AWARD NO. 1
NMB CASE NO. 1

PUBLIC LAW BOARD NO. 7239

PARTIES TO THE DISPUTE:

Brotherhood of Locomotive Engineers and Trainmen

And

Kansas City Southern Railway Company

STATEMENT OF CLAIM:

Claim of the employees:

Appealing the dismissal of MidSouth Rail Engineer Curtis E. Stubblefield. Request reinstatement with seniority unimpaired; all notations in connection with this discipline be removed from his personal work record and pay for all time lost from April 9, 2008, including costs for health and welfare and restoration of all vacation entitlements, plus loss of earnings due to attending the investigation.

OPINION OF BOARD:

At the time of his dismissal, Claimant Curtis E. Stubblefield was assigned as an engineer on Train MJAAR-21. Following a briefing with his crew and the crew of LCAR-20 in East Brandon, Mississippi, the two crews prepared to maneuver to switch out and swap engines. The crew of LCAR-20 moved their cars over the dual control switch first. Then Engineer Stubblefield moved his engine through the dual control and damaged it.

By letter of February 27, 2008, Claimant was notified to appear for a hearing as follows:

> "...to determine your responsibility, if any, in connection with an incident that occurred on February 22, 2008, at approximately 1:00 a.m. While serving as a crewmember of Train MJAAR-21, it is alleged that you failed to properly perform your duties by allowing your Train to run through a dual control switch at East Brandon, MS, resulting in track damage...."

After two postponements, the hearing was held on April 1, 2008. Among the witnesses were the crew members of LCAR-20. By letter of April 9, 2008, Claimant was notified of his dismissal from Carrier's service.

The Organization appealed Claimant's dismissal by letter of May 9, 2008. In that letter, the Organization protested that the crew of LCAR-20, who were called by the Carrier to testify against the Claimant, received the same briefing prior to the incident at issue. It pointed out that the LCAR-20 crew made moves at the dual switch just prior to the time MJAAR-21 arrived, and it questioned Carrier's decision to absolve them of all responsibility. The Organization suggested that the Carrier did not meet its obligation to conduct a fair hearing to "develop the facts", but instead called employees who were involved, possibly culpable, and likely had an "ulterior motive" to place blame on the Claimant. Moreover, the Organization noted, since all crew members received the same briefing, it was logical for Claimant to assume that once he had received word to "proceed," the LCAR-20 crew, which moved first, would have already properly re-aligned the switch for him to go through it.

The Organization also quoted the statements of MJAAR-21 Conductor Guy Burns and Engineer Stubblefield. It points out that both statements confirm that they heard someone say "come ahead" – and that Claimant thought it was the Dispatcher. Therefore they had no idea that the switch had not been properly aligned before they ran over it. In addition the Organization noted that there is conflicting testimony on the hearing transcript regarding who was where among the LCAR-20 crew members, when Claimant apparently got the "come ahead" instruction. Finally, the Organization protests that the Carrier assessed the MJAAR-21 Conductor only a 30 day suspension (5 days actual, 25 deferred), while it dismissed Claimant.

The Carrier denied the Organization's appeal on June 1, 2008. In that denial the Carrier disputed the Organization's allegations that the hearing was unfair in light of the Carrier's choice of witnesses. It contended that in this case there was no reason to bring charges against the crew of LCAR-20. The Carrier maintained that since Claimant was at the controls of the engine, he alone was responsible for the rules violation of which he was found guilty. In addition, the Carrier asserted that Claimant had moved his engine in response to a radio communication (come ahead) that was not directed to him, and no other employee testified to instructing Claimant to move his engine. Finally, the Carrier noted that Claimant had a poor discipline history over his short (6-year) career with Carrier, and insisted that the penalty of dismissal was warranted.

The claim was subsequently progressed as provided in the Parties Agreement, after which time it remained in dispute. Thus, it is properly before the Board for resolution.

The Board has reviewed the entire record in this case, including the rather lengthy and convoluted transcript. It is undisputed on the record that all crew members on both trains received the same briefing and had a similar understanding of how the engine swap was to occur. Apparently the crew of LCAR-20 moved the dual switch and moved their cars without incident in preparation for MJAAR-21 to complete the swap. There is conflicting testimony concerning which crew member – and from which train – was near enough to the dual switch to switch it back into the proper alignment for Claimant's engine to cross. At any rate, it is clear the switch was not properly aligned and that Claimant's engine damaged the misaligned switch.

Claimant's contention that he heard "someone" say come ahead, is confirmed by other witnesses. However, none of the witnesses testified to giving the order, nor are they in agreement where the order apparently came from. Among this morass of conflicting narratives and witnesses whose motives the Organization has understandably questioned, the Carrier has shown only that Claimant proceeded across the switch without ascertaining that the instructions given (come ahead) were actually meant for him and that he failed to confirm that the switch was aligned properly before he moved his engine.

