

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISIONAward No. 24423  
Docket No. 44098  
95-1-93-1-C-4615

The First Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers  
(  
(Chicago and North Western Transportation  
( Company

STATEMENT OF CLAIM:

"The Brotherhood of Locomotive Engineers, C&NW General Committee intends to process claims of Engineer D. N. Newkirk, C&NW Eastern District, in two separate but related cases, BLE Cases 93-441 and 93-442. Involving claim of Engineer D. N. Newkirk, Eastern District, for reinstatement to the service of the Chicago and North Western with all vacation and seniority rights unimpaired in addition to the payment of all health and welfare benefits until reinstated and that he be compensated for any and all time lost, including time spent at the investigation on February 4 and 8, 1993 when charged with alleged responsibility in connection with:

'Your failure to properly perform your duties when you failed to stop before passing absolute signal displaying a stop indication at HM Interlocking on Geneva Subdivision and failure to comply with 49 CFR Part 240.117(e) while employed as engineer on 6564 East (KCPRA) at approximately 0640 on January 20, 1993.'

The second but related case involves claim of Engineer D. N. Newkirk, Eastern District, for reinstatement to service of the Chicago and North Western with vacation and seniority rights unimpaired in addition to the payment of all health and welfare benefits until reinstated and that he be compensated for any and all time lost, including the time spent attending investigation on February 8, 1993 when charged with:

'Responsibility in connection with your failure to operate your train in accordance with speed restrictions on the Geneva Subdivision between Elburn, IL and Geneva, IL and your violation of Federal Regulation 49 CFR Part 240.117(e) while employed as Engineer on 6564 East (KCPRA) at approximately 0600 on January 20, 1993'."

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.

The parties to said dispute were given due notice of hearing thereon.

Claimant began his service with Carrier on October 6, 1988, as a Brakeman. Claimant's initial job assignment, location, and progression thereafter are not at issue in the instant proceeding, and, therefore, will not be discussed further in this Award.

On Wednesday, January 20, 1993, Claimant was employed as the Engineer on Train KCPRA, on duty at 1 AM, operating from Clinton, Iowa, to Carrier's Proviso Yard in Northlake, Illinois, a distance of approximately 130 miles. The Conductor on the job was C. W. Lenover. However, the other members of Claimant's crew that day have not been identified in the hearing record which has been provided herein.

Throughout the entire trip, Claimant operated his train on Track No. 2 in an easterly direction on the Geneva Subdivision. Train KCPRA consisted of five locomotives and 97 cars, one of which was an open-top hopper car which had a 50 miles per hour speed restriction on it -- thus making Claimant's entire train a 50 mph train. According to Claimant, while he was operating the train, Claimant was contacted by the Illinois Train Dispatcher on several occasions who prodded Claimant to expeditiously operate his train so that he might be able to timely proceed into the Proviso Yard between two other scheduled arrivals which were part of the suburban fleet.

As Claimant proceeded toward the Proviso Yard, at approximately 6:40 AM on the day in question, he passed the Signal at Stone Quarry Road (Mile Post 15.7) which, according to Carrier and Conductor Lenover, displayed an approach yellow. Claimant, however, maintains that said Signal showed clear. Both Claimant and Conductor were in the cab of the lead engine at the time.

Claimant then proceeded to the next signal which was at a location called "HM Interlocking" (Mile Post 15.2). Carrier and Conductor Lenover contend that the signal was red. Claimant contends that he first saw a restrictive yellow signal at HM Interlocking, when he was only a short distance away from the signal (approximately five cars away and operating at approximately 25 miles per hour); he briefly took his eyes off the signal and "... reached up to punch the dispatcher of our arrival time ... (and) ... when I looked again, I didn't have a signal any more ...."; instead, the signal was red. At that point, Claimant placed his Train in Emergency, and he ran past the stop signal. Carrier contends that the Train went approximately ten car lengths past the signal; the Organization contends, however, that the distance was only approximately 85 feet.

According to Carrier, while Claimant's train was entering the Yard on the morning in question, Carrier's Manager of Signals, J. Walser, was in the immediate vicinity; he heard the train go into emergency; and he observed the eastbound signals for the HM Interlocking, and the signal indicators for Track 2, which Claimant was operating on at the time, was red.

