

PUBLIC LAW BOARD NO. 4081

PARTIES	CHICAGO AND NORTH WESTERN )	
	TRANSPORTATION COMPANY )	
	)	AWARD NO. 35
TO	AND )	
	)	CASE NO. 37
	BROTHERHOOD OF LOCOMOTIVE )	
DISPUTE	ENGINEERS )	

STATEMENT OF CLAIM:

The BLE-C&NW General Committee requests the DIVISION (sic.) compensate Engineer S. M. Alberg Consolidated Seniority District Northern No. 4 for all time lost, including time spent at the investigation, and that his record of five days suspension be removed from the C&NW Discipline System. Additionally, that Claimant be compensated for the improper Federal Railroad Administration (FRA) 30 days suspension which has already been stricken from his record by the FRA. Claimant was investigated on July 1, 1992 on the following charge:

'Your responsibility for your failure in connection with the derailment and damage to MP642141, MILW 67234, CR 627272 and eight (8) other cars at MP 30.5, Roberts, Wisconsin, on the Eau Claire Subdivision at approximately 1305 hours on June 28, 1992 and your violation of Federal Regulation CFR Part 240.117(E), while you were employed as (head end) Engineer on 6898 East, EMPRA.'

Copy of transcript attached as Employees' Exhibit A. Claim premised on B.I.F. Schedule Rule 38(a) attached as Employees Exhibit B, Federal Regulations 49 CFR Part 240.117, attached as Employees' Exhibit C.

HISTORY OF DISPUTE:

On June 28, 1992 Claimant was operating the first of three head units of a 9240 foot train (EMPRA, 6898 East) proceeding from Minneapolis, Minnesota to Altoona, Wisconsin. The train had pusher or helper service consisting of two units on the rear of the train operated by a Helper Engineer. The train stopped near Roberts, Wisconsin at MP 30.5 to detach the helper units. At the time there was a Conductor in the cab of the lead unit with Claimant as well a Conductor in the cab with the Helper Engineer. There was a derailment of eleven cars rear of the midpoint of the train.

By letters of June 30, 1992 the Carrier notified all four crew members to appear for investigation on the following charge: "Your responsibility for your failure in connection with the derailment and damage. . . ." Additionally, both Engineers were charged with ". . . violation of Federal Regulation 49 CFR Part 240.117(e). . . ." The letters set the investigation for July 1, 1992, and the investigation was held on that date.

By letters of July 10, 1992 the Carrier notified Claimant that as a result of the investigation he had been found guilty of the charges. One letter assessed Claimant the following discipline: "Five (5) Days Suspension effective July 10, 1992 (You are now subject to the Discipline System)." The other letter notified Claimant that "[E]ffective July 10, 1992 your Locomotive Engineers Certificate is revoked for 30 Days, for violation of FRA Regulation 49 CFR Part 240.117(e)." The Helper Engineer was found guilty of the same rules violations and assessed the same discipline except he was suspended for ten days. That discipline is the subject of Case No. 38 before this Board.

The Organization grieved the discipline. The Carrier denied the grievance. The Organization appealed the denial to the highest officer of the Carrier designated to handle such disputes. However, the dispute remains unresolved, and it is before this Board for final and binding determination.

FINDINGS:

The Board upon the whole record and all the evidence finds that the employees and the Carrier are employees and Carrier within the meaning of the Railway Labor Act, as amended, 45 U.S.C. §§151, et seq. The Board also finds it has jurisdiction to decide the dispute in this case. The parties waived hearing.

At the outset the Organization raises the procedural objection that the Carrier failed to hold the investigation within the time limits of Schedule Rule 38(a) which provides in pertinent part that "[T]he investigation shall ordinarily be held within three days; . . . ." The record does not substantiate a violation of the rule as alleged by the Organization. The derailment occurred June 28, 1992, and the investigation was set for and held on July 1, 1992. Clearly, the investigation was held within the time limits of the rule.

With respect to the merits of the case, it is the Carrier's position that the record substantiates Claimant's violation of operating Rule 763 in that Claimant did not communicate to the Helper Engineer in connection with the stop at MP 30.5 that Claimant was going to or had applied dynamic braking and had made a brake pipe

reduction. The Carrier emphasizes that the Helper Engineer, not knowing those facts and having experienced a run out in slack action, had placed the throttle on the helper units in the first or second position to ease further slack run out thus causing the derailment. Under these circumstances, argues the Carrier, the discipline was fully justified.

The Organization responds that Claimant and the Helper Engineer communicated to the extent required by Rule 763(a) which forces the conclusion that the record does not substantiate Claimant's violation of the rule. Moreover, urges the Organization, the FRA set aside the Carrier's finding that Claimant violated 29 CFR 240.117(e) and set aside the 30-day suspension based upon that finding thus warranting this Board in sustaining the claim for compensation lost by Claimant as a result of that suspension.

We believe the Organization has the stronger position with respect to the merits of this claim.

