

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISIONAward No. 24424
Docket No. 44099
95-1-93-1-C-4616

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
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(Chicago and North Western Transportation
(Company

STATEMENT OF CLAIM:

"The BLE - C&NW General Committee requests the DIVISION compensate Engineer L. R. Rowitz Northeastern No. 2 District (Chicago Suburban Zone) for all time lost, including time spent at the investigation, and that his record of five days suspension be removed from the C&NW Discipline System. Additionally, that Claimant be compensated for the improper Federal Railroad Administration (FRA) 30 days suspension. Claimant was investigated on various dates from April 10, 1992 through June 4, 1992 on the following charge:

'Your responsibility for exceeding the maximum permissible speed between M. P. 4.0 and 3.5, Kenosha Subdivision, and your violation of Federal Regulation CFR Part 240.117(E) at approximately 0830 hours on March 17, 1992, while employed as Engineer on Train No. 312.'

Copy of transcript attached as Employees' Exhibit A. Claim premised on BLE Schedule Rule 41 attached as Employees' Exhibit B, Federal Regulations 49 CFR Part 240.117, 240.305 and FRA Interim Final Rule attached as Employees' Exhibits C, D and E."

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.

Claimant began his service with Carrier on July 19, 1951, as a Locomotive Fireman on the Wisconsin Division. 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 March 17, 1992, Claimant was assigned as the Engineer on Suburban Commuter Passenger Job 7107. According to the record, Claimant went on duty at 4:50 AM at Crystal Lake, and operated Train No. 604 into the Chicago Passenger Terminal, arriving at 6:42 AM. He next operated Train No. 307, which departed Chicago at 6:50 AM, arriving in Winnetka at 7:21 AM. On his return trip to the Chicago Passenger Terminal, Claimant operated Train No. 312, which was scheduled to arrive in Chicago at 8:11 AM. The Conductor on Train No. 312 that day was W. Smielis. The other members of Claimant's crew have not been identified.

On the previous evening, March 16, 1992, Carrier issued a speed restriction of 30 miles per hour between Mile Post 3.5 and 4.0 on the Kenosha Subdivision which had been previously posted at 35 miles per hour. According to Carrier, the purpose of this particular speed restriction was to allow Carrier to conduct speed efficiency tests on various suburban assignments departing from the Chicago Passenger Terminal and arriving at the Chicago Passenger Terminal. Said speed restriction was placed on Claimant's train orders as well as on all other trains that operated on the Kenosha Subdivision on March 17, 1992.

On the morning of March 17, 1992, Carrier's Traveling Engineer and the Suburban Division Transportation Superintendent had positioned themselves in a Carrier vehicle on the east side of the right-of-way at approximately Mile Post 3.6 on the Kenosha Subdivision.

At approximately 8:30 AM¹ on the morning in question, the two Carrier officers conducted a radar test of Claimant's train as it passed by them at the Mile Post 3.6; and the radar test showed Claimant's train's speed at between 36.1 and 36.5 miles per hour. Claimant was alone in the cab on the head end of the train at that time.

Shortly after the train's arrival at the Chicago Passenger Terminal, Claimant was notified that he was to report to the Commuter Control Office immediately, and to bring his track bulletins with him. Claimant complied, and a discussion of the incident ensued between Claimant and Transportation Superintendent, the Traveling Engineer, -- and later, with Conductor Smielis. Claimant was not given a breathalyzer/drug test because the alleged speeding violation did not exceed ten miles per hour as per Federal Railroad Administration regulations. It appears that Claimant was permitted to remain in service for the remainder of the shift.

According to the hearing record, on that same morning, a total of seven trains were radar tested by Carrier's officers between Mile Post 4.0 and 3.5; and four of those trains were radared traveling in excess of the 30 miles per hour restricted speed limit.

As a result, of the aforesaid incident, in a certified letter dated March 18, 1992, Claimant was advised by Carrier that he was to attend a formal Investigation on March 19, 1992, which was to be held in order to investigate the following charge:

"Your responsibility for exceeding the maximum permissible speed between M. P. 4.0 and 3.5, Kenosha Subdivision, and your violation of Federal Regulations 49 CFR Part 240.117(E) at approximately 0803 hours on March 17, 1992, while employed as Engineer on Train No. 312."

Said investigative hearing was postponed and rescheduled on various alternate dates. Ultimately, said hearing was convened on April 10, 1992; was recessed and continued on several other days; and was finally concluded on June 4, 1992.

¹ The record which has been presented in this case, contains the times of "8:30 AM" and "8:03 AM" as the time for the conducting of the disputed radar test on Claimant's Train. The parties have offered no explanation for this discrepancy; and the Board is left to conclude that this difference is attributable merely to a typographical error which has been perpetuated in the record.

