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**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 24907

Docket No. 44578

98-1-96-1-B-2120

The First Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(The Burlington Northern and Santa Fe Railway Company

((former AT&SF - E & W Lines)

STATEMENT OF CLAIM:

"That Engineer Botone be returned to service immediately with seniority unimpaired, with pay for all lost time including time spent attending the investigation, with all rights unimpaired and that Engineer Botone's record be expunged of any mention of the incident."

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.

On March 27, 1995, a man committed suicide by placing his head on the rail as Claimant's train was approaching at a speed of 55 miles per hour. The incident occurred about five miles from the Albuquerque yard to which Claimant was headed. The Conductor radioed the Dispatcher and reported the incident. During the conversation, Claimant interjected: "He put his head on the rail. We're heading into

Albuquerque. You're going to have to send somebody out there to find out about it." The Dispatcher replied, "Roger. We'll do." Claimant did not stop the train.

On March 31, 1995, Carrier directed Claimant to report for an Investigation on April 6, 1995, concerning his failure to stop the train and make required inspections. Following two postponements, the Hearing was begun on April 25, 1995, and concluded on April 26, 1995. On May 16, 1995, Carrier notified Claimant of his dismissal as a result of his "misconduct and negligence in this matter."

The Organization contends that Carrier violated Claimant's due process rights because it refused to call the Dispatcher as a witness, because it refused to allow Claimant's therapist to testify, because it refused to admit into evidence a written report from Claimant's therapist, and because it failed to call the Machinist who inspected the train in Albuquerque as a witness. The Organization further contends that Claimant had permission from the Dispatcher to proceed to Albuquerque without first stopping the train and that even if Claimant did not have such permission, Claimant's shock and traumatic reaction to the incident rendered him medically incapable of stopping the train. Finally, the Organization maintains, that under these circumstances, dismissal is arbitrary, capricious and excessive.

Carrier contends that the Dispatcher could offer no material evidence other than what already was in evidence from the tape of the conversation with the Conductor and Claimant. Carrier maintains that the therapist was properly excluded as a witness because he had no evidence concerning the incident. Carrier argues that, "It is Claimant's actions that were under investigation, not his state of mind." Carrier argues that the Dispatcher merely acknowledged Claimant's radio transmission and did not give Claimant permission to continue to Albuquerque without stopping the train. Furthermore, Carrier contends, the Dispatcher had no authority to give Claimant such permission. Carrier urges that it proved the charge and that dismissal was appropriate.

The Organization has made a multi-faceted attack against the discipline. We need only consider one of the Organization's contentions to resolve this dispute. We find that Carrier's exclusion of evidence from Claimant's therapist fatally flawed the Investigation and requires that the claim be sustained.

We find Carrier's argument that this matter did not concern Claimant's state of mind incredible. In handling on the property, Carrier supported the finding of guilt,

characterizing Claimant's failure to stop the train as a "disregard for human life," and "a complete abdication of moral responsibility." Carrier justified the severity of the penalty, maintaining that "Claimant willfully ignored not only the rules, but the basic tenets of human decency in not determining the condition of the trespasser." Carrier reiterated these exact words in its Submission to this Board.

Carrier's own words reveal that Claimant's state of mind was at issue in Carrier's own determination of whether Claimant was responsible for the failure to stop the train and in Carrier's own assessment of the seriousness of the offense. However, the Hearing Officer refused to consider evidence from Claimant's therapist, who began treating Claimant on the day of the incident. The written report that the Hearing Officer excluded maintained that the trauma of the incident rendered Claimant incapable of deciding not to stop the train, and that this was the result of "the mind's automatic protective mechanism that tries to insulate the person from intense over stimulation that is more than the person can stand at the time, and lessen the intensity of the experience." The therapist's report further indicated that Claimant taking the train on to Albuquerque reflected his doing routine tasks that he could repeat without conscious reflection, and was a normal reaction to an extraordinary event.

As an appellate body, we cannot find facts de novo. Our role is to review the findings made on the property and to defer to them as long as they are supported by substantial evidence. However, for such a deferential review to occur, a complete record must be developed on the property. It is totally unacceptable for Carrier to exclude expert evidence of Claimant's state of mind and then rely on Carrier's own highly critical assumptions about Claimant's state of mind in dismissing him. There was a clear violation of Claimant's right to a fair and complete Investigation. Carrier's failure to develop a proper record leaves us no choice but to sustain the claim as presented.

AWARD

Claim sustained.

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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 15th day of June 1998.