

PUBLIC LAW BOARD 6166

Case No. 5  
Award No. 5  
Carrier's File No. 1163160  
Organization's File No. F-25062  
NMB Code 106  
Claimant Engineer D. C. Fretty

PARTIES TO THE DISPUTE:

UNITED TRANSPORTATION UNION  
ENGINE SERVICE

AND

UNION PACIFIC RAILROAD COMPANY

Statement of Claim:

The Organization presents on appeal the claim of Los Angeles Engineer D. C. Fretty that he be reinstated to service, with seniority unimpaired, and that he be compensated for all earnings and credits lost and that all records pertaining to this incident be expunged from his personal record.

Findings:

Upon the entire record and all the evidence, this Board finds the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction of the parties and over the dispute involved herein.

The Claimant was first employed by the Southern Pacific Railroad in April, 1979. He was promoted to engine service in 1995. On the day of the incident which precipitated this claim, November 1, 1998, the Claimant was serving as the Engineer on Train CCOPN-30, light engines, between San Jose, and Oakland, California. Light engines are locomotives without railroad cars attached. In normal fashion, the crew received their paperwork before departure from San Jose. Among the paperwork was a Slow-

Order that reduced the speed of freight trains to a maximum allowable speed from 50 miles per hour to 40 miles per hour between Mile Post 35 and 31, however, according to the Slow Order, the allowable speed for passenger trains was 60 miles per hour.

By letter dated November 5, 1998, the Claimant and his Conductor were notified that they were to appear at a formal Investigation to be held on Monday, November 9, 1998 to develop facts and determine whether they had violated the Slow Order issued on November 1, 1998, by exceeding the maximum allowable speed for their train between Mile Post 35 and 31. In the letter, the Carrier cited a possible violation of Rule 6.31 of Union Pacific Rules, effective April 10, 1994. The rule reads as follows:

Rule 6.31 Maximum Authorized Speed

Conductors and engineers are jointly responsible for knowing and not exceeding the maximum authorized speed for their train. Passenger speed is applicable only to trains consisting entirely of passenger equipment.

When possible, crew members must notify the train dispatcher promptly of any condition that will delay or prevent thier train from making the usual speed.

The hearing was held as scheduled. Following the hearing, the Carrier reviewed the evidence and determined the crew had violated the cited rule. By certified letter dated November 17, 1998, the Carrier advised the Claimant that the evidence supported the charges against him and he was assessed a Level 5 Discipline, which was permanent dismissal. However, when the Carrier reviewed the Claimant's record, they determined the Claimant's record had been clear for 24 months. They reduced the discipline to a Level 4, which was a 30-days actual suspension and the development of a corrective action plan.

The Organization appealed the Carrier's actions by letter dated January 2, 1999. Although the Carrier denied the appeal, they advised the Organization that a review of the Claimant's record resulted in an adjustment in the discipline issued. Despite the reduction in the penalty issued, the Organization continued its appeal through the appropriate channels and it is properly before this Board for review.

#### CARRIER'S POSITION

The Carrier argues that there was substantial credible evidence to demonstrate that the Claimant violated the cited rule. They point to the information downloaded from the events recorder which showed that the Claimant's train reached speeds of 64 mph at Mile Post 35. They contend this was 24 miles per hour over the authorized speed limit. The Carrier disputes the Claimant's contention that it was permissible to operate light engines at passenger train speed. They contend he should have attempted to verify this since the Slow Order clearly restricted the speed of his train. However, they point out that the Claimant in making such claims admitted to exceeding the maximum authorized speed for his train. The Carrier argues that even where the maximum authorized speed was 60/50, the Claimant's train was exceeding the speed limit by 14 mph. This, they say, is a major violation.

The Carrier asserts the discipline was reasonable and consistent with Company policy. The Claimant failed to comply with the rule and his offense was considered a major violation under the Carrier's UPGRADE Policy. The Policy which has been developed to address various aspects of the assessment of discipline, has been held to be a balanced discipline system by Public Law Boards.

The Carrier maintains that it has been well established by various divisions of the National Railroad Adjustment Board, Public Law Boards and Special Boards of Adjustment, that it is

not the purpose of the Board to re-hear an investigation to decide whether or not it agrees with the decision of the Carrier. Instead, the Carrier maintains, the Board needs only to decide whether the Carrier has met its burden of proof, namely whether there is substantial evidence to support the conclusion reached by the Carrier.

The Carrier also argues, that absent a showing that the Carrier has abused its discretion, the Board is without authority to disturb the discipline assessed by the Carrier. There is no evidence in this case, of such abuse.

Finally, the Carrier submits that there were no procedural errors which would cause the Board to overturn the discipline.

#### ORGANIZATION'S POSITION

The Organization argues that the Carrier committed a procedural error when they failed to call two Carrier Officers who would have testified that they had been advising engineers to operate their light engines at passenger train speeds. The Organization insists such testimony would have shed light on the interpretation of the rule and would have corroborated the Claimant's understanding of the rule.

On the merits, the Organization argues at the time of the alleged rule violation there was a great deal of confusion as to the maximum authorized speed for light engines. They reference the testimony of Carrier witness MOP Schmidt who when asked if there was a major misunderstanding of the rules stated, "That could very well be. That could very well be the reason for the flagrant speeding violations." The Organization contends MOP Schmidt's testimony demonstrated that the misunderstanding was wide spread:

I mean, O.K., I mean it's not in effect now. They eliminated general order 59, which allowed us to go

passenger train speed. It was not carried over in the system special instructions. . .and I thought that we didn't have any confusion until very recently when an engineer came into my office and questioned me about it. . .And at that time he indicated to me that he had information that said he was allowed to do passenger train speed. . .

