Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25086
Docket No. 44784
00-1-98-1-L-1742

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

(John A. Saladino
PARTIES TO DISPUTE: (
(Long Island Railroad Company

STATEMENT OF CLAIM:

"Engineer, John A Saladino, claiming 30 days pay for all time lost while being held out of service, in addition to being made whole for any and all benefits lost as well as expungement of my record as a result of the discipline assessed in violation of Article 29 of the BLE agreement in connection with the following charges:

'Your responsibility, if any, for violation of Rule 292 of the Rules of the Operating Department, wherein, you passed signal 16RA, at Dunton, which was displaying a stop indication, at approximately 3:15 PM, while on duty as the Engineer of Run YPD402 on May 25, 1998.'"

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 May 25, 1998, Claimant was operating train YPD402 through Dunton Interlocking. He passed Signal 16RA and began traversing Switch 17 and heard a loud noise. It turned out that Switch 17 was lined against him.

On May 27, 1998, Carrier notified Claimant that he was removed from service. On May 28, 1998, Carrier directed Claimant to report for an Investigation on June 8, 1998. The notice charged Claimant with running through a stop indication at Signal 16RA on May 25. The hearing was postponed to and held on June 15, 1998. On June 22, 1998, Carrier advised Claimant that he had been found guilty of the charge and had been suspended for thirty days.

Claimant has raised a number of procedural arguments. However, because we will decide this claim on the merits, we see no need to address the procedural issues.

The critical question on the merits is whether Carrier proved Claimant's guilt by substantial evidence. The record reveals that Signals 16RA and 16RB were tied to the alignment of Switch 17. If Switch 17 was aligned normally, Signal 16RB would give a restricting indication, allowing traffic to pass, and Signal 16RA would give a stop indication. If Switch 17 was reversed, Signal 16RA would give a restricting indication and Signal 16RB a stop.

The only evidence against Claimant consisted of testimony by the Transportation Superintendent and the Signal Supervisor that, if the signals were operating properly, Signal 16RA should have given a stop indication. They also testified that they put a twenty-four hour watch on Signal 16RA and found no defects. Finally, the Signal Supervisor testified that when he arrived at Dunton Tower, he found the Tower Operator's control to have Switch 17 in the normal position and that it would not have been possible for the Tower Operator to have moved the control from the reverse to the normal position after the damage had been done to the switch.

However, all eye-witnesses testified that Signal 16RA gave a restricting indication. Claimant so testified as did the Brakeman when his preliminary statement was taken. Carrier did not call the Brakeman as a witness at the formal investigation, but we infer that if the Brakeman had been called, he would have testified consistently with his prior statement. Most significantly, the Tower Operator testified that he reversed Switch 17 and that Signal 16RA displayed a restricting indication. He further

testified that after the incident, he was able to move the control for Signal 17 back to a normal position.

Claimant's FRA certificate was revoked as a result of this incident. However, on April 26, 1999, the FRA Locomotive Engineer Review Board overturned the revocation in Docket No. EQAL 98-115. The LERB held that Carrier had improperly revoked Claimant's certificate without first holding a hearing. The Board also noted:

> "[T]he evidence adduced at the hearing is not sufficient to support LI's revocation decision. Both Petitioner and his brakeman testified that they received a favorable signal indication to enter the Dunton interlocking and their testimony is supported by the Dunton Interlocking Operator, who testified that he displayed the signal and lined the switch for Petitioner's movement. The Board believes that this testimony supports Petitioner's assertion that LI did not provide sufficient evidence to support the revocation decision."

We agree with the LERB's analysis and conclude that Carrier failed to prove the charge by substantial evidence.

In its submission, Carrier has argued that even if the signal malfunctioned, Claimant should be held responsible for failing to observe that the switch was lined against him. However, the notice of Investigation only charged Claimant with running the red signal. It is too late now for Carrier to attempt to add a charge that Claimant failed to observe that the switch was lined against him even if he had a favorable signal. Claimant was never placed on notice to defend against such a charge.

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 18th day of January 2000.

Dissenting Opinion of Carrier Member of the Board
Docket ~~Award~~ No. 44748 and 44749 AWARDS 25059, 25060

The Carrier dissents from the proposed Award of the Referee. It does so because the proposed Award (1) ignores explicit language in the Agreement; and, (2) places a construction upon other portions of the Agreement which directly contradict the undisputed findings of fact of Arbitrator Gerald Wallin in an Award dated December 31, 1998, rendered after an extensive recorded hearing.[1] The Referee's proposed Award also contains language regarding the nature of the Agreement which is contrary to the established bargaining history and to the express recommendations of a Presidential Emergency Board and proposes fundamentally to alter the relationship between the Carrier and the Organization.

