

PUBLIC LAW BOARD NO. 3953

AWARD NO. 174

CSX TRANSPORTATION INC.

VS.

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim of Conductor D. E. Walker for clear record and pay for all time lost (5 days) for alleged violation of Safety Rule 91, April 3, 1991.

STATEMENT OF FACTS: On April 3, 1991, Conductor D. E. Walker (hereinafter claimant) was assigned to CSX Train 470-02; at approximately 1000 hours such train was operating near Franklin, Virginia when claimant was allegedly observed by FRA Inspector G. S. L'Hommedieu to be working without wearing the required safety eye wear. Although the FRA inspector made no timely comment concerning the alleged violation, the following day he filed an official (inspection) report, which contained, inter alia, the following disciplinary remarks:

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g) Car Number or Subject	h) Descriptive Remarks
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Operating and Safety Rules	Observed CSX Crew 470 for compliance of carrier Operating and Safety rules The following deficiency was noted the conductor was performing his duties without wearing required personal protection equipment i.e., safety glasses.
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As a result of this report Claimant Walker was timely noticed to appear for an investigation. Prior to such investigation the carrier made a decision not to summon Inspector L'Hommedieu as the only witness, electing to enter his (sic) official report through the post-incident (hearsay) conversation between Messrs. L'Hommedieu and Assistant Portsmouth, Trainmaster E. B. Prater. During the hearing the organization's representative strongly protested the carrier's failure to have the FRA inspector available to testify, citing Article 2, Section 1(A) of the UTU/CSX Schedule Agreement; such contractual excerpt states in pertinent part as follows:

The accused will be permitted to attend the investigation, hear all evidence submitted, interrogate witnesses, and be represented by his choice of a duly authorized representative.

Following the protested hearing Division Manager J. A. Drake reviewed the record disregarded the procedural objections and published his conclusions, stating in pertinent part as follows:

* * * *

"Based on the facts and testimony presented during the course of this investigation, you were working as conductor on Train R47002 near Franklin, Virginia and at approximately 1000 hours you were observed by FRA Inspector G. S. L'Hommedieu performing your duties without Safety eyewear resulting in a deficiency report being entered by him.

Based on these facts and others presented, you are guilty of the violation of Safety Rule 91 that reads: 'Transportation Department employees must wear safety glasses with side shields when on or around engines or cars.'

For your responsibility in connection with this matter, you are assessed discipline in the form of Five (5) days actual suspension from service without pay. The application of this suspension will be withheld until such time you return to service and will commence on the first day you return to service...."

* * * *

Such decision was timely challenged by the organization (Local Chairman Foster) who described two fatal flaws as follows:

"Claimant was not afforded due process in the investigation that was held due to the fact that he was not afforded the privilege of questioning the witness who preferred the charge against him. The witness, Mr. G. S. L'Hommedieu, a federal inspector was not present at the investigation to give testimony. Our agreement under Article 30 (a) states that the accused will be permitted to interrogate all witnesses. Mr. L'Hommedieu was listed as a witness in the letter of investigation but was not present to be questioned. Documents prepared by him were presented and entered as Carrier's exhibit A yet Claimant could not question him about the document presented due to his being absent....

* * * *

Article 31 (f) states: When discipline is rendered requiring actual suspension, such suspension will commence ten (10) days following notice of suspension. Claimant's letter of discipline stated: The application of this discipline will be withheld until such time you return to service and will commence on the first day you return to service. This is a violation of Article 31 (a).—"

* * * *

Such appeal was summarily denied and the dispute was thereafter processed to this Board for final resolution.

FINDINGS: Under 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 this Board is duly constituted by agreement and has jurisdiction of the parties and subject matter.

The "witness appearance" obligations contained in the cited contract provisions has been interpreted by many Boards to only obligate the carrier to exert its best effort where witnesses are not employees or otherwise under management's control. In such circumstances, Boards have historically relaxed the rules of evidence (admissibility) in accepting prepared statements and/or hearsay evidence. However, in this particular dispute the

carrier appeared to make no reasonable effort to summon Inspector L'Hommodieu. Such inaction is exacerbated by the additional fact that there were no other witnesses, and the alleged violation appeared to be one which exclusively turned on personal observations. Although we are reluctant to ignore official documentary evidence prepared by an official (FRA) inspector, who is outside the carrier's employ, the FRA report in this instance does not identify the claimant by name; it only makes reference to a perceived time/assignment/conductor. Such omission is aggravated by the fact that such inspector admittedly talked (observed) to several other crewmen on Train 470-02, thus underscoring the importance of specific identification.

Based on the unique circumstances involved we believe the carrier erred in not exerting any effort to procure the only witness for cross examination. Although our ruling is rooted in the collective bargaining agreement, the parties are warned not to extend our (due process) ruling to disputes which are factually distinguishable.

We make no finding or ruling on the other procedural and/or substantive issues raised in this appeal.

AWARD: Claim sustained on procedural grounds as outlined in award.

Carrier is directed to implement this award within 30 days of the effective date hereof.

Don B. Hays
DON B. HAYS, Neutral Member

H. S. Emerick
H. S. EMERICK Carrier Member

A. L. Smith
A. L. SMITH, Organization Member

12-5-96
DATE