No damage occurred and no one was injured as a result of Claimant's running through the red signal.

On that same day, shortly after the above described incident occurred, Claimant and Conductor Lenover were interviewed by two Carrier officials in order to obtain information as to why Claimant's train ran through the red signal. Also, on January 20, 1993, the events recorders were removed from Units CNW 8050 and CNW 8532 which were the two units on Claimant's five unit consist which were equipped with events recorders on the day of the incident. Said tapes were reviewed by Mr. Volkmar, Carrier's Director of Locomotive Operations, on either January 20 or 21, 1993.

In a certified letter dated January 20, 1993, Claimant and Conductor Lenover were directed by Carrier to attend an investigative hearing on January 22, 1993, which was to be held in order to investigate the following charge:

"Your responsibility in connection with your failure to properly perform your duties, when you failed to stop before passing Absolute Signal displaying Stop Indication at HM Interlocking on Geneva Subdivision and your failure to comply with 49 CFR Part 240.117(e) while employed as Engineer on 6564 East (KCPRA) at approximately 0640 on January 20, 1993."

Said investigative hearing was postponed at the request of Conductor Lenover's Local Chairman, and was rescheduled for February 4, 1993; at which time the hearing was conducted with Claimant present and offering testimony.

Contemporaneously with the above, on February 4, 1993, Claimant and Conductor Lenover were each sent a second certified letter by Carrier directing them to attend another investigative hearing on February 5, 1993, which was to be held in order to investigate the following charge:

"Your responsibility in connection with your failure to operate your train in accordance with speed restrictions on the Geneva Subdivision between Elburn, IL and Geneva, IL and your violation of Federal Regulation 49 CFR Part 240.117(e) while employed as Engineer on 6564 East (KCPRA) at approximately 0600 on January 20, 1993."

Said subsequent investigative hearing was also postponed and rescheduled for February 8, 1993; at which time the hearing was conducted and concluded with Claimant again present and offering testimony.

Pursuant to said investigative hearings, in two separate certified letters both dated February 12, 1993, Claimant was apprised by Carrier that he had been adjudged as guilty as charged; and that, as a result, he was to be dismissed from Carrier's service effective immediately. In addition, on that same day, Claimant was also apprised by Carrier in two other separate certified letters that his Locomotive Engineers Certificate had been revoked for one year effective February 12, 1993 for the absolute signal violation; and that said Certificate had also been revoked for the 30 days effective February 12, 1993 for the speeding violation.

Conductor Lenover was also dismissed from Carrier's service as a result of the above described incident.

Claimant's dismissal was appealed by Organization; and, for reasons which will be developed more fully hereinafter, said appeal was denied by Carrier. The matter was further appealed unsuccessfully by Organization throughout all of the steps of the parties' negotiated grievance procedure. Thereafter, the matter was appealed by Organization to arbitration; and pursuant to hearing, the matter is now properly before the Board for resolution.

In order that the background portion of this Award might be complete, the record which has been presented herein shows that Conductor Lenover's dismissal was also appealed to arbitration by his Organization, the United Transportation Union, AFL-CIO; and the matter was presented to Public Law Board No. 5025 for resolution. In its Awards 121 and 122, Public Law Board No. 5025 mitigated the Conductor's dismissal to a 90 days suspension without pay on the basis that Carrier was somewhat culpable in this matter due to the fact that the Dispatcher had encouraged the Crew to speed-up train operations, thereby causing the alleged speeding violation, and also contributing to the Crew's running through the stop signal at HM Interlocking on the Geneva Subdivision on the morning in question.

Despite Public Law Board No. 5025's resolution of the claim(s) involving Conductor Lenover, however, the parties were unable to resolve the pending claim(s) involving Claimant.

The Organization contests Claimant's dismissal based upon both procedural and merits considerations.

Procedurally, the Organization initially contends that Carrier improperly denied Claimant his Agreement due process rights in this matter insofar as Carrier denied Claimant's request to have an Organizational representative present at his January 20, 1993, interview with Carrier officials.

The Organization next argues that all of the Operating Rules violations which Claimant is charged with having violated on the morning in question were caused by the unnecessary prodding of Claimant by the Train Dispatcher on that same morning in an attempt to position Claimant's train ahead of Train No. 18 upon Claimant's arrival at the Proviso Yard. In attempting to establish this particular aspect of its case, the Organization requested that Carrier provide the entire tape recorded conversation(s) which took place between Claimant and the Train Dispatcher during the Clinton, Iowa, to Proviso Yard portion of the trip.

