

PUBLIC LAW BOARD No. 3598

Award No. 2
Case No. 2

PARTIES TO DISPUTE:

Union Pacific Railroad Company

and

United Transportation Union (E)

STATEMENT OF CLAIM:

"Claim of Engineer R. E. Sisson for time lost and the expungement of 45 demerits wrongfully assessed for allegedly moving Engine 837 without a proceed signal at approximately 5:15 p.m., July 29, 1983. New Yard East Lead, Topeka, Kansas."

FINDINGS:

The Board finds that, upon the whole record and all the evidence, the Employee and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute.

This case involves the same claimant Engineer and the same Foreman and Switchmen as in Case No. 1, before this PL Board. The incident occurred on the same day as the incident in Case No. 1, July 29, 1983.

The claimant, while working as Engineer on the 2:30 p.m. switch engine at Topeka, Kansas, was moving on the East New Yard Lead towards the Cargill Elevator when he received a stop signal to stop his engine, Unit 837, so that the Foreman could line New 9 switch, which was improperly lined. Claimant responded to the signal and stopped. Having lined the switch, the Foreman

(Meier) started to cross over in front of Unit 837 to check on a car in a nearby track. Just as the Foreman started to cross over, Unit 837 started up and proceeded one car length past the Foreman. The Foreman, according to the Carrier, barely avoided being struck by the engine which, it is alleged, moved without a proceed signal from either the Foreman or Switchman Waltho. The incident occurred at 5:15 p.m. No one was injured.

Claimant was called for investigation held on August 3, 1983. The claimant was charged with violation of General Notice, General Rules B, E, L, M, Operating Rules 7(a), 7(b), 7(e), 84, 106, 108, 700, 702, 800 and 868. These Rules have been quoted in Award No. 1, Case No. 1, of this Board and will not be repeated here, with the exception of Rule 702 which states as follows:

"Employees must report for duty at the designated time and place. They must be alert and attentive and devote themselves exclusively to the Company's service while on duty. They must not absent themselves from duty, exchange duties, or substitute others in their place without proper authority."

Following the investigation the Carrier found the claimant guilty as charged and assessed 45 demerits against his record.

The Organization asserts that the charges were unfounded and discriminatory and requests that they be removed from the record of the claimant. The Organization avers that not only were the charges improper but that the claimant did not know of the incident until the investigation on August 3, 1983. Organization states that neither the switchman or the Foreman drew the attention of the claimant to the incident at the time of occurrence but that, in any event, the claimant did receive a proceed signal. The UTU has opined that the ground crew conspired to "set him up" and this opinion is strengthened, in their judgement, by the "fact" that later on the same shift

the claimant was allowed to strike a car with his engine due to the ground crew not giving him the required signals. This conjecture on the part of the Organization permeated their entire submission in this case! The Organization asserts that because the ground crew did not confront the claimant about this incident at the time it occurred they were obviously conspiring to discredit this claimant and incriminate him. And finally, the UTU avers that a proceed signal was given, contrary to the allegations of the Carrier. Since the only witnesses to the incident were the Foreman and switchman Altho, and since neither mentioned the alleged incident to the claimant at the time of occurrence, and since no-one was injured or the move delayed one must wonder how this matter came to the attention of the Carrier at all, for the record is silent on that point.

It is difficult to believe that if the incident occurred as alleged, that the Foreman's safety was jeopardized by the engine moving as it did while he was starting to cross over in front of the engine, that Foreman Meier would have remained silent and not said something to the engineer at the time! Such a mild reaction - in fact no reaction at all - on the part of a switchman under such circumstances truly stretches one's imagination!

