

PUBLIC LAW BOARD NO. 7293

PARTIES) SMART - TRANSPORTATION DIVISION
TO)
DISPUTE) BNSF RAILWAY COMPANY

STATEMENT OF CLAIM:

Appeal on behalf of Memphis, Tennessee Yardman Christopher B. Hosse for removal of a Level S 30 Day Record Suspension and 3 Year Review Period from his personal record and pay for all time lost as the result of an investigation held on November 30, 2010. (Organization File D-1942; Carrier File 55-11-0037)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The discipline here on appeal arises from a Carrier determination that testimony and exhibits as brought forth at a formal hearing at which Claimant Hosse was present and duly represented shows that while working as a crew member on Job YAL161 in Yale Yard of the Memphis, TN Terminal, the Claimant was observed by Carrier supervisory officials to have gone between equipment without first obtaining proper protection in violation of TSR 13.1.1 at approximately 1145 hours on October 5, 2010.

TSR 13.1.1, Going Between Cars or Locomotives, reads as follows in part pertinent as concerns the instant dispute:

Going between or working on the end of rail equipment means an employee has placed all or part of their body where it could be struck by rail equipment if the equipment were to move.

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If a locomotive is not coupled to the rail equipment:

- A crew member must notify all members of the crew by radio that the crew member will be going between or working on the end of rail equipment on any track.

- **Members of the notified crew must acknowledge by radio that they understand a crew member will be going between or working on the end of rail equipment.**

At the company hearing it was testimony of Manager of Rules Boatman that on the date at issue, October 5, 2010, both he and Trainmaster Grindle were performing operations testing in the Yale Yard and, as concerns their observation of Claimant and crew, said the following with a stated reference to a Helper being the Claimant:

We were positioned opposite the main track from this yard crew and when they had shoved down the auto racks they were attached to and we listened to them perform an air test on those cars. We were approximately right across from where the engine was attached to the cars. We heard the Helper get instructions from the Foreman to cut away from the train and close the angle cock on his end of the cars being next to the engine. The Helper acknowledged this. He instructed the Engineer after pulling the uncoupling lever to back up away from the train. He stopped him 50 feet to 60 feet away; he was greater than 50 feet. And then at that time he requested work by radio equipment not coupled to his locomotive. He got a response as required from his Engineer and he stepped between the engine and the cars and closed the angle cock without getting a response from the Foreman by radio, at which time we went ahead and contacted them on the radio, had them stop their work, and work our way back around to their side of the train or their side of the track so that we could talk to them.

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We did have them come down once we got around to their side we did have them come down off the engine, we did interview the crew. The employee stated that he was protected by the Engineer. He also told us that he didn't believe or didn't remember having the eight deadly required briefing, and he thought he was protected, at which time we did explain to him that he needed to have the radio communication from his crew so that he had positive protection from all crew members.

Testimony of Trainmaster Grindle was similar to that of Manager of Rules Boatman as concerned his observations of the Claimant and crew.

In defense of the Claimant the Organization contends that neither the Claimant nor his fellow crew members, Engineer Elsken and Foreman Blackwell, understood

what TSR 13.1.1 actually requires, especially as concerns a radio acknowledgement when a crew member goes between uncoupled engines and cars.

The Board has given careful study to testimony of the Claimant, Engineer Elsken and Foreman Blackwell. In doing so, the Board finds that it may properly be concluded that each of them was aware of TSR 13.1.1 requirements, including radio acknowledgements involving a crew member going between uncoupled engines and cars, as in the dispute at issue.

In this respect, it is noteworthy that Trainmaster Grindle presented into evidence at the hearing documentation supporting the fact that the Claimant had attended an April 12, 2010 training session and briefing on the subject of what is commonly known by the Carrier and its employees as the Eight Deadly Decisions to be avoided in terms of a protection of life, one of the Eight listed as demanding that the employees must not: "Go between coupled cars or locomotives, or working on the end of cars or locomotives without proper protection." Engineer Elsken and Foreman Blackwell were shown to have attended a like training session involving the Eight Deadly Decisions on April 13, 2010. In other words, all three crew members had been instructed on the importance of full compliance with rules such as TSR 13.1.1 just five months before the incident the subject of this dispute.

That Engineer Elsken knew TSR 13.1.1 requires a radio acknowledgement to a crew member who has announced over the radio they are going between equipment is evidenced by Engineer Elsken having done so in this case, having admittedly radio responded to the Claimant's radio transmission. Engineer Elsken also gave a radio acknowledgement to Foreman Blackwell after the latter had said that he too was going between equipment.

As concerns Foreman Blackwell, the Board finds no merit in assertions that when he told the Claimant he wanted him to cut away from the train and close the angle cock on the cars next to the engine that this was tantamount to Foreman Blackwell having knowledge that the Claimant was going between cars not coupled to the engine and therefore no need for a radio acknowledgement to the Claimant from Foreman Blackwell.

In this latter respect, the Board concurs with the response that Manager of Rules Boatman gave to this Organization argument at the hearing, namely, Foreman Blackwell did not know *when* the Claimant was going to go between the engine and the cars. Moreover, the referenced instructions that Foreman Blackwell gave to the Claimant issued before the uncoupling of the cars from the engine had taken place. It thus seems to the Board that in making the subsequent radio announcement about his going between the uncoupled engine and the cars, and receiving a radio acknowledgment from Engineer Elsken, that the Claimant knew or should have

known that radio acknowledgements were required from all crew members before going between the uncoupled engine and cars.

Further, as the Carrier submits in argument to the Board, assertions that a rule was violated because none of the crew members understood the rule is clearly self-serving; the number of awards that have held the *ignorance of the rule defense* is legion.

As concerns the several procedural arguments advanced by the Organization, the Board finds them to be without agreement support of record or not of a sufficient substance to conclude that the Claimant had been denied benefit of a fair and impartial hearing.

In the light of the above considerations and overall study of the record the Board finds the Carrier to have shown just cause for its assessment of the discipline at issue. Accordingly, the claim to modify or set discipline as assessed aside will be denied.

AWARD:

Claim denied.



Robert E. Peterson
Chair & Neutral Member



Andrea N, Smith
Carrier Member



J. Michael LaPresta
Organization Member

Fort Worth, TX

Dated: 9/26/17