

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6198**

**JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
T. M. STONE, CARRIER MEMBER
DON M HAHS, ORGANIZATION MEMBER**

**BROTHERHOOD OF LOCOMOTIVE ENGINEERS
SLSW, GENERAL COMMITTEE**

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER ST. LOUIS SOUTHWESTERN RY. CO.)**

**Award No. 13
Case No. 13
Engineer J. R. McDonough
Level 4 30-day Suspension**

*Date of Hearing - May 1, 2000
Date of Award - July 31, 2000*

Statement of the Issue

The Chairman and Neutral Member, after review of the entire record, has determined that the issue before this Board is:

Was Carrier justified in assessing Claimant Engineer J. R. McDonough Level 4 discipline of thirty (30) days actual suspension in connection with his alleged failure to obtain authority from the proper dispatcher to pass an absolute signal displaying the "Stop" indication on the Jonesboro Subdivision on July 8, 1999?

FINDINGS:

Public Law Board No. 6198, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein.

The dispute at issue herein concerns Claimant McDonough's alleged failure to secure proper authority in accordance with applicable Operating Rules prior to operating his southbound loaded coal train, 2CATGP, past the absolute red signal at Jonesboro Junction on Carrier's Jonesboro Subdivision on July 8, 1999. As background information germane to the incident at bar, the Board notes that the absolute signal in question is located at Mile Post 119.7 on the Jonesboro Subdivision, and is designated "Jonesboro Junction" in the Jonesboro Subdivision timetable. According to our understanding, that

selfsame signal represents the junction point between Carrier's Jonesboro and Wynne Subdivisions, and carries the designation "CPY 235" in the Wynne Subdivision timetable. To complicate matters, these two subdivisions are controlled by two different train dispatchers; Dispatcher 16 controlling the Jonesboro Subdivision on radio frequency 14-14, and Dispatcher 34 controlling the Wynne Subdivision on radio frequency 24-24. As a matter of operating practice, the Jonesboro Junction signal, (CPY 235 per our previous note), is controlled exclusively by the Jonesboro Sub dispatcher on frequency 14-14, and the first signal encountered by southbound train crews on the Wynne Sub, designated "CPY 236", is controlled exclusively by the Wynne Sub dispatcher on frequency 24-24. As a consequence of this practice, then, southbound crews proceeding from the Jonesboro Subdivision onto the Wynne Subdivision by the Jonesboro Junction (aka. CPY 235) absolute signal, are required to change radio frequencies from 14-14 to 24-24 in order to communicate with the Wynne Sub dispatcher in authority from that point southward.

With this background, the Board examines the complex chain of events of July 8, 1999 leading to Claimant's discipline. According to all the evidence, Claimant, an engineer with an exemplary 30-plus year service record, and his conductor (himself in possession of 35 incident-free years of service), were operating 2CATGP southbound on the Jonesboro Sub (with intent to diverge onto the Wynne Sub at Jonesboro Junction), when they encountered the approach signal to Jonesboro Junction displaying the yellow aspect. Unknown to the crew, three Carrier officers, conducting operating rule efficiency tests in the area, had shunted the track circuit south of CPY 236, causing *both* CPY 236 and Jonesboro Junction (CPY 235 per the Wynne Sub timetable) absolute signals to display STOP indications for southbound train movements. As such, the approach to CPY 235 was properly yellow. Claimant proceeded by the yellow signal at the speed prescribed by Carrier's General Code of Operating Rules and stopped before any part of his train passed the red absolute Jonesboro Junction signal.