This matter concerns the Carrier's assignment of the claimant, Harold Johnson, to work a conductor's shift (at his normal rate of pay under the Agreement) in a circumstance in which no conductors were available to fill the assignment. As reflected in the answer of the Carrier's board member during the Referee hearing to a question posed by the Organization's representative, there has been a long standing past practice of assigning engineers to conductor work where conductors were unavailable. In a letter written by Robert Smithers, one of the Carrier's managers, referred to in the proposed Award of the Referee, the Carrier suspended only its assignment of engineers as passenger attendants. That did not extend generally to conductor assignments. In any event, Smithers did not write the letter, because "Carrier was aware that it had no authority to assign an Engineer to a Conductor's position," nor is there a scintilla of

[1]That arbitration occurred pursuant to an order of the United States District Court for the Eastern District of Pennsylvania in Civil Action No. 97-7518.

evidence in the record to support that conclusion by the Referee.

Contrary to the proposed Award of the Referee, Section 101 of the Agreement is not a "Scope Rule". The Referee's suggestion that Section 101 constitutes the Engineers' Scope Rule is beyond the Referee's jurisdiction and in direct contradiction to Section 402(n) of the Agreement which provides:

> "No arbitrator may make any award which in effect gives the grievant, SEPTA or the Union anything he or it bargained for, but failed to get during negotiations."

The uncontradicted history of the parties' bargaining reflects that the Agreement contains no scope rule.

The Referee is not necessarily bound by interpretations of the Agreement made by a prior arbitrator or referee; he is, however, obligated to give substantial deference to such an interpretation, and he has no authority, in the absence of new evidence, to ignore findings of fact made by a prior referee or arbitrator. The Wallin Award, acknowledged by the Referee, summarizes the bargaining history between the parties as follows:

1. "When initial bargaining did not produce an agreement, Presidential Emergency Board ('PEB") No. 196 was formed in the fall of 1982 to make recommendations for settlement based on a final package offer format. The Organization's final offer to the PEB was essentially a copy of the labor agreement it had recently concluded with Amtrak. Its proposal began with a traditional railroad industry type of scope rule and included the following sentence:

   > It is understood that the duties and responsibilities of Passenger Engineers will not be assigned to others.

Carrier, on the other hand, proposed language reflecting greater work rule flexibility that permitted cross-utilization of employees under certain circumstances. The parties remained at loggerheads on this and other issues.

As part of its analysis, the PEB concluded that the new labor contracts should follow a transit model with greater work rule flexibility than existed under the traditional railroad model. Accordingly, the PEB recommended Carrier's final offer be selected over that of the Organization."

2. "Despite the recommendations of the PEB, the parties remained apart on work jurisdiction and other matters. The parties finally adopted a new labor agreement following a 108-day strike that began in March of 1983. Their new Article 1, Section 101 was entitled 'Union Recognition' instead of 'Scope and Definitions' as the Organization had proposed."

3. "On July 15, 1990, the Organization served its proposals to amend the existing labor agreement pursuant to Section 6 of the Railway Labor Act. In pertinent part, it proposed to delete the existing Section 101(a) and replace it with language that, for the most part, was identical with its final offer submitted to PEB 196 in 1982. Specifically, its Section 6 opener proposed to include the following sentence:

> It is understood that the duties and responsibilities of engineers will not be assigned to others and that the duties and responsibilities of other crafts effective December 31, 1982 will not be assigned to engineers.

Once again, however, the Organization's proposed language was not adopted in the final agreement."

(emphasis added)

These findings of fact clearly demonstrate that (1) no scope rule exists; (2) the Organization initially sought, but was unsuccessful in obtaining, a scope rule, and thereafter in 1990 sought unsuccessfully to add language that would have converted Section 101(a) into a scope rule; (3) the Agreement follows a transit model and not "the prevailing condition in the railroad industry... that Engineers and Conductors are two separate classes and crafts" (page 5 of

the Referee's proposed Award).

In light of the bargaining history as found by Arbitrator Wallin, and in no way contested by the Organization in this proceeding, for the Referee to construe Section 101(a) as a scope rule gives the Organization something that it expressly failed to achieve in bargaining. This violates Section 401(n) of the Agreement. The bargaining history also contradicts the Organization's position, adopted by the Referee, that in order to assign engineers across so called "craft lines", the Carrier requires a specific agreement and that such flexibility could otherwise not be presumed. The bargaining history shows that exactly the opposite is the case: Carrier resisted the Organization's proposal for a scope rule, and thus it is the Organization that must obtain specific language to restrict the assignment of engineers to conductor work.

Accordingly, it is the opinion of the Carrier representative that the Carrier had a right under the circumstances to assign engineer Harold Johnson to perform conductor's work and that the grievance must, therefore, be denied.

Joseph P. Horbury

Joseph P. Horbury, Sr.
Carrier Member
First Division, NRAB