

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISIONAward No. 24404
Docket No. 44109
94-1-92-1-S-6564

The First Division consisted of the regular members and in addition Referee M. David Vaughn when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
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(Springfield Terminal Railway Company

STATEMENT OF THE CLAIM:

"Claim is presented on behalf of Claimant, Engineer J. F. Hines, for removal of discipline assessed, and payment of all time lost, as a result of hearing held February 20, 1992, and discipline assessed of 15 marks by notice dated March 5, 1992. Claim is supported by MEC/PT Agreements in effect, Article 18, 41 and 47."

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 waived right of appearance at hearing thereon.

Claimant is employed by the Carrier as a Engineer. On February 4, 1992, Claimant was operating Train MAWA. At 0730, near Mile Post 98, a coupler knuckle fractured and the train broke in two, resulting in delay.

The Carrier convened an Investigation to ascertain Claimant's responsibility for "failure to perform[his] duties" at the time and place of the separation. The Investigation was held on February 20, 1992.

The Carrier interviewed Claimant shortly after the incident and, according to the Carrier officials who conducted the interview and who testified at the investigatory hearing, Claimant said that the train had been travelling over poor track over undulating territory at approximately 20 miles per hour ("mph") in notch eight and that he reduced the throttle to the fourth notch at mile post 96, after cresting a hill, and made a 10 pound application of air, released them, and then reapplied the air brakes at seven or eight pounds, when the train broke in two and went into emergency.

At the hearing, Claimant testified that he had applied, and maintained, a minimum brake application, and then reduced the throttle a notch at a time until he reached the proper throttle modulation.

Claimant's testimony at the hearing, summarized here, is consistent with proper train-handling. The statements he is alleged to have made shortly after the incident, by contrast, do not appear to be. In particular, Claimant's alleged sharp reduction of the throttle after cresting the hill would not have been consistent with proper train handling.

In none of the testimony presented by the Carrier is there any direct explanation for what caused the broken coupler knuckle and resultant train separation. It is established that the track was poor and undulating, making train dynamics more variable and train handling more difficult. It is also established that the weather was extremely cold, a condition which makes metal more brittle, reduces the controllability of air brakes and changes the rolling resistance of trains.

Claimant conceded at the hearing that he may have given different statements immediately after the hearing as he did at the hearing. He testified, however, that the testimony he gave at the hearing was true.

At the hearing, the Organization objected to the lack of specific charges in the notice and, during the hearing, objected to the bias of the hearing officer in disallowing certain questions and interrupting responses concerning areas including proper operating practices, while allowing Carrier witnesses who had not witnessed the incident to testify on theory and speculation.

Following the Investigation, the Carrier assessed Claimant 15 marks for improper train handling. The Organization protested the penalty. The claim was progressed in the usual manner, without resolution; and it was referred to the Board.

Claimant had been disciplined for improper train handling on five previous occasions.

The positions of the parties were set forth in thorough written Submissions. They are briefly summarized as follows:

The Carrier argues that record contains substantial evidence of Claimant's failure to operate his train properly. It asserts that the Carrier properly gave more weight to Claimant's immediate post-incident statements than those made at the hearing. It asserts that those statements, which establish that Claimant reduced the throttle to notch four with the first brake application upon cresting the hill, establish his improper train handling. It discounted Claimant's later statements as having been prepared only after having been "prepped" by his representative; and it points to Claimant's concession at the hearing that his statements differed. The Carrier asserts that the penalty was lenient, in light of his five previous violations of proper train handling. The Carrier urges, therefore, that the Claim be denied.

The Organization argues that the Carrier improperly relied on evidence outside the hearing in the form of Claimant's alleged pre-hearing statements to Carrier officials, in violation of the requirement that the Carrier's decision must be based on the hearing and in violation of Claimant's due process rights. It also argues that the Carrier improperly considered Claimant's prior record to establish his guilt of the charge at issue in this proceeding. The Organization also argues that the charges were not sufficiently specific to meet the Carrier's obligation and to allow the Organization to prepare its defenses. The Organization asserts that the Carrier failed to prove its case, since there is no direct evidence as to the cause of the broken knuckle and no way to exclude causes other than Claimant's substandard performance. It points out that the evidence of Claimant's misconduct is all circumstantial: there is no single hypothesis to which the circumstances point and, therefore, no ability by the Carrier to exclude other causes for the broken knuckle. It asserts that equipment fails for reasons other than performance deficiencies on the part of employees and that the conditions present made such failure quite possible. The Organization urges, therefore, that the claim must be sustained.

The Board turns now to consideration of the positions of the Parties. We are not persuaded that the notice was so general as to violate Claimant's due process rights. The performance at issue was clear; and, from review of the transcript, the Organization was well prepared to defend the charges.

Neither is the Board persuaded that the consideration of Claimant's previous train handling violations was improper. It is well established that an employee's prior violations may not be used to establish guilt in a subsequent investigation. However, there is no indication that the Carrier used the information other than in assessing the proper penalty to be imposed.

A review of the Carrier's use of statements made by Claimant outside the hearing in the course of Carrier post-incident interviews with him indicates that it used the alleged statements - clearly hearsay - as part of its case and not merely to rebut or discredit Claimant's testimony to the contrary. The Board is not persuaded that such use was proper.

Moreover, the hearing record is replete with mixes of testimony from Carrier officials as to what constitutes proper train handling in the abstract and what would have been the proper response under the particular circumstances of the case. The Hearing Officer allowed Carrier officials to submit that general and speculative testimony, but restricted the Organization's opportunity to exclude or test such testimony and to submit similar testimony in response. This the Board is also persuaded was improper; and an overall reading of the hearing officer's conduct of the hearing indicates that the officer conducted the investigation in a partisan manner, effectively restricting Claimant's rights to challenge the Carrier's case and to put on its own defenses.

Finally, the use by the Carrier of circumstantial evidence to prove that Claimant's sub-standard performance caused the coupler knuckle to break required that the circumstances point to such performance as the cause of the break-in-two and that there be no other, equally plausible causes. This standard the Board also concludes the Carrier failed to meet. Indeed, the nature of the terrain over which the train operated, the poor condition of the track, and the extreme cold weather are each plausible factors in the occurrence of the break-in-two. Undoubtedly, those factors made Claimant's train handling difficult and quite possibly caused, or contributed to, the broken knuckle.

If the Carrier is to discipline engineers for improper train handling as a result of break-in-twos, it must afford their representatives opportunity to put in evidence on an equal and unbiased basis; and, if the charge is based on circumstance, must establish that the other plausible causes of the problem were not operative in the incident. This burden the Carrier did not meet in its charge against Claimant.

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 7th day of November 1994.