

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

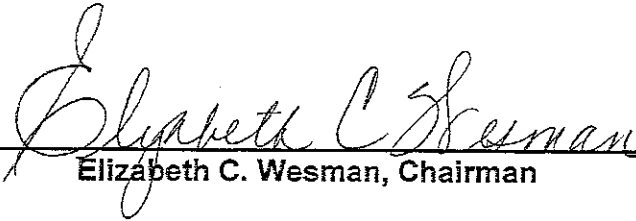
despite the misprint in the notice of investigation.

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

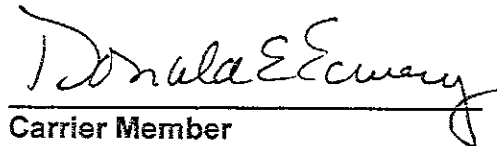
We also note that the Carrier's witnesses testified consistently that the detector in question, at Milepost 130, had been disabled by being unplugged and that there was no way that Claimant could have actually heard a broadcast from the detector. While it is possible he thought he heard the detector, 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