

PUBLIC LAW BOARD NO. 4269

AWARD NO. 521

CSX TRANSPORTATION INC.

VS.

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM:

Claim of Conductor J. C. Hamilton (572618) for clear record, pay for all time lost and reinstatement of benefits pursuant to the Schedule Agreement in connection with investigation held November 16, 2006. **CSXT File No. 102556. CSXT Equipment Handling Rule 4250-A. 5 days actual suspension.**

STATEMENT OF FACTS: Jacob C. Hamilton (hereinafter

Hamilton/claimant) was employed by the carrier on April 25, 2004.

Claimant's employment history, although comparatively brief, does reflect two previous sanctions growing out of alleged (minor) rule violations. In November 2006, Hamilton was assigned and working as a conductor, operating trains out of the carrier's Southover Yard, Savannah, Georgia.

On November 7, Hamilton was the conductor assigned to train Q631-07; his engineer was E. J. Osteen. During the pre-noon hours this crew was working in the vicinity of Fouraker (Callahan Subdivision), when they were instructed by radio dispatch to stop in a siding (Mile Post SM 3.5) and await (inspect) a passing (north bound) train coming out of carrier's Baldwin Yard. We would note parenthetically that such interception (inspection) had been pre-arranged by Manager J. T. Shiver, who had secreted himself in that general geographical area and was conducting (solo) operational rules tests on those crews under his direction who were operating on the Callahan Subdivision.

According to Shiver's (subsequent) recollections, he was secreted in an adjacent area and observed Engineer Osteen correctly position Train Q631-07 in the siding (approximately 200 feet from a guarded crossing on the south end of Fouraker). Shiver first recalled that he observed the train come to a stop and the crew (Osteen/Hamilton) remains in the engine for several minutes before the defect detector signaled the approach of the northbound train. According to Shiver's *initial recollections*, he recalled Hamilton *allegedly* dismounting the engine, on the engineer's side, and

remaining in essentially that same location while visually inspecting the passing train (same side as the engineer). Whereupon Shiver left his observation post, mounted Q631-07's engine and confronted the crew with the perceived violation of Rule 4250-A,¹ demanding an explanation for Conductor Hamilton's election not to cross to the other side of the parallel track to conduct his observations.

As a direct result of Trainmaster Shiver's reported perceptions, under date of November 10, 2006, Conductor Hamilton received the following notice:

* * * *

Arrange to attend a formal investigation to be held in Conference Room, 1401 Staley Avenue, Savannah, Georgia, commencing at 0900 hours (CSX Time), on November 16, 2006.

The purpose of this investigation is to develop the facts and place your responsibility, if any, in connection with a report received that on November 7, 2006, at approximately 1125 hours, while working Q63107, in the vicinity of Fouraker, you failed to inspect passing train, and all circumstances relating thereto.

You must be fully rested under the FRA Hours of Service Law to attend the scheduled investigation.

¹ Carrier's Rule 4250-A states (emphasis added or in original):

A. **Performing Inspection While Stationary**

When there are two or more inspecting employees, one employee should be stationed on each side of the passing train, *if possible*. Engineers may inspect the passing train from the locomotive cab.

When inspecting a passing train from the ground, do not stand:

- Closer than 30 feet from the passing train.
- Between the rails of the adjacent track.

You may have representation in accordance with your working agreement and you may have witnesses present who have knowledge of the matter under investigation.

You have the option of an IRC in lieu of the investigation scheduled above. If you elect to attend the IRC option, there will be no discipline assessed and the only record will be a notation to your personal file. To elect the IRC option, sign in the space below and send a copy of this letter (no later than 24 hours prior to the scheduled hearing) to Southern Region-Administration, via fax to company number 426-6225 or bell number 904-279-6225, or send via U.S. mail to 6735 Southpoint Drive S., CSX Building II, 2nd Floor - J645, Jacksonville, FL 32216-6177. If you choose the IRC option, you **MUST** also immediately notify your supervisor and **duly authorized representative** of your election. If you do not submit the signed election form within 24 hours prior to the date of the hearing, we will assume that you have elected to proceed with customary handling under the Railway Labor Act and the hearing will be convened as scheduled.

