

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

Award No. 28327  
Docket No. 47810  
16-1-NRAB-00001-120273

The First Division consisted of the regular members and in addition Referee Gail R. Moran when award was rendered.

**PARTIES TO DISPUTE:** ( (Brotherhood of Locomotive Engineers and Trainmen  
(Union Pacific Railroad Company

**STATEMENT OF CLAIM:**

“Claim of \_\_\_\_\_ for removal of Discipline, claiming full backpay (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer record.”

**FINDINGS:**

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant, \_\_\_\_\_ had been employed by the Carrier for seven years at the time of the incident involved in these proceedings with a clean disciplinary record. On January 11, 2011, the Claimant was the Engineer on train WMHGHA 10. The Conductor was Mr. D. A. Midkiff.

The salient facts are not disputed. The Claimant and crew were operating a work train near Mile Post 0.5 at the Carrier's 12th Street yard in St. Louis,

Missouri. They were on Track 13 off the main track. The weather was cold and snowing and it was after dark. The crew stored and secured the train cars on Track 13. They separated the engine locomotive to move it to the other end to get power to the stored cars. In the process of running the locomotive east on the track, with the Claimant at the controls, the locomotive derailed at a static (fixed) derail. There was no personal injury as a result of the derailment. The derail was properly lined in the open (derailing) position, the track was painted yellow to alert crews to the derail's location, and there was derail signage to flag the derail.

By letter dated January 21, 2011 the Carrier issued a Notice of Investigation for an Investigation and Hearing to be conducted on January 31, 2011 to determine the Claimant's culpability in connection with the following charge.

**"While you were employed as an Engineer on the WMHGHA 10, at/near St. Louis, Missouri, near Milepost .5, Jefferson City Subdivision, at approximately 1850 hours, on January 11, 2011, you allegedly failed to move your engine at a speed that allows you to stop within half the range of vision or short of a derail or switch lined improperly."<sup>1</sup>**

The hearing was postponed then held on February 28, 2011. On March 9, 2011, **was issued a Notification of Discipline Assessed, specifically:**

**"While you were employed as Engineer on the WMHGHA 10, at/near St. Louis, Missouri, near Milepost .5, Jefferson City Subdivision, at approximately 1850 hours, on January 11, 2011, you failed to move your engine at a speed that allows you to stop within half the range of vision or short of a derail or switch lined improperly This is found to be in violation of Rule 6.28, as contained in the General Code of Operating Rules, effective April 7, 2010."**

Under the Carrier's Upgrade Progressive Discipline Table, Engineer Dawson was assessed discipline at LEVEL 4. He was required he serve a ten-day suspension, without pay, and pass an operating rules or equivalent exam that included remedial training prior to return to work.

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<sup>1</sup> Conductor Midkiff was issued an identical Notice of Investigation.

The Organization did not dispute the fact that Claimant operated the engine over a derail, but argued that there were mitigating circumstances. The Organization posited that the location of the derail was newly installed (within the six month period preceding the incident); that there was no Carrier bulletin to inform employees of the placement or installation of the derail; that the derail signage was inadequate; and, that the Claimant was operating under adverse weather conditions after dark with blowing snow. The Organization also argued that the level of discipline assessed was incorrect and that the Claimant should have been charged with a violation of Operating Rule 8.20, a LEVEL 3 offense, rather than the LEVEL 4 discipline attendant to Operating Rule 6.28. The Organization cited prior awards that Rule 6.28 had been interpreted as a “speed rule,” and asserted that speed was not an issue in this case.

The Carrier contended that the derail was fully visible and disputed that there were any mitigating circumstances to excuse the derailment. The Carrier argued that photographs taken close in time (fifteen to twenty minutes) after the incident did not support that there was blowing or accumulated snow that obscured the Claimant’s vision nor the derail and its signage or markings. The Carrier maintained that Claimant simply failed to get his engine stopped in time and, thus, violated Rule 6.28 that required a train be operated at a speed to stop short of a derail.

The Board has reviewed the complete record in this case, including the transcript of formal proceedings and the documentary evidence, and does not find the Organization’s arguments regarding mitigating circumstances to be persuasive. The record revealed that the Carrier discontinued the practice of notification to employees by Bulletin of the placement/installation of derails substantially prior to the incident in question. The photographic evidence taken at the scene in close proximity in time to the incident does not show accumulated snow that obscured the derail, and the derail signage stood free and clear of snow. Even if there were blowing snow at the time of the incident, there is insufficient evidence in the record to indicate that the weather conditions were so adverse that they concealed the location of the derail.

However, the Board does find compelling the Organization’s argument that the Claimant should have been charged with a violation of Operating Rule 8.20, which is a LEVEL 3 discipline, rather than Operating Rule 6.28, a LEVEL 4 discipline, under the Upgrade Policy.

Operating Rule 8.20 reads, in relevant part, as follows:

**Derail Location and Position**

“Employees in train, engine, and yard service must know the location of all fixed derails. Train or engine moving on or entering tracks where fixed derails are located, must stop at least 100 feet from derail in derailing position. Movement must not continue until the derail is placed in the non-derailing position . . . . Do not make movement over a derail in derailing position.”

Operating Rule 6.28, Movement on Other Than Main Track, the rule which Engineer Lawson was charged with violating, has at its essence the speed of the train and specifically states that, “except when moving on a main track or on a track where a block system is in effect, trains or engines must move at a speed that allows them to stop within half the range of vision short of a derail.” [emphasis added]

Train speed was not the cause of running over the derail in this case. The record disclosed that the primary Carrier witness, who was called to the scene shortly after the derailment, testified that he believed the train was operating within the required speed restrictions of 0-10 miles per hour. The Claimant and Conductor Midkiff testified, without contradiction, that the Claimant was slowing the train as he approached the switching point. For whatever reason, perhaps looking back for the Conductor, the Engineer did not see the derail and ran through it, but the record is devoid of any evidence that speed was the cause.

The Board finds that the Carrier has met its burden that Claimant made movement over a derail in violation of Operating Rule 8.20, but that imposing discipline under Operating Rule 6.28 was improper. Thus, the discipline should be modified consistent with these Findings and the Claimant made whole for any loss of earnings and benefits resulting from the imposition of discipline under Operating Rule 6.28.

The Organization raised several procedural arguments in the underlying proceedings, but the Board is satisfied that the Claimant was accorded due process.

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**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of First Division

Dated at Chicago, Illinois, this 31st day of August 2016.