letter of July 24, 2009 that he had been found guilty as charged and was assessed a thirty (30) day suspension, with 5 days being an actual suspension and 25 days a record suspension.

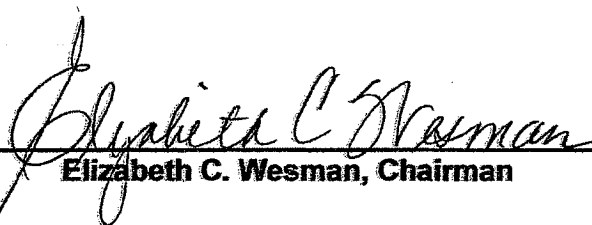
The Organization filed a claim appealing Claimant's discipline on August 28, 2009. The claim was denied on October 5, 2009. That denial was appealed and the claim was subsequently progressed in the usual manner, up to and including conference on the property. Thus, it is properly before the Board for adjudication.

The Board has reviewed the somewhat confusing transcript in this case. Testimony regarding what kind of maneuver was involved and whether or not Claimant followed proper procedure is conflicting. As is true in all such discipline cases, the Carrier bears the burden of persuasion. We do not find that, in this case, the Carrier


met that burden of persuasion. Accordingly, the instant claim is sustained for failure of proof.

AWARD

Claim sustained.


Elizabeth C. Wesman, Chairman


Organization Member


Carrier Member

Dated JUNE 21, 2010

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

And

MidSouth Rail Corporation (Kansas City Southern Rwy.)

STATEMENT OF CLAIM:

Claim of MidSouth Rail Engineer Joel L. Sugg for the removal of the sixty (60) day suspension consisting of thirty (30) days active and 30-day record suspension for the alleged violation of Kansas City Southern Railway's Air Brake Systems and Train Handling Rules and Instructions 104.14 – Securing Equipment in connection with an incident that occurred on June 3, 2009 at approximately 12:54 p.m. for allegedly failing to perform his duties in a safe and proper manner by allegedly failing to perform a test for securement of his locomotives at or near Mile Post 91.2, Jackson, MS while serving as Engineer of Train R-JA121-03 with all notations of discipline expunged from his personal work record and compensation for all time lost, including loss of earnings due to attending the June 19, 2009 investigation. (Carrier File No. M0109-9046)

OPINION OF BOARD:

At the time of the incident at issue in this claim – June 3, 2009 – Claimant J. L. Sugg was assigned as the Engineer on Train R-JA12-03. He parked his locomotives at the end of his tour of duty at approximately 12:54 p.m. On June 4, 2009 MOP Jon St. Vigne downloaded tapes from two locomotives and apparently noticed that Locomotive 2951 did not have a test for securement on June 3, 2009. In a letter dated June 12,

2009, Claimant was directed to appear for a formal investigation as follows:

A formal investigation will be held to ascertain the facts and determine your responsibility, if any, in connection with an incident that occurred on June 3, 2009, at approximately 12:54 p.m. While serving as an Engineer of Train R-JA121-03, it is alleged that you failed to properly perform your duties in a safe and proper manner by failing to perform a test for securement on your locomotive.

The hearing was held on June 19, 2009. Following the hearing, by letter of July 3, 2009, Claimant was notified by the Carrier that he had been found guilty as charged and was assessed a penalty of thirty (30) days actual time off and a thirty (30) day record suspension, "which will not be served, but recorded in your personnel file as an actual suspension."

The Organization filed a claim on Claimant's behalf on July 30, 2009. That claim was denied on September 9, 2009. The denial was appealed and the claim was subsequently progressed up to and including conference on the property on February 23, 2010.

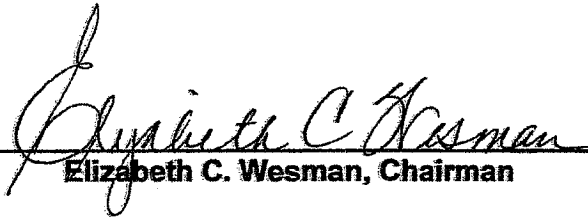
It is the position of the Carrier that there is no disputing the downloaded records from the locomotive in question. Thus, it insists, the evidence clearly supports the Carrier's position that Claimant did not perform the test for securement as required. In light of that fact, the Carrier maintains that that discipline assessed was reasonable and in keeping with the severity of the Claimant's apparent failure to properly perform his duties.

The Organization insists that, in light of the fact that Claimant is not a “rookie” – rather, he has nearly 20 years in Carrier’s service – his testimony that he routinely performs the test for securement throws doubt upon the accuracy of the tapes downloaded by Mr. St. Vigne. Thus, the Organization argues, there is sufficient question regarding the evidence put forth by the Carrier at the investigation to invalidate the charges against Claimant and compel the Board to sustain this claim in its entirety.