As in Case No. 1, before this Board, the Carrier asserts that the charge against the claimant was proved by "substantial evidence." Unlike the occurrence in Case No. 1, however, there is no substantial evidence in the subject case that the alleged incident ever occurred. The Board recognizes the principle that, as stated in First Division Award No. 15032, among others, ". . .since the carrier has the primary responsibility to evaluate the evidence we may not reverse the carrier's determination merely because of such a conflict in the testimony." In the instant case, however,

the only "evidence" upon which the Carrier based its determination was the testimony of the three employees involved, the claimant, the Foreman and the switchman (pin puller). The occurrence was so vague, in the mind of the claimant, that the groundman (Waltho) found it necessary to recite the circumstances for his benefit, at the investigation, before the claimant even knew what he (Waltho) was talking about; the incident having allegedly occurred a mere five days prior to the investigation. At that point the claimant was apparently unaware that anything improper had happened, as alleged. Testimony by the Foreman revealed that although he did not give a "come ahead" signal to the engineer he acknowledged the possibility that Waltho had given such a signal. (Tr 9) He also testified that when he heard the engine rev up he gave no "stop" signal to the engineer even though he was then about 10 to 15 feet away. He did, however, see Waltho give a stop signal and the engine was stopped. The gist of the foregoing exchange is simply that only two individuals were in a position to testify as to whether or not the engineer received a come ahead signal and then a stop signal, those two being the claimant engineer and Waltho. The Carrier obviously elected to believe Waltho and disbelieve the claimant.

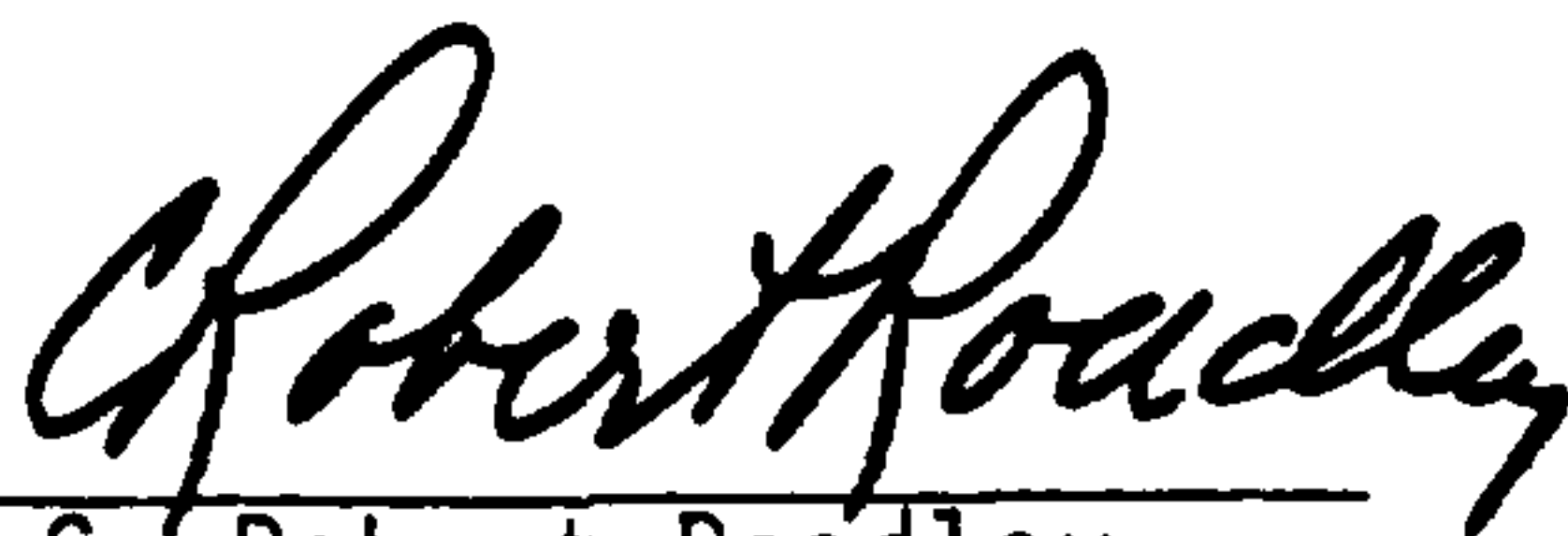
And, again, the entire incident was apparently so minor in the minds of both Meier and Waltho that neither of them felt it necessary to say anything about it to the claimant. And yet, somehow, the occurrence grew to such major significance that it became the subject of a formal investigation and resulted in charges being levied that the claimant had violated the General Notice, four General Rules, and ten Operating Rules. Such a "shot-gun" approach, to merely ascertain whether or not the claimant moved Unit 837 without having received a proper signal to do so appears to have been extreme.

