AWARD NO. 20
NMB CASE NO. 20

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 NO. 20
NMB CASE NO. 20

AWARD

Claim denied.

Elizabeth C. Wesman, Chairman

Organization Member

Carrier Member

Dated 9/27/10