Subsequent to the conclusion of said investigative hearing, in two separate certified letters both dated June 9, 1992, Claimant was notified by Carrier that he had been adjudged as guilty as charged; and that, as a result, he was to be assessed a five days disciplinary suspension which was to be effective June 10, 1992, and he was to be placed on Carrier's Discipline System; and also effective on that same date, Claimant's Locomotive Engineer's Certificate was to be revoked for 30 days for violation of FRA Regulation 49 CFR Part 240.117(e)(2).

A claim was filed by the Organization on August 1, 1992, in protest of Claimant's aforestated suspension and certificate revocation. Said claim, for reasons which will be discussed in greater detail hereinafter, was denied by Carrier; and the matter was appealed unsuccessfully by Organization throughout all of the steps of the parties' negotiated grievance procedure. Thereafter, the matter was appealed to arbitration by Organization; and pursuant to hearing, the matter is now properly before the Board for resolution.

Concurrent with the above described handling of the pending claim by the parties on the property, the Organization also appealed Claimant's 30 days revocation of his Locomotive Engineer Certification to the U.S. Department of Transportation, Federal Railroad Administration, Locomotive Engineer Review Board for review in accordance with the provisions of Title 49, Part 240 of the Code of Federal Regulations (CFR). The FRA Engineer Review Board upheld Carrier's revocation of Claimant's Locomotive Engineer's Certification. The Organization appealed the aforestated FRA decision in accordance with Sections 240.407 and 240.409 of 49 CFR, Part 240; and at the time that this dispute came before the Board on August 11, 1994, the appeal before the FRA apparently was still pending.

Organization's position in this dispute is predicated upon a combination of procedural and merits arguments.

Accordingly, Organization challenges the accuracy of the radar gun and the entire radaring procedure which was utilized by the Carrier officers to record the speed of Claimant's train on the day in question. In this regard, Organization contends that the calibration and maintenance of the radar gun is suspect since Carrier witnesses admitted at the investigative hearing that the gun had not been serviced for five years.

Still yet further, Organization also asserts that the location at which the radar test was made on that morning compromised the accuracy of the readings because Claimant's train was operating on a curve and on an elevation whereas the radar unit was allegedly calibrated for a straight line type of operation; and the radar reading was made by aiming the radar gun through the windshield of the vehicle which the Carrier's officers were sitting in at the time. Even more significantly, Organization also contends that said Carrier witnesses admitted in their hearing testimony that the speedometer on the operating unit of Claimant's train was not accurate and there was a discrepancy between the recorded speed and actual speed of approximately one-half to four and one-half miles per hour; Carrier had no measured miles on the Kenosha Subdivision for an engineer to check the accuracy of the unit's speedometer; and the Operating equipment involved in the instant case did not have any type of event recorder which could be used to corroborate assertions made by either side in this dispute concerning the speed of Claimant's train on the morning of March 17, 1992.

Organization's next general area of argumentation in this dispute is that Carrier assessed discipline against Claimant in a disparate manner, which is improper; thus warranting the sustaining of the pending claim. In support of this assertion, Organization contends that Claimant was assessed a five days suspension and a 30 days FRA revocation of his certification. However, Claimant's Conductor on Train No. 312 that same morning, who, in accordance with Operating Rule 106 A, was "... jointly responsible (with Engineer Claimant) for ascertaining the maximum authorized speed for the operation of their train or engine ...", received no discipline whatsoever in this matter. Still yet further regarding this same point, Organization also contends that disparate application of discipline herein is further evidenced by the fact that of the three other trains which were also radared by Carrier's officers exceeding the 30 miles per hour restricted speed limit on the morning in question, two engineers received no discipline whatsoever; and the Engineer who operated Train No. 314 on that same morning merely received a written "Performance Review" with no suspension or Investigation.

Related to the preceding contention, the Organization next argues that Carrier does not have a clearly established policy to determine when to charge/investigate/discipline a speeding engineer in such situations. In this regard, Organization maintains that the testimony of the Traveling Engineer indicated that there was a consensus among Carrier's transportation officers that the threshold limit for determining whether discipline would be assessed for speeding was five or six miles per hour in excess of the restricted speed limit.

While the testimony of the Traveling Engineer at the formal Investigation left it unclear at that time whether Carrier, in fact, had adopted the policy which was alluded to, Claimant's Organizational Representative repeatedly requested that Carrier's Manager of Locomotive Operations be called and made available to testify at the hearing. The Hearing Officer, however, denied this request.

