

PUBLIC LAW BOARD NO. 3452

PARTIES) UNITED TRANSPORTATION UNION
TO)
DISPUTE) NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM:

"Appealing the five (5) days deferred suspension assessed Brakeman C. S. Starr as a result of the findings of a hearing held on July 21, 1982." (File: TR-BRS-82-126)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee respectively 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.

While working as a brakeman on a road switcher, Claimant was observed by two Carrier officials to have mounted the trailing end of the rear unit in his locomotive consist. At the time, the road switcher was beginning to pull cars down a lead track from Plant 2 toward Plant 1 (Belden Brick) in the vicinity of Sugar Creek, Ohio. As a consequence of the aforementioned observations, Claimant was directed to appear for formal investigation. The notice of charge, in pertinent part, advised Claimant it was "in connection with your alleged violation of Safety Rule 1072 on July 12, 1982 whereby you mounted the trailing end of your rear unit, #2517, which was other than the rear piece of equipment in your train."

Safety Rule 1072 reads as follows:

"When mounting or dismounting moving equipment, employees must get on or off the trailing end of the rear car if practicable. If necessary to get on or off other than rear car, use the leading end of the car if practicable."

At the company hearing, Carrier's witnesses testified to a belief Claimant could have mounted the leading end of the car coupled to the engine unit, the leading end of the remaining equipment, or the trailing end of the rear car. The two witnesses also expressed a belief that other methods of boarding the equipment were available to the Claimant. These alternative methods were reviewed by the hearing officer to some extent at the hearing, and were summarized by Carrier in its presentation to this Board to be as follows:

- "1. He could have mounted the units when they were stationary (21, 30, 64, 76, 77, 86, 106, 126);
2. He could have stopped the movement prior to boarding (177, 210)
3. His fellow employe boarded while the units were standing

(63) and continued up the ladder. Claimant could have followed suit;

4. He could have mounted the lead unit (22, 64, 76, 99, 105, 111);
5. He could have mounted the trailing end of the rear car (22, 99)."

Basically, it was the contention of the witnesses that Claimant could have used any of the above methods to, as the Carrier stated in its position, "properly board the locomotive without violating rule 1072 and without being impracticable."

The Claimant readily attested to his knowledge of the dictates of Safety Rule 1072 at the hearing. The transcript also shows that when the hearing officer asked Claimant whether in conversation with the Trainmaster at the time of the incident he had acknowledged he was aware that it was a safety violation to have boarded the trailing end of the unit, Claimant had responded, "I did." We do not, however, find this colloquy to represent an acknowledgement of guilt to the charge, for the Claimant offered reason as to why he found it practicable to have boarded the trailing end of the unit as opposed to the leading end of the first car or the trailing end of the last car. In this connection, Claimant stated that he had pulled the pin behind the second car, so as to spot the third car, and that after a fellow brakeman had mounted the engine unit and given the Engineer a proceed signal, that he stepped away from the unit to make sure the pin stayed up and the cars became separated, or remained uncoupled, and that he boarded the trailing end of the unit as it was slightly moving. It was Claimant's further testimony that he boarded the trailing end of the unit so as to be able to get into the cab of the unit to avoid being hit by brush and, as he stated, "probably gotten knocked off by it," in riding down the lead track on the side of a car.

While the Claimant's contentions about the brush were contested by the Trainmaster, we think it apparent the latter was familiar with only track or right-of-way conditions in the immediate area where he had made his observations of Claimant and that short distance away from the point where the switching move commenced and he proceeded to stop Claimant's train to discuss the Safety Rule and the manner Claimant had boarded the equipment. In this respect, we find it noteworthy that in response to a question relative to conditions along the right-of-way, the Trainmaster said the lead track ran "between a quarter to a half mile up from the Main track and it's been some time since I was up and down that lead completely." A further contention subsequently asserted by the Trainmaster concerned a question as to whether Claimant could have ridden the end ladder of the last car after mounting the trailing end of that car and swinging around the back of the car to keep any brush from the trees from knocking him off the car. While this might be termed an afterthought on the part of the Trainmaster in terms of the manner it was introduced into the hearing record, it is something we find not to have been fully developed or substantiated at the hearing as being practicable.

In regard to the contention Claimant could have used certain other methods of boarding the equipment, we think it must be borne in mind that Claimant was cited for violation of Rule 1072, or a charge narrowly and specifically related to the manner Claimant had boarded moving equipment. Whether other methods of boarding

standing equipment were available or feasible do not appear to have been covered by the scope of the notice of charge filed against the Claimant. Accordingly, we believe this Board is obliged to restrict its consideration of the dispute here at issue to a question of whether or not Claimant's actions constituted violation of the Safety Rule which was cited in the charge, namely, Rule 1072, and not upon a more general charge.