Carrier, however, could only provide a 20 minutes segment of that tape -- allegedly because the major portion of the subject tape had been accidentally recorded over by someone in the Dispatcher's office, and thus was lost. Given this development, Organization maintains that Claimant was deprived of his right to secure/inspect relevant and material evidence which would have supported his position in this matter; and that said occurrence, in effect, denied Claimant of his right to a fair and impartial hearing as is contractually required.

The next significant area of argumentation proffered by Organization herein is that Carrier has failed to establish that the signals which were involved in this incident were, in fact, in proper working condition at the time of the occurrence. In this regard, Organization contends that Carrier did not conduct all of the diagnostic tests to establish that the entire signaling system at the HM Interlocking was functioning properly that day. In particular, according to Organization, had Carrier conducted a Megger test(s) on the subject signals, then the issue of the proper functioning of those same signals could have been resolved. Since the reliability of the operation of these signals is contested in the instant case, since the absence of such proof has been cited in similar railroad arbitration cases as the basis for overturning management's disciplinary assessments, and since Carrier bears the burden of proving that its signals were operating properly in such a case; then, according to Organization, substantial evidence does not exist in the record to support Carrier's assertion that Claimant ran through the red stop signal at HM Interlocking on the date in question as charged.

As its final significant argument regarding the failure to stop charge, Organization notes that Conductor Lenover who was also in the engine cab at the time of the occurrence was given only a 90 days suspension by the Board in Public Law Board No. 5035, Awards 121 and 122. Accordingly, therefore, Organization contends that since the Conductor and Engineer bear equal responsibility for proper train operations in accordance with Carrier's Operating Rule 106A, then Claimant's dismissal should be reduced to a 90 days suspension commensurate with that which was assessed against Conductor Lenover.

Turning next to the speeding charge which is involved in this dispute, Organization initially contends that Carrier improperly brought this charge against Claimant in an untimely manner in violation of Rule 41 which requires that "(I)nvestigations shall ordinarily be held within three days" of the alleged rules infraction(s).

In support of this particular argument, Organization maintains that M. Volkmar, Carrier's Director of Locomotive Operations, testified at Claimant's February 8, 1993 investigative hearing that he reviewed the event recorder tapes through his computer printout machine in his office on either January 20 or 21, 1993, which was either 14 or 15 days prior to Carrier's issuance of the hearing notice to Claimant on February 4, 1993, apprising him of the February 5, 1993 hearing date which was subsequently postpone/rescheduled, convened on February 8, 1993. Said hearing, Organization contends, thus was held well in excess of the Rule 41 three days statute of limitations.

Continuing, Organization next argues that the evidence utilized by Carrier to determine Claimant's guilt in the speeding charge (i. e. - the tapes from the engine events recorders) should not be credited in this proceeding because the tapes did not have any certification of authenticity, nor any other certification to establish that the recorders had been calibrated properly by Carrier. Furthermore, according to Organization, the only evidence adduced by Carrier to substantiate Claimant's alleged speeding violation on January 20, 1993, was the events recorder tapes which were allegedly removed from C&NW Engines 8532 and 8050. However, Organization notes, the Conductor's Wheel Report for Train KCPRA on the date in question indicates that Claimant's train had two engines, and they were C&NW 6564 and C&NW 6811; and said Wheel Report does not show that Engines 8532 or 8050 were even assigned to Claimant's train on the day in question.

Still yet further, Organization also challenges Carrier's introduction of the events recorder tapes into evidence at the investigative hearing because Claimant contends that he checked his engine speedometer on at least two occasions on the evening in question, and discerned that he was not speeding; and moreover, Carrier has failed to maintain a proper chain of custody of the two tapes as is required in order to establish the proper evidentiary foundation to verify the authenticity of the tapes. Furthermore, according to Organization, the critical facts which could have been adduced by Carrier to attempt to correlate the speed of Claimant's train on the morning in question to the tapes themselves were not entered into evidence by the particular Carrier employees who performed such work (i. e. - installed, removed or transposed said tapes). Instead, Carrier attempted to provide such information after the fact and through witnesses who were not even involved in the activity. Absent such vital background information, Organization contends that Claimant's investigative hearing was not conducted in a fair and impartial manner as is contractually required by Rule 41 of the controlling Agreement.