* * * *

We would note parenthetically that Hamilton rejected the IRC option and the investigative hearing was convened in Savannah, Georgia, on November 16, 2006, with Trainmaster R. G. McCoy serving as the conducting officer. Claimant personally appeared and was represented by UTU Local Chairperson K. Knorr.

During the hearing Terminal Manager Shiver recounted how he had directed the operational test set up so that claimant's train would meet the northbound train operating out of the Baldwin Yard terminal. Shiver further testified in some detail how, just prior to the arrival of such (passing) train,

he “clearly” observed Conductor Hamilton step out of the engine cab, utilizing the fireman’s side front door of the locomotive, and then exit down the stairs on the engineer’s side of the locomotive. Furthermore, Shiver testified that that location was where claimant remained as he (*sic*) stood to view and inspect the passing train. That at no time did the conductor make any attempt to cross to the opposite side of the track, as required by the carrier’s operating rules.

Shiver detailed how he heard the (passing train) detector sound when the approaching train was approximately at the 1.3 milepost. Based on such recollection; Shiver opined that there was more than sufficient time for Hamilton to exit the locomotive and get into position, some 30 feet clearance on the opposite track-side from the engineer. We would note parenthetically that based on the schematic placed into evidence, the closest safe position for such observation would have been approximately 200 feet south of the locomotive, and across the tracks. *Significantly, on cross examination Shiver appeared to change his story, essentially admitting that he actually never saw Hamilton exit the engine or climb to the ground, but*

only observed him while he (Hamilton) was standing next to the engine as the northbound train passed.

Shiver's "original" rendition was challenged by both Hamilton and Engineer Osteen, both of whom confirmed, under oath, that as their (*sic*) train was coming to a stop in the siding, Hamilton put on his radio, dismounted the engine and conducted an inspection of approximately fifteen to twenty of the cars making up Train Q631-07, before he was alerted to the approach of the northbound train by the automated detector. Apparently misjudging the time available to him to make a crossover to a safe observation location, Hamilton was only able to "safely" return to the front of his train and observe the passing train from the same side as Engineer Osteen.² Claimant Hamilton explained his initial (inspection) actions by referring to those carrier directives which mandate that a trainman should always inspect his own train when stopped and time permits.

Following completion of the investigation all of the transcript/evidence was forwarded to Jacksonville Division Manager R. J. Frulla, Jr. for his review and disposition. Under date of December 7, 2006,

Manager Frulla issued the following disciplinary notice, to wit (*emphasis added or in original*):

* * * *

Reference formal investigation conducted on November 16, 2006, in Conference Room, 1401 Staley Avenue, Savannah, Georgia, in which you were charged in connection with a report received that on November 7, 2006, at approximately 1125 hours, while working Q63107, in the vicinity of Fouraker, you failed to inspect passing train, and all circumstances relating thereto.

As a result of the testimony and other evidence presented in the investigation, it has been determined that you are indeed guilty of violation CSXT Transportation Equipment Handling Rule 4250-A. For your violation of this rule, you are assessed five (5) days actual suspension, commencing 0001 hours, Monday, December 11, 2006, through 2359 hours Friday, December 15, 2006.

* * * *

Such decision was timely challenged (claim filed) by the organization/claimant. Under date of March 28, 2007, Director of Labor Relations Myron W. Becker denied such appeal, stating in pertinent part as follows:

* * * *

You appeal has numerous reason's why Claimant did not inspect the train from the opposite side of the tracks when there were two available employees to do so. (Claimant and Engineer) Obviously, the testimony from the Claimant and the Engineer raised issues about the events of the day that are not in concert with the events described by Trainmaster Shiver. One event we are clear on is the transcript patently shows that the Claimant did inspect the passing train from his train's side of the track. Clearly the rule requires when two employees are present

² The approaching train was already too near the crossing (only safe place to cross the tracks) when Hamilton arrived at head end of his train; therefore it "was not possible" to safely cross the tracks in order to conduct an inspection from the other side.

