

The First Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Engineer D. M. Menas and Fireman J. C. Braun, Eastern Division (formerly known as Northern Division), request that they be compensated for all time lost while they were held from service between March 17, 1987 and June 12, 1987, or the day they actually began performing service for carrier after their reinstatement to service on June 12, 1987. Claimants had been dismissed on the following charge:

'Your responsibility for your failure to comply with applicable instructions and rules governing Automatic Interlocking at Watertown, WI, causing Soo Line train to make emergency brake application, and your failure to promptly report this incident to proper authority while assigned as a crew member on Extra 4481 West at about 10:20 a.m., Monday, March 16, 1987.'

Copy of transcript attached as Employees' Exhibit A.
Claim premised on BLE Rule 41 and UTU-E Rule 41, as revised.
Copies attached as Employees' Exhibit B."

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

On March 16, 1987, Claimants were operating as an Engineer and Fireman on Extra 4481 West at Watertown, Wisconsin. At approximately 10:15 A.M., they approached the automatic interlocking plant for the Soo Line - C&NW crossing and found the absolute signal at the crossing indicating red (Stop). The head brakeman for the assignment walked to the signal control box and started operating the release mechanism so that the engines could flag thru the crossing. While waiting for the delay time mechanism to clear, a Soo Line train approached the crossing, made an emergency brake application and stopped twelve to sixteen car lengths beyond the diamond (crossing.)

On March 18, 1987, Claimants were notified to appear at joint C&NW/Soo Line investigation on a charge of:

"Your responsibility for your failure to comply with applicable instructions and rules governing Automatic Interlocking at Watertown WI, causing Soo Line train to make emergency brake application, and your failure to report this incident to proper authority while assigned as a crew member on Extra 4481 West at about 10:20 a.m., Monday, March 16, 1987."

Following the conclusion of the hearing both Claimants were notified that they were disciplined with dismissal. The appeals on the dismissals were handled in the customary fashion up to and including Carrier's highest designated officer for such matters. In this handling the parties agreed that if Claimants could successfully pass a polygraph examination concerning the incident they would be returned to service, and the Organization could process the issue of wage losses to this Board. Both Claimants were administered tests on May 13, 1987. The results of the examination were released on May 21, 1987, and Claimants were reinstated to service on June 12, 1987.

Claimants' investigation got underway at 9:16 A.M. It was not concluded until fifteen hours later, at 12:05 A.M. The transcript is nearly 300 single spaced typewritten pages. Five employees were charged and all testified. Eleven Supervisors and employees (5 C&NW and 6 Soo Line) also were questioned. Questions were asked, sometimes at the same time, by one C&NW Officer and one Soo Line Officer who acted as "co-interrogating officers." Representatives of two Organizations were also present and actively participated in the hearing. A number of exhibits, including pictures of the plant, track diagrams and recorder tapes, were made a part of the record. Statements from non-employee witnesses, including a police officer, were also accepted. Both the Organization and the Carrier, in their Submissions before this Board, commented on the conflict in facts contained in the transcript.

For instance Carrier stated:

"*** The transcript of the investigation shows a definite conflict in facts as developed at the investigation. The question before this Board is whether or not there was substantial evidence in the record upon which the Carrier could reasonably conclude that Claimants were responsible as charged. The evaluation as to the credibility of the witnesses was reserved to the officer making the determination concerning discipline."

We agree completely with the first two sentences and agree with the third sentence in those instances where the officer making the determination concerning discipline was also the officer which conducted the investigation. However, if he did not conduct the investigation he did not observe the demeanor of the witnesses and was not qualified to make findings as to credibility. In this regard see Third Division Award 13180, wherein the Board stated:

"There is conflicting testimony in the transcript of the hearing as to material and relevant facts. Only the hearing officer who presided at the hearing and observed the demeanor of the witnesses was qualified to make findings as to credibility. He did not do so. In the absence of resolution of credibility by the hearing officer, it cannot be determined whether there is substantial evidence to support the findings made by General Agent Key."
(Underscoring added.)

In this matter the investigation was conducted jointly, by the Transportation Superintendent of the C&NW and the Superintendent, Terminal and Road Operations, of the Soo Line. The discipline was issued by the Assistant Vice President and Division Manager of the C&NW.

Nonetheless, study of this record indicates to us that there is no clear showing that Claimants "failed to comply with applicable instructions" (the basic charge) when operating in the area of the interlocking plant at the time of the incident. In order to determine that Claimants failed to comply with applicable instructions it would be necessary to make a host of credibility evaluations on the plethora of testimonial conflicts present in the record. With one exception, dealing with motive, (admittedly a persuasive indicator of conduct), this does not seem to have been the case here.

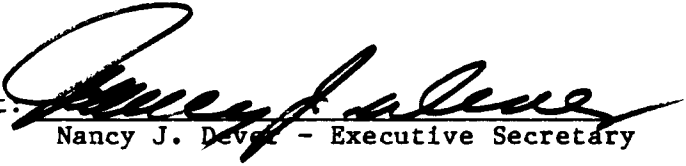
Accordingly, we are unable to find that the Investigation transcript contains adequate evidence to support a finding that Claimants were guilty of the charge of failure to comply with applicable instructions and rules governing automatic interlocking movements. The discipline cannot be allowed to stand. The Claim will be sustained. Claimants to be compensated for time out of service, less deduction for outside earnings.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest.


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1989.