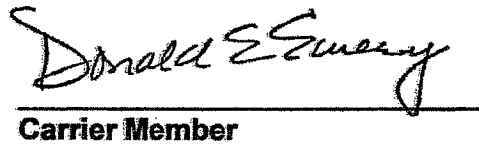
The Board has reviewed the transcript and the documentary evidence in this case. We do not agree with the Organization’s proposal that the Claimant’s service *per se* casts doubt upon the accuracy of the downloaded tapes. Other than Claimant’s statement that he is sure he performed the test at issue, there is no showing that the download was somehow faulty. In light of his long service however, and Claimant’s relatively good discipline history, we do find that the penalty assessed by the Carrier was disproportionate to Claimant’s offense. Accordingly we find that the penalty assessed shall be reduced to a letter of reprimand, and Claimant shall be reimbursed for time lost during his 30-day actual suspension.

AWARD

Claim sustained only to the extent set forth in the above Opinion.


Elizabeth C. Wesman, Chairman


Organization Member


Carrier Member

Dated JUNE 21, 2010

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

and

MidSouth Rail Corporation (Kansas City Southern)

STATEMENT OF CLAIM:

Claim of MidSouth Rail Engineer Mathew Allbritton for the removal of a 30 day suspension, 5 actual and 25 record, plus the payment of 5 days plus 1 day attending the investigation assessed on June 25, 2009 in connection with an alleged violation of KCS GCOR 6.31, 1.47(c) and KCS System GO No. 1, item 15 – KCS Special Instructions, Section L.

OPINION OF BOARD:

On June 25, 2009, Claimant M. Allbritton was assigned as an Engineer on Train OLZJA-19. On that same morning, a team of supervisors conducted a "failed detector" test using the Defect Detector at MP 130 – which was along Claimant's route. Claimant and his conductor operated through the detector at 1:26 a.m. The event recorder showed that Claimant operated his train through the detector between MP 130 and 112.9, the site of the next detector. Both Claimant and the Conductor were removed from service that day pending an investigation, and by letter of July 1, 2009 they were notified to appear for a formal investigation into the following alleged violation:

...While serving as a crew member of Train ILZJA-19, it is alleged that you failed to properly perform your duties in a safe and proper manner by failing to respond to a trackside detector failure and continued to operate train at speed of 50 MPH when maximum allowable speed was 30 MPH. This incident occurred at or near Milepost 115 [*sic*].¹

A hearing was held on July 13, 2009. Following that investigation, the Claimant was notified, by letter dated July 25, 2009, that he had been found guilty as charged and was assessed the penalty of a thirty (30) day suspension with five (5) days to be served as actual time off and a twenty-five (25) day record suspension "which will not be served, but will be recorded in your personnel file as an actual suspension.

The Organization appealed the discipline by letter of August 6, 2009. At the outset, it protested the fact that the letters sent to Claimant were misrepresented at the hearing. Specifically, it noted that there was actually no letter in evidence postponing Claimant's disciplinary hearing. In that case, the Organization maintained, the disciplinary hearing was not properly postponed and was therefore not properly held under the Parties' agreement. The Organization points out that the incident at issue occurred on June 25, 2009, and the formal investigation was not held until July 13th, or nineteen days after the incident.

With respect to the merits of the case, the Organization protested that it was possible the tapes and the supervisors were incorrect. It noted that Claimant emphatically stated, when stopped on the day in question and at the hearing, that he

¹ The Parties agreed at the hearing that the actual location for the detector was at issue was MP 130,

had heard the detector, even though his Conductor did not. He insisted that he had heard it and it gave him the axel count – which he then relayed to his Conductor when asked. The Organization suggested that there is the possibility that the supervisors did not disconnect (unplug) the detector as they thought, and that Claimant actually heard the detector.

The Carrier denied the claim on October 2, 2009. In that denial it maintained that the transcript of the investigation clearly showed that Claimant was guilty as charged, and under the circumstances the discipline assessed was neither unreasonable nor arbitrary. It contends that it was clear from the downloaded event tapes that the train did not slow as per KCS System Special Instructions, Section L— Trackside Warning Detectors, Part 3 – Detector Failure. The claim was subsequently progressed including conference on the property. Accordingly it is properly before the Board for resolution.

The Board has reviewed the transcript and documentary evidence in this matter. With respect to the Organization's procedural objection, we agree with the Organization that there was considerable confusion regarding the alleged postponement. However, there is sufficient confusion to suggest that there was no nefarious intent on the part of the Carrier to interpret the Organization's request for a delay of one hearing (under 49 CFR 240.225) as acceding to postponement of the

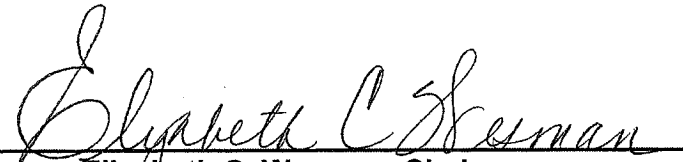
despite the misprint in the notice of investigation.

formal investigation held by Carrier's hearing officer. Thus, we do not find that this confusion constitutes a fatal procedural flaw in this case.