The Organization insists that prior to the elimination of General Order No. 59, the maximum authorized speed for light engines was passenger train speed. The Organization maintains the General Order was eliminated by omission from a later version of the system special instructions. They maintain it was improper to modify the rule without clearly posting or announcing the change. They assert that Company officers and "rules gurus" were confused about the rule. They point to further testimony from MOP Schmidt who reiterated his conversation with UP Rules expert Robert E. Lee. Mr. Lee, in discussions with MOP Schmidt expressed his belief that when a speed board read 60/40 and light engines operating in dynamic, the light engines could travel at 60 mph. They point out that MOP Schmidt also reiterated a conversation he had with another MOP the morning of the Investigation. Therein, the other MOP, upon hearing Schmidt's interpretation of the Rule 6.31, indicated he had been instructing his engineers in his district to operate light engines at passenger speed.

The Organization argues that when the Claimant's arguments were placed before the Locomotive Engineer Review Board (LERB) of the Federal Railroad Administration (FRA), they granted the Claimant's petition and disapproved UP's decision to revoke Claimant's certification. They submit that this Board should conclude that the Claimant did not deserve to be disciplined in this instance and the claim should be sustained.

## DECISION

This Board has reviewed the evidence in this case, along with the contentions of the Parties. There is no dispute that the Claimant operated his light engines at maximum authorized speed for passenger train speeds, except for about 30 seconds when his speed reached 64 mph. The Carrier officer who reviewed the speed tape testified that the 64 mph speed was incidental and quickly corrected by the engineer. The Board certainly does not believe the Claimant warrants discipline for this less than momentary lapse.

It is clear to this Board that there was a great deal of confusion about the rule at issue here. Even some of the Carrier's officers believed light engines could still operate at passenger train speeds. Moreover, these officers were advising engineers to that effect. There is no doubt there was widespread confusion about the rule and many engineers were advised by their MOP they could operate light engines at passenger train speeds. It is credible that the Claimant had this understanding, although he may not have obtained such direction from a Carrier officer. The point is, he could well have obtained it from a Carrier officer depending upon which one he questioned.

It is a basic principle in discipline cases that rules must be reasonable, consistently applied and widely disseminated. In this case, the Board believes the deficiency in the Carrier's case lies in the fact that although there may have been a posted rule, the rule itself was at best ambiguous and not adequately communicated. This is especially true in light of the fact, General Order 59, which advised that light engines could operate at passenger train speed was not clearly overturned. Although Rule 6.31 establishes that "Passenger speed is only applicable to trains consisting of passenger equipment", it does not address light engines. The confusion on the part of locomotive engineers is apparent from the testimony of MOP Schmidt, as well as, Claimant's testimony on P. 36 of the transcript:

Q. Have you reviewed the rule 6.31?

A. Yes I have.

Q. And does it say that passenger train speed can be utilized for anything other than passenger equipment?

A. I have read that part, yes.

Q. So it says it has to be passenger equipment, correct?

A. It says consisting entirely of passenger equipment.

Q. Was your train on that day in question entirely passenger equipment?

A. I had no equipment. (Emphasis added)

Q. So it was not passenger equipment? You did not have any passenger equipment on you (sic) train did you that day?

A. That they don't consider light engines passenger equipment no I didn't.

It was obvious in reviewing the transcript, especially the testimony of MOP Schmidt regarding his discussion with other Carrier officers and the Claimant's testimony, that there remained a belief among them that light engines were not considered freight trains and were still operating under the same rules as the passenger trains. Furthermore, at least two Carrier officers advised Schmidt that they were telling their engineers they could operate the light engines at passenger speeds.

Moreover, there was discussion about the Union Pacific revised system special instructions issued October 25, 1998. Within those instructions is the instruction, "Engines running lite: When operative dynamic brake is not sufficient to control speed", speed is 45 mph. Admittedly, this is car speed versus track speed, however, it obviously contributes to the confusion.

The Board believes the Carrier has the obligation to clearly communicate its rules to its employees. There is a special onus when a rule is changed and an existing practice is disallowed. It was obvious in this case, that the rule which mandates that light engines now be considered freight trains was not communicated to engineers in the manner it should have been.

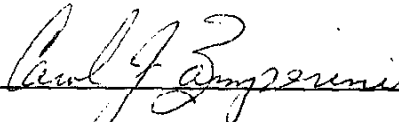
Judging from his testimony, MOP Schmidt should have clarified this rule with the Claimant. Even he testified that if he had, he was certain the Claimant would not have ignored his directive and would have complied with the rule as interpreted by the Carrier and Schmidt. (See TR. P. 24)

At most the Claimant could be held culpable for not asking a Carrier officer for a clear interpretation of the rule. If he had asked Schmidt, as he probably should have, he would have gotten the Carrier's interpretation of the rule. However, the Board is also aware that if the Claimant had asked another MOP for an interpretation, he may have been told that light engines operate under passenger speed rules. The Claimant cannot be held accountable in this case.

AWARD

The claim is sustained.


The Carrier is to comply with this Award within thirty (30) days of its receipt.



Carol J. Zamperini  
Impartial Neutral and Chairperson



Charles R. Wise  
Carrier Member



John A. Previsich  
Employee Member

Submitted this 20<sup>th</sup> day of September, 2000.