Award No. 29
Case No. 6702

PUBLIC LAW BOARD NO. 1007



PARTIES TO DISPUTE:

Brotherhood of Locomotive Engineers

Erie Lackawanna Railway Company

STATEMENT OF CLAIM:

"Claim of New York Division Engineer F. J. Pinkela requesting that a discipline entry be expunged from his personal service record and that he be paid for all time lost as a result of an investigation held on March 7, 1972."

FINDINGS:

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

The claimant engineer was in assigned through-freight service between Port Jervis, N.Y., and Croxton Yard. On February 24, 1972, the claimant handled Train NE-74, Port Jervis to Croxton, and on February 25, 1972, he handled Train CX-99, Croxton to Port Jervis.

On March 1, 1972, the Carrier sent a letter to claimant notifying him to attend an investigation "in connection with exceeding authorized maximum speed, on Train NE-74 on Thursday, February 24, 1972, also, exceeding the authorized maximum speed on Train CX-99 on Friday, February 25, 1972, between Croxton and Port Jervis." The investigation was held March 7, 1972. Thereafter, the Carrier found claimant in violation of certain operating rules and timetable instructions. The claimant was given a 20-day suspension for the violation.

In seeking to set the penalty aside, the Organization, in behalf of claimant, has contended there were a number of procedural defects and that the evidence does not support a finding of fault on the part of claimant.

(1) It is contended the claimant was not timely notified of the investigation. Paragraph (b) of Article 60 of the Engineers' agreement provides, in part:

"An employe, charged with an offense, will be notified in writing within seven (7) days from the date it is known the alleged offense occurred ...."

The notice, mailed March 1, 1972, charged claimant with violating maximum speed regulations on two days, February 24 and 25. The notice was received by claimant on March 3, 1972. The language of the rule is specific. It requires that the employe be "notified," i.e., receive the notice within seven days from the occurrence. See Award No. 80. Public Law Board No. 250, which involved the

same parties and the same rule. As to the occurrence on February 24, the notice was ineffective; but as to the recurrence on the 25th, the notice was received on the 7th day and is valid as to the charge relating to that day.

(2) The Organization contends the investigation was unfair because the presiding officer refused to receive certain evidence offered by claimant's representative. He offered the Dispatcher's record of the running time of the same trains for a period of 30 days. This evidence was properly excluded. Under the specific charge, the total elapsed time for the trips is not a factor. The running time of CX-99 on other days or on February 25 is not material to the issue of whether claimant at some point or points on the trip, Croxton to Port Jervis, operated his train at a speed in excess of the maximum speed established by regulations or instructions of the Carrier.

(3) It was also contended the Carrier had singled out the claimant for discipline and therefore had prejudged his guilt. This contention is premised on the fact that the conductor on NE-74 and CX-99 was not also charged along with the claimant. The decision of the Carrier not to charge the conductor is of no help to the claimant, who was at all times in control of the engine. If the conductor had evidence helpful to the claimant, he could have been produced as a witness. The record does not show that such a request was ever made. We do not find in the record any indication that the presiding officer was biased toward the claimant.

(4) It was also contended that the Carrier, in producing speed tapes at the investigation, had not complied with Paragraph 3 of the Supplemental Agreement of October 4, 1968. This provision of that agreement is as follows:

> "3. Speed Tapes:
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> When a speed tape is to be used as evidence against an engineer who is charged with an alleged speed violation, Carrier must show that such tape was removed from the locomotive which the engineer was operating at the time the alleged violation occurred, and that the speed recorder was accurate and in good working order."

The Road Foreman of Engines testified that when the CX-99 arrived at Port Jervis on February 25, 1972, he asked the claimant "how the speedometer was working." The claimant replied "it was okay." At that time claimant was told the tapes would be removed and was asked if he wanted to see them. He replied "No." The tapes were then removed and when calibrated, tests showed that the recorder showed an error of 1.4 m.p.h. at 10 m.p.h., to 2.8 m.p.h. at 50 m.p.h.

The record also shows that when the tapes were plotted to locations on the trip Croxton to Port Jervis they showed that the engine exceeded the maximum allowable speed at various places from 1.6 m.p.h. to 22.2 m.p.h.

The claimant testified that the recorder on Engine 3667 (CX-99) gave erratic readings at different points; that he checked the recorder for accuracy at different points and at different speeds, and found the recorder fast from 3 to 5 m.p.h. Claimant stated the reason he exceeded the maximum speed was due to the improper function of the speed recorder. It is noted, however,

that, using claimant's own calculation, he exceeded the maximum speed at various points, particularly in the area where there was a restricted speed of 25 m.p.h.

We have excluded from our consideration of the record all of the testimony relating to the speed of NE-74 on February 24, 1972, because the charge for violating rules on that date is barred under the rule. But, as to charge for rule violation on February 25 (Train CX-99), we find there is substantial evidence supporting the Carrier's determination the claimant was at fault.

As to the penalty assessed, we assume the Carrier, in fixing a 20-day suspension, considered that claimant had violated the speed rates on both February 24 and 25. Because we have excluded reference to any violation on February 24, we are reducing the penalty to 10 days. The claimant, therefore, should be paid for lost wages for 10 days.

AWARD: Claim allowed for 10 days at the applicable rate. The Carrier is directed to make the within award effective on or before 30 days from the date hereof.

/s/ Robert O. Boyd

Robert O. Boyd, Chairman

/s/ W. H. Jaco

W. H. Jaco, Employees Member

/s/ C. H. Zimmerman

C. H. Zimmerman, Carrier Member

Cleveland, Ohio

April 2, 1974