(in this case claimant and engineer) one should be on the other side of the track from the passing train, in order to inspect both sides. Clearly and for what ever reason the Claimant failed to cross the tracks and make a proper inspection of the passing train. The testimony of both the Company witness, along with that of Claimant and Engineer support that Claimant was in violation of the rule for which charged and disciplined.

The discipline assessed was minor in this particular case and in line with the IDPAP Policy, in fact Claimant was offered in IRC with his peers in order to discuss the issue and avoiding an investigation.

The testimony and exhibits have been reviewed carefully. No mitigating circumstances have been found to warrant overturning or amending the discipline. Therefore, your appeal is denied in its entirety.

* * * *

Thereafter the dispute was internally deadlocked and ultimately referred to this Board for final resolution.

FINDINGS: Under the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement and has jurisdiction of the parties and subject matter.

After our review of the investigative transcript and admitted evidence, this Board is convinced that Conductor Hamilton was afforded a fair and impartial hearing, was well represented and given a reasonable opportunity to present evidence and examine all witnesses necessary to

present a defense to the carrier's charges. *Ergo* no denial of due process occurred.

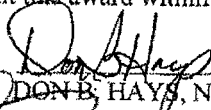
As regards the merits of this appeal, as has often been expressed by this and other Boards, a single, uncorroborated supervisor's testimony, if facially credible, is normally accepted as the most credible rendition of what actually occurred. Such presumption is based on this Board's belief that an employee, who is accused of wrongdoing, has a natural tendency to "*put his best foot forward*" when telling his side of the facts. Although he (*sic*) will not often tell a deliberate lie under oath, there is too often much color and shadow added, which collectively tends to present a materially different picture than that portrayed by an observing supervisor, whose recollections appear on the surface to be free of "bent or bias," and there were no other physical/psychological impediments or obstructions which could have distorted his (*sic*) view.

However, an exception to this "presumption in favor of a supervisor" axiom often occurs when there is a *third party witness*, who appears and credibly (no apparent bias) recalls a materially different sequence of events than that described by management. Although this Board is ever mindful of

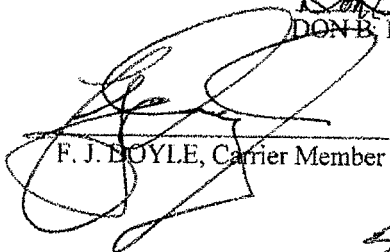
the presence of "Semper Fi" among working colleagues in the railroad industry, that possibility was neither plead nor proven in this appeal. And while such conflicting (third party) recollections may not necessarily be accepted as "the ultimate truth", they often serve to neutralize a single supervisor's testimony. Such a result is particularly true where, as here, the accusing supervisor and only carrier witness was moved to admit, on cross examination, that he misspoke when he first testified that he "actually saw" the claimant (Hamilton) dismount from the engine. That revelation, at the very least, tends to move this Board toward corroboration of the recollections of Engineer Osteen.

In sum we find that the carrier's evidence did not "*tip the scales*" in favor of a conviction. And, as often stated by essentially all Boards, in a disciplinary action it is the employer (carrier) who must bear the ultimate proof responsibility; failure to carry such burden of persuasion compels a conclusion in favor of the accused employee based only on the "burden of proof" issue. Accordingly, we are compelled to sustain this claim based on the carrier's proof deficiency.


AWARD: Claim *sustained*, for the reasons set forth hereinabove. Carrier is directed to implement this award within 30 days of the effective date hereof.



DON B. HAYS, Neutral Member



F. J. BOYLE, Carrier Member



R. G. BOLING, Organization Member



DATE