Under the circumstances the Board does not find that Claimant's actions amid the apparent confusion at the scene constitute negligence of a magnitude that would warrant dismissal, even in view of his less than stellar discipline record to date. In light of his prior record, it is reasonable to suggest that Claimant should have been more cautious before proceeding over the switch in question if he had any doubts about who was giving him the order to move his engine. However, we do not find that his attitude bespoke of carelessness or disregard for proper procedures or safety. Accordingly, we find that his discipline should be reduced to a 2 month actual suspension without pay, and he should be reinstated with back pay less the 2 month suspension and less any interim outside earnings.

AWARD

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

Elizabeth C. Wesman

Elizabeth C. Wesman, Chairman

Organization Member
(I DISSENT IN PART)

J. G. Adams

Carrier Member

Dated January 16, 2009

Labor Members' Concurring and Dissenting Opinion
To PLB No. 7239
Award 1

After the Board correctly reached the conclusion that the Carrier did not show cause to assess a dismissal, but instead reduced the discipline to a sixty-day (60) day suspension, and ordered the Claimant reinstated, the Board incorrectly concluded, we strongly believe, that the Carrier should be permitted to offset the Claimant's awarded backpay by his outside earnings during the period for which the Carrier had liability. We will attempt in as few words as possible to explain why the offset is palpably erroneous.

The problem is the Board's application of the common law make whole concept in fashioning a remedy where the applicable agreement language is explicitly not an ordinary make whole provision. The parties' discipline agreement was, by this industry's standards, of very recent (2000) vintage. In the negotiations that produced it, the Carrier could have sought to bargain for the right to offset earnings from awarded backpay, but did not. Rule 34, Section H, Paragraphs 4 and 5 specifically outline how employees are to be paid any awarded backpayments, which is either "reinstated with pay for all time lost" or in this case "time lost by an employee when held out of service shall be deducted from the assessed period of suspension." This leads to two related conclusions; first, that the offset issue was a matter of equity between these parties, and two, in granting the Carrier the right to offset, the Board has altered the parties' agreement by creating a provision, that did not exist.

To paraphrase the U. S. Supreme Court in United Steelworkers of America v. Enterprise Wheel and Car Corp. (363 US 593), an arbitration award is legitimate only so long as it draws its essence from the collective bargaining agreement. The remedy in this Award does not conform to the express language of the agreement. The Board seems to have substituted its own sense of industrial justice in applying a facet of common law of damages doctrine the parties' negotiations had specifically excluded from their agreement. An arbitration Board exceeds its power to fashion remedies where that remedy does not draw its essence from the collective bargaining agreement. This is what we believe happened here.

Merle W. Geiger, Jr., Organization Member

AWARDS NOS. 1 & 2
NMB CASES NOS. 1 & 2

PUBLIC LAW BOARD NO. 7239

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INTERPRETATION

Following issuance of the Board's awards in Cases No. 1 and No. 2, the Parties requested an Executive Session to request a clarification of the Awards. Specifically, the Parties were in dispute regarding implementation of the findings regarding award of back pay in both cases.

In awarding back pay, the Board stated the remedy as follows:

> **In Case No. 1**: Accordingly, we find that [Claimant's] discipline should be reduced to a 2 month actual suspension without pay, and he should be reinstated with back pay less the 2 month suspension and less any interim outside earnings.
>
> **In Case No. 2**: Accordingly, we find that Claimant 's discipline should be reduced to a two month's actual suspension, and that he should be returned to work with back pay, less the two month's suspension, and less any outside interim earnings.

The Parties have requested that the Board clarify the method by which each Claimant's "lost earnings" should be calculated.

In each case the Board has found that the remedy should be a "make whole" remedy – less the time period of the discipline. That is, each Claimant should be reimbursed in a manner which left him financially no worse, nor any better, off than he would have been if he had been assessed only the two month's suspension.

Because of the erratic scheduling and complex FRA regulations applying to engineers and conductors, determining a "make whole" remedy is not a simple task. It is certainly not one that should be performed by a "guestimate" on the part of the Board.

FINDINGS:

After much forthright discussion and helpful explanations on the part of both Parties, the Board finds as follows:

The Parties shall convene at a mutually acceptable time and place and examine relevant employee records to determine, as nearly as possible, what hours (including overtime, if any) Claimants would have worked less their two month suspension. Those hours should be multiplied by the applicable wage rates for each Claimant. Next, in order to avoid a windfall gain, each Claimant's actual outside earnings shall be deducted from the back pay calculation. By actual outside earnings is meant that income that each Claimant gained during his time not in service to the Carrier, but does not include such monies as he would have to reimburse (for example as with some Railroad and other unemployment benefits) once he returned to work.

In order to expedite this process, the Parties shall make every effort to convene within the next 60 days – that is, within 60 days of the Parties' receipt of this Interpretation. In the event, there is need for further discussion on this matter it, too, should take place within 60 days of the Parties' receipt of this Interpretation.

Elizabeth C. Wesman, Chairman

Organization Member

Carrier Member

Dated September 11, 2009