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NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25201
Docket No. 44766
01-1-98-1-P-1426

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

(United Transportation Union
PARTIES TO DISPUTE: (
(Paducah and Louisville Railway

STATEMENT OF CLAIM:

"Claim of Engineer/Conductor E. A. Puckett for removal of discipline assessed to his personal work record and payment for time lost when serving a sixty (60) day 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 April 15, 1997, the Carrier received a complaint from one of its customers that a coal train on which the Claimant was assigned as the Engineer was observed to be operating at an excessive rate of speed. Thereafter, the Carrier directed the Claimant to report for a formal Investigation into such matter.

Following a Hearing into the reported incident, the Claimant was notified by letter of May 12, 1997 that he was determined to have, in fact, operated his train at excessive speeds on April 15, 1997, and that for such violation of certain stated Rules he was suspended for 60 days, beginning April 18, 1997 and ending June 16, 1997.

Since the Hearing also served as a revocation of engineer certification Hearing as specified in 49 CFR 240.307, the Claimant was notified that his engineer certification was revoked for a period of 30 days beginning April 18, 1997 and ending May 17, 1997. The matter of revocation of the engineer certification is the subject of a separate dispute, or a matter not here before the Board in this case.

In reviewing this docket the Board finds that it may not reach the merits of the dispute in that the Carrier failed to provide opportunity for the Claimant and his representative to confront and question the individual who was purported to have downloaded the event recorder from one of the three engines assigned to the Claimant's train, namely, the Supervisor of Locomotive Engineers for the Illinois Central Railroad (ICR).

Rule 34, section 1(c), of the Controlling Agreement prescribes that the Carrier shall have the responsibility of producing sufficient witnesses to develop the facts concerning the incident or occurrence being investigated.

Since the Carrier controlled the Investigation, it had the duty and responsibility of developing the facts in a fair and impartial manner. In failing to produce the ICR Supervisor, and instead presenting one of its own Carrier supervisory officials to interpret the download data as placed on a disc by the ICR, the Claimant's right to a full and fair Investigation was abridged. Certainly, testimony of the ICR Supervisor was material to a determination as to his qualifications for downloading the data, the manner in which the event recorder was downloaded, when it was last calibrated for accuracy, and other related matters concerning the operating condition of the engine units. It is also noteworthy that no certification of authenticity of the disc was provided to the Carrier by the ICR Supervisor.

The Carrier witness, for example, said that he thought that there was a 90-day inspection requirement for the event recorder, but he had no proof that the engine in question had been subjected to such an inspection, but he had "no reason to think otherwise." The Carrier witness also admitted that he "did not have any maintenance records at all on the locomotive or anything concerning it." And, the Carrier witness essentially admitted that there was some problems in putting the Carrier Quantum system program data together with the Pulse brand system used by the ICR for the event recorder on the engine unit at issue.

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In addition, while only one event recorder was downloaded, the record shows that the Claimant had operated the train from one of the three engine units for part of the assignment, and from another unit for the balance of the assignment. Therefore, as the Organization points up, even assuming, arguendo, that the presence of the ICR Supervisor was to be overcome, the event recorder from the other engine unit that was used in operation of the train should likewise have been downloaded for the purpose of a comparison of any variations between the two event recorder units.

It is firmly settled in the Law of Labor Relations that the burden of proof squarely rests upon the employer to convincingly demonstrate that an employee is guilty of the offense upon which his or her disciplinary penalty is based. Thus, the Carrier having failed to produce witness testimony material to a determination of the charge, it is difficult to hold that the Claimant can validly be held to have been shown to have operated his train at an excessive rate of speed. The claim before us must therefore be sustained.

In view of the conclusions stated above, the Board finds it unnecessary to rule on the various procedural objections advanced by the Organization, and we express no opinion on the validity of such argument.

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 14th day of May, 2001.