We also note that the Carrier's witnesses testified consistently that the detector in question, at Milepost 130, had been disabled by being unplugged and that there was no way that Claimant could have actually heard a broadcast from the detector. While it is possible he thought he heard the detector, we agree with the Carrier that if he had the slightest doubt about the transmission, he should have called #88 for confirmation and, failing that, slowed the train. Claimant did neither. Under the circumstances we find no basis for overturning Carrier's assessment of discipline in this case.

AWARD

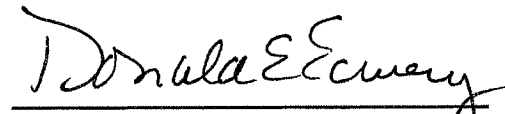
Claim denied.



Elizabeth C. Wesman, Chairman



Organization Member



Carrier Member

Dated 7/27/10

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

And

MidSouth Rail Corporation (Kansas City Southern)

STATEMENT OF CLAIM:

Claim of MidSouth Rail Engineer Jason Johnston for the removal of a Letter of Reprimand plus the payment of one day attending the investigation, which was assessed on July 3, 2009 in connection with an alleged violation of KCS GCOR 7.1

OPINION OF BOARD:

At the time of the incident at issue, May 31, 2009, Claimant was working as a Conductor on Train R-JA221-21 switching cars in Jackson Terminal. At about 6:50 p.m., a Car Inspector noticed that car ADMX 62054 on Track 4 had severe damage. He surmised that the damage had been caused by the car striking a cut of cars already on Track 4 at a higher than prescribed rate of speed during Claimant's switching operation. On June 10, 2009 Claimant was sent a notice to appear for an investigation into the following charges:

...on May 31, 2009...you failed to properly perform your duties in a safe and proper manner when conductor, Mr. McCarter operated the locomotive and engineer, Mr. Johnston (Claimant) worked on the ground as a conductor. This incident occurred at or near Milepost 91.2, Jackson Yard.

A hearing was held on June 19, 2009. Following that hearing, by letter of July 3, 2009, Claimant was notified that he had been found guilty of the charges and was assessed a Reprimand.

The Organization appealed the discipline on July 29, 2009 and that appeal was denied on September 10, 2009. The matter was subsequently progressed in accordance with the Parties' agreement and is properly before the Board.

The Carrier contends that the amount of damage done to the car (about \$56,000 according to Carrier) speaks for itself. It argues that such extensive damage could not have occurred but for the fact that Claimant did not switch cars safely. The Carrier further maintains that the record established that Claimant allowed three loaded cars to be kicked into Track 4 where they struck five cars already on the track and secured. It also asserts that the testimony and evidence on the record sufficiently support the charges levied against Claimant and that the discipline should stand.

At the outset the Organization has raised a timeliness objection regarding the timing of the notice of hearing and the holding of the investigation. In short, there is a dispute between the Parties regarding the distinction, if any, between the word "from" (as in "from the date of the occurrence") and the word "after" (as in "after the date of notification"). The Board feels that there is not a serious procedural issue presented with respect to these terms and the dispute over "definitions" in this case is better left to the Parties' in negotiation.

With respect to the merits of the case, the Organization protests that the Carrier's chief witness did not witness the incident "first hand" and therefore cannot be sure what caused the damage at issue. It argues that Claimant did not "kick" the cars but simply released the brakes and allowed slack to let the cars roll. Further, it points out that he had to bump the cars somewhat to get them to roll; and insists that, therefore, he actually had no control over the speed. The Organization thus maintains that Claimant was not at fault and that the charges remain unproven.

The Board has reviewed the transcript of the hearing and the documentary evidence on the record. We do not agree with the Organization that the Carrier's witness's testimony is of no value because he did not actually witness the accident first hand. Given the circumstances surrounding the incident, it was more than reasonable that when he came upon the damage the Manager of Mechanical Maintenance (with more than 37 years of service) could draw an accurate conclusion regarding what caused the damage to the end of the car in question. The alternative theories proposed by the Organization (See, for example, Tr. p. 26) cannot stand against the experience of the Carrier witness (Tr. p. 27).

In light of the foregoing we find no basis upon which to overturn Carrier's assessment of discipline. Accordingly the instant claim is denied in its entirety.

AWARD

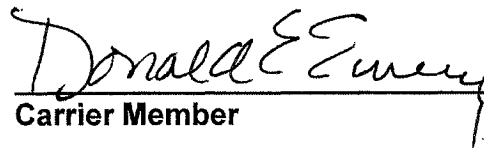
Claim denied.



Elizabeth C. Wesman, Chairman



Organization Member



Carrier Member

Dated 9/27/10