

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25422
Docket No. 45011
03-1-00-1-U-2205

The First Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(N. H. Buchanan (D. E. Thompson)

PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of Engineer N. H. Buchanan for thirty (30) days lost wages given the FRA Locomotive Engineer Review Board's decision to disapprove the Carrier's decision to revoke Engineer Buchanan's certification for thirty (30) days."

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 September 5, 1997, the Carrier conducted an Investigation and FRA Hearing in connection with an incident involving a collision of train operated by the Petitioner with cars of another train on September 1, 1997. As a result of this Investigation, the Carrier revoked the Petitioner's certificate for 30 days, and it assessed a Level 2 to the Petitioner's personal record. The BLE thereafter appealed the Carrier's decision to revoke the Petitioner's certificate, asking the FRA LERB to review the matter, and also progressed an appeal of the assessed discipline. The Carrier agreed to remove the Level 2 discipline from the Petitioner's record, and the LERB issued a decision disapproving of the Carrier's revocation of the Petitioner's certification. The Carrier thereafter requested a 409

Hearing, and the FRA Administrative Hearing Officer issued an "order of dismissal," bringing the revocation issue to a close. The Organization then sought pay for the Petitioner's 30 days of lost time, pursuant to the November 1998 Letter of Understanding between the Carrier's Director of Labor Relations and the Organization's then General Chairman. The Carrier refused to pay the Petitioner for this lost time, and the Petitioner filed the instant claim.

The Petitioner contends that given the November 1998 understanding, as well as the number of identical claims that have been paid both prior to and subsequent to this case, the instant claim is valid. The Petitioner argues that given the awards regarding payment, or nonpayment, of lost time subject to decisions of the LERB, there should be no doubt of the Carrier's knowledge and understanding of the policy regarding payment for lost time in cases where the LERB rules that revocation was improper. The Petitioner contends that the facts of this case regarding time lost due to the revocation are essentially the same as the facts in those Board decisions in which claimants were awarded lost time when certification revocation was reversed by the FRA. The Organization ultimately contends that the claim should be sustained.

The Carrier argues that the instant claim should be dismissed because it was not handled in the usual manner on the property; it was out of time. The Carrier asserts that the claim was based on the LERB decision, but it was not handled as a claim, but rather as a simple request to allow additional compensation. The Carrier additionally argues that the claim should be denied based upon the long line of First Division Awards holding that LERB decisions are separate from RLA actions, and the Division has no jurisdiction to award remedies as a result of LERB decisions.

The Carrier maintains that for the Board to have jurisdiction over a claim, the claim must have been handled "in the usual manner" on the property. The original discipline appeal in this matter was handled in the usual manner, and it was settled by letter agreement. During the same time, a separate governmental action was processed, involving the revocation of the Petitioner's Engineer's certificate. The Carrier argues that more than 18 months after the discipline appeal had been settled, the General Chairman asked, in conversation, that the Petitioner be allowed 30 days' pay because the LERB had reversed the de-certification. This request was followed up by faxes, and then simply forwarded to the First Division. The Carrier argues that this was not the "usual manner" of handling disputes on the property, and the claim should be dismissed for that reason alone.

The Carrier then emphasizes the long list of Awards refusing to consider claims based on the handling of the LERB for lack of jurisdiction. The Carrier maintains that the appeal process before the LERB is outside the realm of the Railway Labor Act, and the Board therefore has no jurisdiction over such matters. The Carrier argues that confusion occurs when, as often happens, the Carrier issues discipline for the same occurrence that resulted in the revocation of an Engineer's license. In the appeal of Carrier discipline in such a case, it is difficult to ignore the workings of the parallel handling before the LERB. As a result, claimants often try to convince the First Division to award lost pay caused by the application of the FRA's licensing regulations. The Carrier emphasizes, however, that if it chose not to issue discipline in a case that nevertheless required decertification for some period of time, the Board would have no jurisdiction to consider a claim for lost time, because the time loss did not occur as a result of any action involving the contracts between the Carrier and the Organization.

The Carrier contends that in the instant matter, the Level 2 discipline assessed the Petitioner required only one day off with pay. The FRA regulations, however, required a 30-day suspension of the Petitioner's certificate, during which time the Petitioner was unable to work. The Carrier maintains that the Petitioner's loss of pay was not as a result of any contract between the Carrier and Organization, and his claim for lost pay does not properly belong before the First Division. The Carrier asserts that the Board should follow its own precedent and refuse to award compensation as a result of the LERB's action.

As for any reference to an earlier settlement of a similar claim as precedent for requiring payment of the instant claim, the Carrier argues that the earlier settlement stands for the proposition that the Carrier will consider payment of claims only to the extent the Carrier's discipline caused a loss of pay should a LERB decision overturn a decertification. The Carrier maintains that it never was intended that the Carrier would, by the terms of that settlement, agree to pay for all time lost as a result of FRA action when the Carrier's discipline had little or no cause of the lost pay. The Carrier contends that the claim should be denied in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board has reviewed the record in this case, and we find that the Petitioner has shown with sufficient evidence that the Carrier must reimburse the Petitioner for the 30 days of lost wages given the FRA Locomotive Engineer Review Board's decision to disapprove the Carrier's revocation of the Petitioner's certification.

The ruling by the Chairman of the Locomotive Engineer Review Board issued on July 13, 1998, states:

"Based on its review of the information provided, this Board finds that UP's revocation of Petitioner's certificate was in error because the September 3 charging letter to Petitioner failed to provide sufficient notice to Petitioner concerning the pertinent alleged violations.

* * *

... Based on these findings, the Board disapproves UP's decision to revoke Petitioner's certification. . . . The Board's disapproval decision shall be shown on all UP records, notations, or references that specifically identify Petitioner, on all records that are kept in accordance with 49 CFR Part 240, and on any records that contain references to UP's revocation decision."

Consequently, it is clear to the Board that there was no basis for the UP's revocation of the Petitioner's certificate. Since the Petitioner lost 30 days of pay as a result of the wrongful action taken by the Carrier, the Board finds that the Carrier must reimburse him for the time lost.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Petitioner(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 April 2003.