Prior to stopping at the red Jonesboro Junction signal, the crew of 2CATGP prematurely switched radio frequencies from the Jonesboro Sub frequency of 14-14 (over which they had properly been communicating up to that point), to the Wynne Sub frequency of 24-24, and attempted, in error, to obtain permission from the Wynne Sub dispatcher to pass-by after the stop. (It has been noted above that the Wynne Sub dispatcher possessed no authority to grant the a request.) As if that were not enough, the Wynne Sub dispatcher *did* respond to that call, *and erroneously identified himself as the Jonesboro Dispatcher*. The record contains the following transcription of that crucial exchange:

Dispatcher:	Jonesboro Sub dispatcher, over. (In actuality, the Wynne Sub Dispatcher is talking here.)
Train:	(inaudible) ... it looks like we have got a stop signal down here, over.

Dispatcher: I have got two people talking at once. Loaded coal train, you are correct. I have got a track indication on the switch at Y236. Can you see the signal from your location, over? (Emphasis added)

Train: (No response)

Dispatcher: Loaded coal train coming at Jonesboro Junction, over.

Train: Yes, we can see the signal.

Dispatcher: What is your lead engine, over.

Train: It's a UP 8270 south, over.

Dispatcher: Up 8270 south, after stopping at control point Y236, you have authority to cross signal as far stop indication main track, to the main track southbound move, over. (Emphasis added)
(Transcript of investigation at pages 42 and 43):

Claimant and his conductor, believing, albeit in error, that they had received permission to pass the red signal at Jonesboro Junction (CPY 235), proceeded as directed by the dispatcher, after completing their stop. Carrier officers performing the safety efficiency test, were listening to radio transmissions on both channels 14-14 and 24-24, and were aware at the time that Claimant's crew had asked the wrong dispatcher for permission to pass the red absolute signal at Jonesboro Junction and that the dispatcher authorized the crew to proceed. After verifying the fact that authority to proceed had never, in fact, been correctly granted by the *real Jonesboro Sub dispatcher* on frequency 14-14, they stopped the train and removed both crew members from service pending investigation.

Subsequent to the events of July 8, 1999, Claimant was directed to attend a formal investigation, prior to which the Organization's Vice General Chairman, Mo. O. Coats, made the following pertinent written request by letter dated July 15, 1999:

I request that said investigation be postponed until Friday, July 23, 1999. I also request a copy of the event recorder printout for a period of time of ten (10) minutes prior to and ten (10) minutes subsequent to incident in question. I also request a transcribed copy of the voice tapes denoting any conversation between the crew of the train in question and the

dispatcher that authorized said train by the signal. We request that said dispatcher be called as a witness in this investigation.

The investigation was, in fact, conducted on July 23, 1999, during which two out of three of Vice Chairman Coats' above requests were summarily denied. The event recorder tapes were not downloaded for review, nor was either dispatcher involved in the incident present for questioning and cross-examination. (It is also noted for the record that dispatcher voice tape transcriptions were not made available to the Organization as requested, but pertinent portions of the tapes themselves were played during the hearing and subsequently entered into the transcript of investigation.) The Board further notes that the July 23, 1999 hearing, in addition to serving its fact-finding purpose under the controlling Agreement, also satisfied the procedural requirements for investigation as specified by the Federal Railroad Administration in 49 CFR Part 240, Qualification and Certification of Locomotive Engineers, and the resultant revocation of Claimant's Engineer Certification was duly appealed before that authority. Subsequent to the hearing, Claimant was assessed Level 4 discipline of thirty (30) days actual suspension, the propriety of which is now before us for final disposition.

Upon review of the entire record, this Board is persuaded by the Organization's threshold argument that Claimant was deprived of due process when Carrier refused to summon the Jonesboro and/or the Wynne Subdivision dispatcher to the hearing in accordance with the Organization's request under controlling Article 44. The Board is concerned by the substantive voids in the record as an unquestionable result of their absence; voids which may have totally exonerated Claimant at best or mitigated his error at the very least.