Operating Rule 763 provides in pertinent part that when a train has helper service the Engineer on the front of the train is in charge of any movement, minimum throttle setting must be used on the helper engine, the engine on the front of the train must be in a higher throttle setting, the helper engine must be the first to reduce throttle settings, dynamic braking is confined to the front engine with the helper engine in idle and the helper engine must be placed in idle when a brake pipe reduction is observed on the helper engine unless information from the Head Engineer states otherwise. However, nothing in the rule specifically requires that the Head Engineer communicate to the Helper Engineer that he is placing the train in dynamic braking or making a brake pipe

reduction in connection with stopping the train. The Carrier would have us infer such a requirement from the aforesaid pertinent provisions of the rule as well as from the facts that the train was unusually long and being operated in undulating territory thus presenting unusual handling problems. However, all four employees testified at the investigation that Claimant's handling of the train in connection with the stop as well as his communication with the Helper Engineer were in accordance with established practice. While the Carrier disputes that assertion, the fact remains that the weight of the evidence supports it. Accordingly, we do not believe the record substantiates Claimant's violation of Rule 763.

We believe the foregoing conclusion is buttressed by the April 15, 1994 Decision of the FRA Locomotive Engineer Review Board finding that there was no substantial evidence supporting the conclusion that Claimant had violated 49 CFR 240.117(e)(3) providing in pertinent part that "[A] railroad shall consider violations of its operating rules and practices that involve: . . . (3) failure to adhere to procedures for the safe use of train or engine brakes; . . . ." In the course of its Decision that Board reviewed pertinent provisions of Rule 763 and found that the record did not substantiate Claimant's violation of the rule. While this Board is not bound by the Decision, we find it highly persuasive.

Turning to the remedy sought by the Organization in this case, again we must find that the Organization has the stronger position. Having found that the record does not substantiate Claimant's violation Rule 763, it follows that the Carrier's finding to the contrary must be set aside, his record cleared of the five-day suspension and

compensation afforded for all time lost in connection with the investigation and suspension. It also follows that the five-day suspension properly could not trigger application of the Carrier's Discipline System. Although a copy of Claimant's service record submitted into evidence before this Board by the Organization indicates that Claimant was removed from the Discipline System on May 16, 1994, that fact does not alter the conclusion that the Carrier improperly placed Claimant in the Discipline System as a result of the incident in this case.

Nor is the Carrier's argument well founded that this Board has no jurisdiction to award compensation to Claimant for the time he was suspended as a result of the Carrier's finding that he violated applicable FRA Regulations. By letter of March 25, 1992 from the FRA Administrator to the Organization's President the FRA makes clear that by implementation of the rule at issue in this case the FRA did not intend to foreclose proceedings under Section 3 of the Railway Labor Act, 45 USC §153, for recovery of compensation lost as a result of an improper finding by a Carrier that an Engineer violated the FRA Regulation. Indeed, the letter makes clear that the FRA intended that avenue to be open to Engineers to recover such compensation. Accordingly, the claim in this case for compensation for the period Claimant's Locomotive Engineers Certificate was revoked by the Carrier in connection with the incident in this case is valid for the twenty-five days the license was suspended in addition to the concurrent five-day suspension from work for which Claimant is to be compensated separately as provided in this award.

Carrier's Dissent to Award Nos. 35 & 36 of PLB 4081

Carrier dissents to the Board's finding of jurisdiction to award lost time caused by the application of the FRA decertification regulations covering engineers. The award does not represent the main-stream line of awards covering this matter. See Award 10 of PLB 5527 (BLE vs Springfield Term Ry Co - O'Brien, 1996):

"This Board submits that issues involving engineer certification under Title 49 Part 240 of the Code of Federal Regulations are beyond our jurisdiction. They involve matters of federal law over which we have no authority. This Board agrees with those prior tribunals that have also declined to address issues related to FRA certification of locomotive engineers. (See SBA 183, Award Nos. 2, 19 and 20)."

Also, Award No. 11 of PLB 5663 (UTU vs BN - Cluster, 1995):

"The claim for compensation involves interpretation not of the collective bargaining agreement but of the Code of Federal Regulations, which is not within our jurisdiction to construe. If the thirty-day suspension had been imposed as a matter of discipline for rule violation in this case, we would have no hesitation in sustaining the claim for lost time. But Carrier suspended Claimant's license based solely on the fact that his unit was moved resulting in running over a blue flag, and Carrier's apparent understanding that that fact alone, without any prior determination of fault on Claimant's part, required the revocation of his license under 49 CFR 240. Carrier made the suspension effective before it even sent him a notification of investigation, much less after it concluded that he was at fault. Thus the issue is whether Carrier was correct in its interpretation of the Federal Regulations, and that must be determined according to the dispute resolution process contained in 49 CFR 240, not by this Board.

Claim for removal of censure from Claimant's personal record sustained. Claim for compensation for earnings lost due to suspension dismissed for lack of jurisdiction."

Finally, 1st Division Award 24424 (BLE vs CNW - Mikrut, 1995):

"Given the above reasons, this Board is compelled to rule that the pending claim, which has been filed in this matter, must be sustained as presented. Having made the preceding determination, however, the Board is also compelled to rule that we have no jurisdiction to remedy the FRA's 30 days revocation of Claimant's Engineer's Certification. Such a matter involves a statutory appeal procedure; and the questions of whether or not said revocation was proper, and whether or not Carrier will be required to reimburse Claimant for lost wages incurred during the period of said 30 days license revocation will ultimately depend upon a ruling by the FRA which that agency has the sole and exclusive jurisdiction to make."

August 14, 1997

  
C. R. Wise - Carrier Member