Next, Organization asserts that Carrier's Manager of Signals could not have seen the signal aspects of the Signal at the HM Interlocking at the time of the incident as he contends, due to the configuration of the Yard.

Lastly, Organization contends that Claimant admittedly was an inexperienced engineer; he was deficient in respect to his train handling abilities when approaching interlockings; and he and his Local Chairman had previously asked Carrier for additional time in freight service to allow Claimant to improve his train handling skills. These requests, however, were denied; and Carrier, therefore, must now take some responsibility for the incident which occurred at HM Interlocking on January 20, 1993.

Therefore, in conclusion, Organization maintains that substantial evidence does not exist in the hearing record to establish that Claimant was guilty of either running the absolute red signal at the HM Interlocking or that he was speeding while operating Train KCPRA on the morning of January 20, 1993. Accordingly, Organization urges that the pending claim should be sustained; and that Claimant should be returned "... to service with compensation for all lost time, and all entries expunged from his record with seniority and vacation rights unimpaired."

Carrier asserts that Claimant's investigative hearing was conducted in a fair and impartial manner as is required; and that both charges (i. e. - running through the stop signal and speeding) were proved by Carrier with substantial evidence.

As for Organization's procedural objections, Carrier contends that Rule 41 does not require the presence of an Organization representative at a pre-hearing interview between an employee and management; nor does said Rule specify that an investigative hearing will be held within three days of the occurrence of the triggering incident. Instead, according to Carrier, Rule 41 merely states that an Investigation "... shall ordinarily be held within three days" (Emphasis added by Carrier). Not only does the use of the word "ordinarily" in said Rule provide some flexibility in Carrier's handling of such situations; but, according to Carrier, in the instant case, Carrier was not aware that Claimant's train was speeding on January 20, 1993, until the events recorder tapes were pulled and analyzed by Carrier's Director of Locomotive Operations. Carrier maintains, therefore, that Claimant was charged by Carrier within the three days time limit as required after the discovery of the speeding infraction had been made known to Carrier on February 2, 1993.



Turning next to the merits portion of this case, Carrier maintains that Claimant did, in fact, run the red stop signal at the HM Interlocking on the day in question. This fact, according to Carrier, was acknowledged by Claimant himself; and was corroborated by the testimony of Conductor Lenover and J. Walser, the Carrier's Manager of Signal Systems. In addition, Carrier also points to that portion of the Conductor's hearing testimony which indicates that at Stone Quarry Road (Mile Post 15.7), Claimant's train had an approach yellow signal which should have alerted Claimant to be prepared to stop at the next signal (i. e. - the signal at HM Interlocking). Still yet further regarding this same point, Carrier also cites the computer print-out of the signal monitoring system which was introduced into evidence at the investigative hearing, which showed that at the time of the incident, the signal at HM Interlocking indicated "stop," and that the signal was in proper working order that day.

Carrier next argues that Claimant's contentions that the signal at Stone Quarry Road was clear and that the signal at HM Interlocking was a restrictive yellow signal which suddenly changed to stop as he came upon it, is completely self-serving testimony; has been totally disproved by other, more credible evidence and/or testimony; and thus should not be credited by this Board.

Continuing, Carrier also argues that the evidence of record herein also establishes that Claimant was operating his train at excessive speed on the morning in question. Accordingly, Carrier contends that Claimant continuously operated his train in excess of 50 miles per hour for a distance of approximately five and one-half miles between Mile Posts 43.3 and 37.5; and, at one point, he even reached a speed of 64 miles per hour. Further related to this same point, according to Carrier, Claimant acknowledged that he was aware that he knew that he had a 50 miles per hour restricted car in this train that day. Claimant's defense that he was not speeding, Carrier contends, is purely self-serving and fabricated given the substantial evidence and hearing testimony contrary thereto. Regarding the Organization's contention that the events recorder tapes were not authenticated, Carrier asserts that Carrier's Director of Operations, who testified at Claimant's investigative hearing, independently verified the accuracy of said tapes; and the Organization did not effectively rebut Carrier's findings related to those same tapes.

