

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISIONAward No. 24406  
Docket No. 44112  
94-1-92-1-S-6563

The First Division consisted of the regular members and in addition Referee M. David Vaughn when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers  
(Springfield Terminal Railway Company

STATEMENT OF THE CLAIM:

"Claim is presented on behalf of Claimant, Engineer J. F. Hines, for removal of discipline assessed, and payment of all time lost, as a result of hearing held February 20, 1992, and discipline assessed of 20 marks by notice dated March 5, 1992. Claim is supported by MEC/PT Agreements in effect, Article 41 and 47."

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 waived right of appearance at hearing thereon.

Claimant is employed by the Carrier as a Engineer. On February 4, 1992, Claimant was operating Train MAWA. He testified that, for a distance of 10-12 miles prior to Mile Post 98, he operated his Train at a speed of approximately 20 miles per hour ("mph").

Rule 137 provides, in part, that " . . . if, for any reason, a freight train cannot maintain a speed of 25 mph or more, immediate action must be taken to reduce the speed of the train to 10 mph or less."

The Carrier convened an Investigation to ascertain Claimant's responsibility for "failure to perform[his] duties" at the time and place of the separation. The Investigation was held on February 20, 1992.

The Carrier interviewed Claimant shortly after the incident and, according to the Carrier officials who conducted the interview and who testified at the investigatory hearing, Claimant said that the train had been travelling over poor track over undulating territory at approximately 20 miles per hour ("mph") in notch eight for some time prior to cresting the hill at Mile Post 98.

Claimant's testimony at the hearing was that the locomotive consist he was operating lacked an operating speedometer, leaving him to estimate his speed by timing his passage from milepost to milepost and that the territory over which he was operating was undulating, leading to acceleration and deceleration through 20 mph, but not in violation of his understanding of the "harmonic rock" rule, with which he had had no previous contact. He also denied having been trained in interpretation of or response to "harmonic rock" situations. Claimant testified that he operated throughout his trip in a manner consistent with his understanding of the Rule and safe operation.

The testimony presented by the Carrier relies, essentially, on the statements of Claimant. There is no contention that Claimant had ever been instructed in the Rule or that any other employee had ever been disciplined under the Rule. Indeed, it is not established what is the proper response when an engineer is operating in undulating territory and train speed fluctuates up and down on poor track.

Claimant conceded at the hearing that he may have given different statements immediately after the hearing as he did at the hearing. He testified, however, that the testimony he gave at the hearing was true.

At the hearing, the Organization objected to the lack of specific charges in the notice and, during the hearing, objected to the conduct of the hearing officer in disallowing certain questions and and responses and in conducting the hearing in a biased manner.

Following the Investigation, the Carrier assessed Claimant 20 marks for improper train handling. The assessment was in addition to marks assessed for improper train handling, based on the same charges and hearing. See First Division Award 24404 before this Board. The Organization protested the penalty. The claim was progressed in the usual manner, without resolution; and it was referred to the Board.

Claimant had been disciplined for improper train handling on five previous occasions.

The positions of the parties were set forth in thorough written Submissions. They are briefly summarized as follows:

The Carrier argues that record contains substantial evidence of Claimant's violation of the "harmonic rock" rule. It asserts that the Carrier properly gave more weight to Claimant's immediate post-incident statements. It asserts that those statements, which establish that he operated his train at 20 mph, rather than reducing speed to 10 mph as required by Rule 137, establish Claimant's violation of the Rule. It asserts that the special instruction allowing operation of trains with inoperative speed recorders at normal speed does not apply because Claimant did know his speed. The Carrier asserts that the penalty was lenient, in light of his five previous violations of proper train handling. The Carrier urges, therefore, that the Claim be denied.

The Organization argues that the hearing officer was biased, in that he improperly prevented the Organization from asking questions necessary for development of its case and because he acted as an advocate for the Carrier. It also argues that the Carrier improperly relied on evidence outside the hearing in the form of Claimant's alleged prehearing statements to Carrier officials, in violation of the requirement that the Carrier's decision must be based on the hearing and in violation of Claimant's due process rights. It argues, further, that the Carrier improperly considered Claimant's prior record to establish his guilt of the charge at issue in this proceeding. The Organization also argues that the Carrier failed to prove its case, since the evidence of Claimant's "violation" of the Rule is based merely on Claimant's estimate of his speed and does not take into account the territory through which Claimant was operating or the lack of training he had received in the Rule. It asserts that the Carrier failed to meet its burden of proof. The Organization urges, therefore, that the claim must be sustained.

The Board is not persuaded that the inclusion of Claimant's previous train handling violations was improper. The evidence is that the Carrier used the information only in assessing the proper penalty to be imposed.

A review of the Carrier's use of statements made by Claimant outside the hearing in the course of Carrier investigation of the incident indicates that it used Claimant's statements as to the speed at which he was operating - clearly estimates - as part of its case. The Board is not persuaded that such estimates were sufficient to sustain the Carrier's burden.

Moreover, the hearing record is replete with intervention by the Hearing Officer to cut off questions by the Organization and to allow and assist the Carrier in developing its case. An overall reading of the Hearing Officer's conduct of the hearing indicates that the officer conducted the Investigation in a partisan manner, effectively restricting Claimant's rights to challenge the Carrier's case and to put on its own defenses. See also the Board's discussion in First Division Award 24404 before this Board.

Indeed, the undulating terrain over which the train operated made difficult any determination, either by Claimant at the time or by this Board, of whether 25 mph could be sustained. In light of the circumstances under which Claimant operated and the lack of training in the impact of the Rule, and the absence of a fair and impartial hearing, the Board is not persuaded that the discipline imposed can be sustained.

AWARD

Claim sustained.

O R D E R

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 7th day of November 1994.