A number of obvious questions come to mind when considering the events of July 8, 1999, none of which were adequately addressed by the taped dispatcher/train exchanges made part of the hearing record. For example, why on earth did the Wynne Dispatcher misrepresent himself to the crew as the Jonesboro Dispatcher, frequency 24-24 notwithstanding? What did he mean when he addressed the "train coming at Jonesboro Junction"...(transcript of investigation at pages 42 and 43). Did he really mean the train passing Jonesboro Junction, since he had no practical authority to control that signal? What were normal operating practices between the Jonesboro and Wynne Sub dispatchers in directing movements of southbound trains approaching the Jonesboro Junction signal with intent to diverge onto the Wynne Subdivision? Was there conversation between the Jonesboro dispatcher and the Wynne dispatcher at the time of this incident; indeed were they able to communicate with the instant train crew on each other's designated radio frequency? What, if anything, were they told by Carrier officials with respect to the efficiency test being conducted on Claimant's train? None of these critical questions were satisfactorily resolved during the investigation process because the dispatchers involved were not made available for questioning.

And, apparently, according to the record, the Locomotive Engineer Review Board of the FRA agrees. It independently concluded, as have we after careful consideration, that the conduct of the July 23, 1999 hearing was so seriously flawed by Carrier's refusal to call two crucial witnesses, that the final outcome was rendered, in effect, questionable in its most favorable light. The LERB found as follows with respect to the revocation of Claimant's Engineer Certification subsequent to the July 8 incident:

Point (5) of findings:

When considering procedural issues, the Board's standard for review will be to determine whether substantial harm was caused the petitioner by virtue of the failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision. 58 Fed. Reg. 18982. [900] (Apr. 9, 1993)

Point (6) of findings:

Petitioner was substantially harmed by the presiding officer's decision to deny Petitioner's requests for the dispatchers to be available for questioning. See Letter from M.O. Coats, BLE Vice Chairman to Jerry Everett, UP Superintendent (July 15, 1999) and Transcript at 12-15, 24-25, 36-37, 40-41, 44, 92-93, 118. Examination of both dispatchers was essential to developing the facts and may have led to evidence exonerating Petitioner. (Emphasis added.)

Based on these findings, the Board finds that UP improperly revoked Petitioner's certificate because the railroad failed to provide fair procedures for a hearing pursuant to Section 240.307 and hereby grants the petition in accordance with the provisions of Title 49. Part 240 of the Code of Federal Regulations.

While this Board's function under the Railway Labor Act and that of the LERB remain separate and distinct in terms of stated purpose, we are, in instances of bona fide prejudice, held to the same standard. We, too, find that Claimant's right to a thorough probing into all facts and circumstances playing into the events of July 8, 1999 was substantially damaged by Carrier's arbitrary disregard of Vice Chairman Coats' repeated requests to question and/or cross-examine the dispatchers involved. This Board stands firm in its judgment that a hearing officer is not privileged to avoid or manipulate evidence (in this case by disallowing pertinent testimony), and in so doing, steer an investigation toward an outcome favoring charges that have been leveled against an employee.

Therefore, the instant claim will be sustained in its entirety, without prejudice to its merit, on the basis that Claimant was denied a fair and impartial investigation as

required by the Agreement. Carrier is hereby directed to remove the Level 4 suspension at bar and all references to the events of July 8, 1999 from Claimant's service record, and compensate him for any and all time lost as a direct result of that discipline.

AWARD

The issue before this Board:

Was Carrier justified in assessing Claimant Engineer J. R. McDonough Level 4 discipline of thirty (30) days actual suspension in connection with his alleged failure to obtain authority from the proper dispatcher to pass an absolute signal displaying the "Stop" indication on the Jonesboro Subdivision on July 8, 1999?

is answered in the negative, "No." The Claim is sustained as set forth in the findings.

ORDER


Carrier is directed to comply with this Award within thirty (30) days of the date indicated below.



John C. Fletcher, Chairman & Neutral Member



T. M. Stone, Carrier Member



Don M Hahs, Organization Member

Dated at Mount Prospect, Illinois, July 31, 2000