Given the above reasons, Carrier contends that substantial evidence exists in the record herein to support Carrier's dismissal of Claimant not only for running a red stop signal on January 20, 1993, but also for operating his train in excess of speed restrictions on that same day. Accordingly, Carrier maintains that given the seriousness of these proved infractions -- whether considered separately or in combination -- the discipline of dismissal which was assessed herein is neither arbitrary nor excessive; and is clearly supported by arbitral precedent.

The Board has carefully read, studied and considered the complete record which has been presented in this case, and we are persuaded that substantial evidence exists to establish that Claimant ran through a red stop signal at HM Interlocking on January 20, 1993. However, we are equally persuaded that sufficient evidence does not exist to support the second charge which was leveled against Claimant by Carrier herein -- namely, that Claimant operated his train at an excessive rate of speed on that same day.

Regarding the red stop signal violation, a significant component of that charge would be Carrier's ability to prove that said signal(s) was/were operating properly at the time of the incident on the day in question. We are persuaded that Carrier has met this requisite burden of proof. Not only does the record contain the testimony of a credible eye witness, the Manager of Signal Systems, indicating that the HM Interlocking Signal was red at the time; but additionally, we also have the computer print outs which establish that the signal showed an approach yellow at Stone Quarry Road and a red stop at the HM Interlocking. Although Claimant's recollection of the signal functioning at that time might be contrary to this evidence/testimony, nonetheless, substantial evidence indicates that the HM Interlocking Signal was red stop at the time and that Claimant's train ran through it. Furthermore, even though Claimant was responding to the encouragement of the Train Dispatcher to operate Train KCPRA at a speed which would enable Claimant to fit into a slot between two other arriving trains, Claimant, as the Engineer, and the Conductor bear ultimate responsibility for the safe operation of their train. We also believe that Carrier has sufficiently established that the signal system was in proper operating order on the day in question, since the computer monitoring system did not indicate any operating problems, nor did Organization proffer any credible evidence to indicate that the signal system malfunctioned on that day.

With respect to the corollary charge of Claimant's alleged speeding while operating Train KCPRA on that same day, and without addressing any of Organization's procedural objections regarding that same charge, we find that Carrier's reliance upon the speed tapes for this purpose was deficient. In this regard, Organization correctly argues that Carrier failed to maintain a proper chain of custody which is needed in order to establish the authenticity of said speed tapes. Absent proper authentication of the speed tapes, we cannot properly find a rule violation based upon this evidence.

Having made the preceding determination, we must next determine whether or not Carrier acted in an arbitrary or capricious manner when it assessed the ultimate discipline of dismissal against Claimant herein.

With respect to the facts of record which are before us, and limited to those facts alone, we find that Carrier's decision to dismiss Claimant was excessive. We reach this conclusion based upon due consideration of the fact that Public Law Board No. 5025, in its Awards 121 and 122 reviewed the dismissal of Conductor Lenover for his involvement in the subject January 20, 1993, incident, and concluded that the Conductor's culpability only warranted the assessment of a 90 days suspension without pay. Consequently, in accordance with the arbitral principle which generally espouses that employees charged with the same offense should receive the same level of discipline, this Board can find no good or compelling reason why Claimant's disciplinary assessment should exceed -- in significant amount -- that which has been assessed against his co-perpetrator, Conductor Lenover. Claimant's dismissal, therefore, shall also be rescinded; and converted instead to a 90 days disciplinary suspension without pay.

Having resolved this matter on the basis of the preceding rationale, and lest there be any questions by the parties concerning the issue of the one year and the 30 days revocations of Claimant's Locomotive Engineers Certificate in accordance with FRA Regulation 49 CFR Part 240.117(e), suffice it to say that this Board does not have jurisdiction to consider or remedy any such protest/complaint in this regard. Furthermore, the Organization's procedural objection concerning Carrier's denial of Claimant's alleged request for Organization representation at his January 20, 1993 meeting with Carrier's officers has been considered and rejected due to the fact that Organization has failed to establish that there is either a contractual, statutory or judicial basis for such representation; and moreover, Organization has also failed to establish that discipline was assessed against Claimant in this matter as a direct consequence of said investigative meeting.

AWARD

Claim sustained in accordance with the Findings.

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 30th day of March 1995.