

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 24963

Docket No. 44676

98-1-97-1-U-1996

The First Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company (former Chicago
(& North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim of Engineer R. Middleton, Union Pacific Railroad former Chicago and North Western Transportation Company, for compensation for all lost time, including time spent at the investigation and that any and all reference to this incident be expunged from his personal service record when he was investigated on the following charge:

‘your failure to reduce to restricted speed within the specified limits and struck torpedoes at MP 84.59 on November 7, 1996, while employed as crew member on CSPD8Z06.’

Subsequent to the investigation, claimant was assessed a Level IV discipline, 30 day actual suspension.”

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 November 7, 1996, Claimant was working as Engineer on Train CSPD8Z 06 in Pool Freight Service on the Illinois Subdivision running between Proviso, Illinois, and Clinton, Iowa. At a point about 50 miles east of Clinton, Carrier officials performed a surprise field efficiency test by placing two sets of torpedoes on the rails ahead of Claimant's train. Claimant and his crew were riding in a state-of-the-art, quiet engine cab, equipped with sound proofing materials. The unit is referred to by railroad personnel as a North American comfort cab. Claimant's diesel unit hit the torpedoes at a speed of 64 miles an hour at mile post 84.59. Claimant and the Conductor did not recognize the exploding torpedoes as torpedoes, but thought they had hit some debris on the track or the cab of the engine had been hit by stones thrown by people along the track.

After a short time and further consideration of the incident, the crew concluded that perhaps they ran over torpedoes. They proceeded to slow the train down, as is required by Rule. The Dispatcher was notified that the train crew thought they had hit torpedoes. The train was directed to continue on to Clinton and complete its run. The train crew claimed they did not hear torpedoes explode and only considered the noise they heard to be torpedoes when they noticed a car chasing them through the countryside. As a result of the incident, Claimant was charged as follows:

"Please report to office of the MTO, Clinton, IA, on Monday, November 11, 1996 at 10:00 A.M. for investigation and hearing to determine responsibility, if any for:

'your failure to reduce to restricted speed limits and struck torpedoes at MP 84.59 on November 7, 1996, while employed as crew member on CSPD8Z 06.'

Please be advised this investigation and hearing to develop the facts and determine your responsibility, if any, will also satisfy the procedural requirements as specified by the Federal Railroad Administration in 49 CFR Part 240, Qualification and Certification of Locomotive Engineers.

Depending on the results of this investigation and hearing, your qualification requirements for the position of Locomotive Engineer may be affected.

This investigation and hearing will be conducted in conformity with applicable rule and or agreement between the Company and your Union. You are entitled to representation per the applicable Schedule Agreement rule and may produce such witnesses as you desire at your own expense. (See Form 2 for applicable discipline.)"

Hearings in the matter were held on November 26 and December 2, 1996. As a result, Claimant was found guilty as charged and assessed Level 4 discipline under Carrier's "UPGRADE" Progressive Discipline Policy (a 30-day suspension). Claimant's action was also considered by Carrier in light of FRA 49CFR, Part 240. As a result of that review, Claimant's Locomotive Engineer certificate was revoked for 30 days.

The assessment of discipline and the revocation of Claimant's certificate were each protested through appropriate channels. Carrier denied Claimant's challenge of the 30-day suspension. The FRA, however, agreed with the Organization that the facts surrounding the incident did not rise to the level of a decertification. It directed Carrier to delete any reference to decertification from Claimant's record.

The Board reviewed the extensive record and carefully considered all comments made by the parties at the Hearings. As a result of that review, the Board has concluded that the train crew in this instance was not negligent in any manner and that the quiet cab environment, together with the crew wearing ear plugs, made it exceedingly difficult for the crew to ascertain that they had run over torpedoes. The Board concludes that Carrier's discipline of Claimant in this instance constitutes an arbitrary and capricious action. There are no facts in this record to support the notion that Claimant knowingly ran over torpedoes and failed to slow his train down. For Carrier to conclude that the train crew should have known that they struck a torpedo and therefore are guilty of failing to properly respond to an exploding torpedo allows for a number of assumptions on Carrier's part that are not justified. The crew members claimed they did not recognize the noise they heard as an exploding torpedo. The Board is persuaded that no train crew that knowingly ran over torpedoes would not immediately take action to reduce the speed of the train, if for no other reason than to save their own lives. Claimant took the proper action when it was concluded he may have struck torpedoes.

The Board finds Carrier did not carry its required burden of proof in this instance. It did not demonstrate that Claimant was aware his train had run over torpedoes when it happened.

Claimant took the appropriate action of slowing his train down when it was concluded it may have run over torpedoes. This was the identical conclusion of the FRA Locomotive Engineer Review Board. It is the Board's decision to sustain the claim.

AWARD

Claim sustained.

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 21st day of December 1998.