

AWARD NO. 52  
Case No. 52

Organization File No.  
Carrier File No.

**PUBLIC LAW BOARD NO. 7154**

PARTIES     ) BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN  
              )  
TO            )  
              )  
DISPUTE     ) CANADIAN NATIONAL (ILLINOIS CENTRAL RAILROAD)

STATEMENT OF CLAIM:

Claim of CN/IC Engineer D. Jobe for removal of a dismissal, reduced to a sixteen (16) day suspension and plus one (1) day attending the investigation held on January 28, 2010 to determine his responsibility, if any, in connection with: Your alleged non-compliance with Bulletin Notice No. 12, Iowa Zone, dated January 4, 2010, by failing to operate through snow and ice filled flange-way, resulting in the derailment of the locomotive.

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated October 15, 2007, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

While working as engineer on Job L59291-06 on January 6, 2010, Claimant's locomotive derailed at an industrial crossing. According to the Carrier, the derailment was caused by the locomotive traveling through a curve where the flangeway was filled with snow and ice. Apparently, the wheel was lifted over the rail. Claimant was consequently directed to attend a formal investigation at which he was charged as follows:

Your alleged non-compliance with Bulletin Notice No. 12, Iowa Zone, dated January 4, 2010, by failing to operate through snow and ice filled flange-way, resulting in the derailment of the locomotive, while you were a crewmember on job L59291-06 on January 6, 2010, at approximately 14:45 hours, in the vicinity of the Union Pacific's west leg of WYE, Cater [*sic*] Lake, Iowa.

Following the investigation, which was held on January 28, 2010, Claimant was dismissed from service by letter dated February 12, 2010. (The Organization argues the decision was not timely, but the Agreement requires notification "within fifteen days after the investigation." Inasmuch as the discipline was rendered on the fifteenth day after the investigation, the Board does not find the Organization's argument to have merit.) On February 27, 2010, however, Claimant was advised that he was reinstated to service. This action was taken unilaterally by the Carrier and does not affect the Organization's claim for time lost.

The Carrier's charge against Claimant relies upon the following instruction contained in Iowa Zone Bulletin Notice No. 12, issued on January 4, 2010:

When riding equipment, employees MUST ALWAYS be particularly vigilant where flange-ways may be filled with snow, ice, or other material, or where trackage is covered with excessive amounts of snow or ice. If either condition is noted, locomotive must first carefully operate through the flangeway, and if in doubt, detrain and walk ahead clear of the equipment to determine if the locomotive(s) or car(s) can move through the area without derailling until beyond the condition.

The Carrier's case hinges upon the testimony of the Senior Supervisor - Mechanical, who arrived at the scene of the derailment at 1:00 am, more than nine hours after the incident. During that time, it is evident that the snow had continued to accumulate. Thus, he was unable to determine the track condition at the time of the derailment. His review of the event recorder tape from the locomotive showed that the engine was being operated at approximately five miles per hour. With respect to this evidence, he stated, "Basically indicates that they went through the crossing very

slowly, you know, five miles an hour which is quite slow.” We understand this comment to mean he took no exception to the speed of the train. He took exception, though, to the fact that nobody got off the engine to walk ahead of it as it passed over the crossing. Acknowledging that getting off the engine is a judgment call, he then testified as follows:

- Q. So we’re supposed to get down on the ground any time there’s snow present?
- A. When in doubt.
- Q. So if they weren’t in doubt, then there was no need to get down on the ground?
- A. Unfortunately, again, when it comes to judgment, if you weren’t in doubt and you derailed, you should have been in doubt.

This is tautological reasoning that simply cannot be accepted by this Board. The question should be whether the circumstances present at the time caused the crew to doubt whether passage over the track was safe. It is not the outcome that determines whether doubt should have existed. They testified they believed it was safe. One factor in making this determination was their belief that a Union Pacific train had traversed this crossing earlier. Additionally, they had not encountered a problem with any of the other crossings they went over.


The Carrier has the burden of proof, and the rule applied in this case does not contain clear criteria that would dictate when someone has to get off the engine to inspect the track. In this case, the Carrier has not met its burden of showing that circumstances dictated that someone get off the engine. The charge, therefore, has not been proven and the discipline must be rescinded.

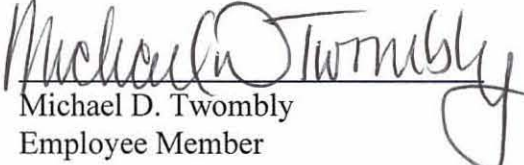
While, in light of the above conclusion, it does not affect our decision, the Board feels compelled to comment upon the wording of the charge against Claimant. It implies that Claimant was disciplined for not running his locomotive through the flangeway, when, in fact, the substance




of the charge was that he did so, but did it improperly. This point was not raised in the investigation, and it appeared that all parties understood the purpose of the investigation, but the issue was raised during the appeal of the discipline.

AWARD: Claim sustained. Carrier is directed to comply with this Award within 45 days.

  
Barry E. Simon  
Chairman and Neutral Member

  
Michael D. Twombly  
Employee Member

  
Timothy E. Rice  
Carrier Member

Dated: JANUARY 18, 2011  
Arlington Heights, Illinois