In addition to the above arguments, Organization also contends that the Hearing Officer failed to conduct the investigative hearing in a fair and impartial manner as is required by Schedule Rule 41. In this regard, Organization asserts that numerous procedural improprieties were committed by Carrier and the Hearing Officer in this matter including the following: the Statement of Charges which was included in the Notice of Hearing "presumes guilt in its wording" and indicates prejudgment against Claimant on the part of Carrier; the Hearing Officer continually interrupted Claimant's Representative at the hearing; he instructed Carrier witnesses not to answer certain questions; he did not allow Claimant's Representative to fully develop the facts, and prohibited information and witnesses from being available at the Investigation; many leading questions were posed to Carrier's witnesses by the Hearing Officer; the Hearing Officer met with Carrier witnesses prior to the Investigation, and discussed their testimony and the outcome of the Investigation with them; he failed to remove himself as Hearing Officer when it became apparent that he had knowledge of various Carrier policies which were involved in this matter, but refused to divulge that information to Organization on the record; and he permitted Carrier witnesses to be evasive in their testimony and hostile to Claimant's Organizational Representative at the investigative hearing.

In counterpoint to Organization's contentions, Carrier argues that Claimant's investigative hearing was conducted in a fair and impartial manner as is contractually required; and that substantial evidence is contained in the record to establish that Claimant was, in fact, speeding on March 17, 1992, as charged. Accordingly, Carrier maintains that Claimant's disciplinary assessment of a five days disciplinary suspension and placement on Carrier's disciplinary system was proper, and should remain undisturbed.

Regarding the FRA's 30 days revocation of Claimant's Locomotive Engineer Certification, Carrier contends that the Board, is without authority or jurisdiction to determine the propriety of said certification revocation. Such a determination, Carrier asserts, lies within the sole and exclusive province of the FRA.

Accordingly, therefore, Carrier concludes that the pending claim is totally without merit; and thus should be dismissed.

The Board, as all arbitration tribunals in the railroad industry, sits as an appellate body to review whether or not Carrier's disciplinary decision in a particular case is supported by substantial evidence on the record; and, upon a positive finding, to then determine whether Claimant has been treated in a fair and impartial manner as is required by the Agreement.

After carefully reading, studying and considering the complete record which has been presented in this matter, in particular the 244 page investigative hearing transcript which covered several hearing days, we are compelled to conclude that substantial evidence does not exist on the record to support Carrier's decision to discipline Claimant for excessive speeding. Moreover, we also find that Claimant has been denied his right to Agreement due process in this matter.

In support of the aforestated determinations, we note several significant deficiencies in Carrier's handling of this matter and Carrier's argumentation which was presented in this case. Most notably, Carrier has failed to credibly rebut Organization's assertion that Carrier did not have a clear and consistently administered disciplinary policy for speeding engineers; or that Carrier's assessment of discipline against Claimant herein was not disparate in comparison to that which was assessed against other speeding engineers on previous occasions or those engineers who were detected speeding in that same radar check on the very same morning as Claimant.

Still yet further, also left unexplained in this matter is why Carrier chose not to cite Claimant's Conductor who was assigned to Train No. 312 on the day in question and not assess him any amount of discipline whatsoever although Carrier's Rule 106 clearly states that both the Conductor and the Engineer are "... responsible for the safety and protection of their train and the observance of the rules"; and more specifically, "... are jointly responsible for ascertaining the maximum authorized speed for the operation of their train or engine and such speed must not be exceeded." When Claimant's Organizational representative attempted to develop this particular line of questioning more fully at the investigative hearing through Carrier's witness, the Hearing Officer ordered the witness not to respond. In addition, the Hearing Officer also denied Organization's request to have Carrier's Manager of Locomotive Operations testify at the investigative hearing; who, according to other Carrier witnesses, was not only a significant participant in the assessment of Claimant's disputed discipline herein, but who also could have definitively enunciated Carrier's policy concerning Carrier policy(ies) relative to engineer speeding violations.

By denying the Organization the opportunity to cross-examine witnesses on valid defense theories, and by refusing to supply the testimony of material witnesses, it is believed that Carrier denied Claimant due process in this matter which is a violation of Claimant's Agreement right to a fair and impartial investigative hearing.

Given the above reasons, this Board is compelled to rule that the pending claim, which has been filed in this matter, must be sustained as presented. Having made the preceding determination, however, the Board is also compelled to rule that we have no jurisdiction to remedy the FRA's 30 days revocation of Claimant's Engineer's Certification. Such a matter involves a statutory appeal procedure; and the questions of whether or not said revocation was proper, and whether or not Carrier will be required to reimburse Claimant for lost wages incurred during the period of said 30 days license revocation will ultimately depend upon a ruling by the FRA which that agency has the sole and exclusive jurisdiction to make.

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.