It appears to this observer that the guilt of the claimant had already been decided before the investigation ever took place and it was simply a matter of determining which Rule, or Rules, he violated! If, as asserted by the Organization, there was an underlying motive in the prosecuting of this case such motive is not apparent from the record. What is apparent, however, is that the record in this case does not support the Carrier assertion that "substantial evidence" was adduced at the investigation to support the charge against this claimant, conflicts in testimony notwithstanding. On the basis on the foregoing conclusion, it would therefore be improper to base the assessment of discipline on the claimant's previous personal record.

There is an obvious under-current prevailing that this case and Case No. 1, previously referred to, are related in that there appeared to be a determination on the part of the claimant's crew to "set up" this claimant, one way or another. Such a suspicion is illfounded on the basis of the records in each case for the events, circumstances, and occurrences in each case are sufficiently different as to make them distinguishable.

The Board, having found an insufficiency of "substantial evidence" in the subject case to prove the charge against this claimant the grievance will be sustained.

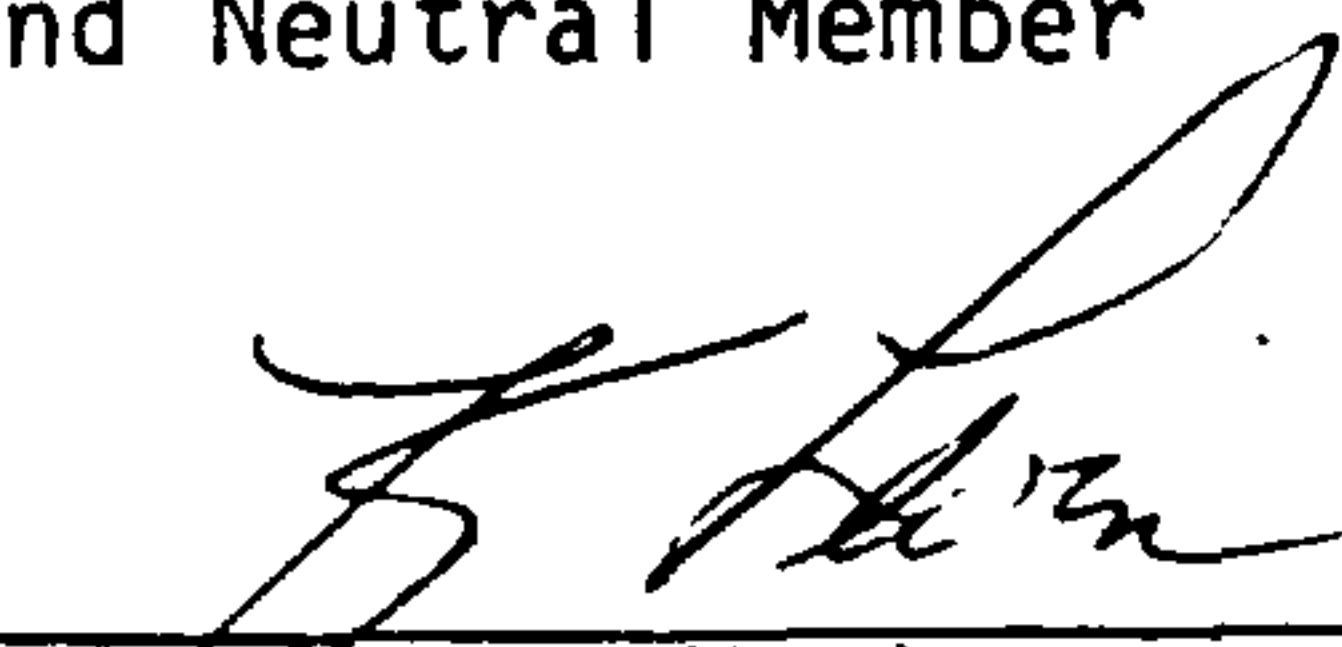
AWARD: Grievance sustained.



C. Robert Roadley
Chairman and Neutral Member



Carrier Member



Employee Member

Dated: 8/13, 1984