As concerns Safety Rule 1072, in its arguments to this Board the Organization's representative urged that since the Rule made specific reference to mounting or dismounting moving cars, it had no application to Claimant having boarded a moving engine unit. In this connection, it was asserted that other Safety Rules under those rules pertaining to "Getting On or Off Equipment" (Rules Nos. 1070, 1071, 1073, 1074, 1075, 1076, 1077, and 1078) either use the inclusive term, "equipment," or give mention to the individual rule covering both locomotives and cars, as opposed to Rule 1072 appearing to make reference to only the method for getting on or off moving cars.

We do not find this argument to be timely made or properly before us. If the Organization is of the belief that Rule 1072 has no application to locomotives or engine units we think it should have taken such matter up at the company hearing or at appeal hearings on the property. However, since the record fails to show that either Claimant or his local representatives had expressed such a defense or distinction as concerns equipment covered by the Rule, we must, for the purpose of this review, assume there was a local belief Rule 1072 has application to moving equipment and not necessarily just to cars alone.

In regard to application of Rule 1072 to the mounting or dismounting of cars or engines, as the case may be, we think it clear that the Rule as written gives individuals some latitude relative to a determination as to what they may find to be practicable at a given time and place. We do not find, as the Claimant wrongfully inferred in reply to a question by his representative at the company hearing, that the Rule places total discretion in the hands of each individual. In our view, as we would understand the Rule, should an individual find it necessary to mount or dismount a car (or engine, if such be the accepted interpretation and practice), that individual must get on or off the trailing end of the rear car or unit, and get on or off the leading end of the rear car or unit only when it is not practicable to use the trailing end. Conversely, if it is necessary to get on or off other than a rear car or unit, an individual must use the leading end of that car or unit, and use the trailing end of the car or unit only when it is not practicable to have used the leading end. In other words, the Rule does not give complete discretion to an individual. It calls for a conscious awareness to the initial mandates of the Rule, and justifies alternate action only when sufficient reason dictates it not to be practicable to mount or dismount in the stated or preferred manner.

In the instant dispute, after giving careful and studied consideration to the hearing record, we are persuaded that Claimant had sufficient reason to support his belief it was not practicable to have boarded the equipment in the preferred manner. We find it was wrong, therefore, for Carrier to have held him to be in violation of Rule 1072. Accordingly, it will be our finding the disciplinary entry be expunged from Claimant's record and that he be compensated for time lost, if any.

In conclusion, and in consideration of certain representations made to the Board by Carrier relative to a sustaining award being mistakenly interpreted as sanctioning less than complete and full adherence to Safety Rules, the Board would state that it recognizes, as it would assume all should, that safety rules are conceived and established in good faith for the protection of an employee and others from accident and injury. Thus, it would seem to us that it is axiomatic that no useful purpose is served by one willfully attempting to subvert the purposeful meaning and intent of a safety rule as an expression of or disregard of authority. Certainly, for one not to comply with Safety Rules, or for others to permit noncompliance, could prove injurious or fatal to one's self or others.

AWARD:

Claim sustained.

ORDER:

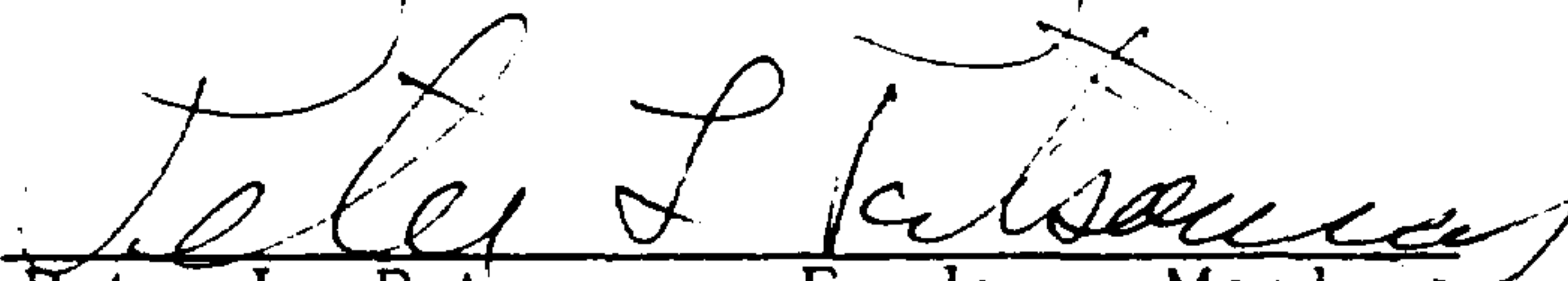
The Carrier is directed to make this Award effective within 30 calendar days of the date set forth below.



Robert E. Peterson, Chairman
and Neutral Member



Arthur R. Lane, Jr., Carrier Member



Peter L. Patsouras, Employee Member

Roanoke, VA
August 31, 1984