PUBLIC LAW BOARD NO. 5335

AWARD NO. 1
Case No. 1

PARTIES) United Transportation Union
TO)
DISPUTE) Duluth Missabe & Iron Range Railway Company

STATEMENT OF CLAIM:

Claim for Conductor Donald J. Long, allowing all lost earnings, including Crew Consist Payment and Productivity Sharing Allowance, and that credit for Railroad Retirement, Carnegie Pension Fund and or Transtar Pension Fund be afforded, and that all mention of this matter be expunged from the claimants record. That all monies lost and retrieved, be made available by separate check. This claim results from suspension served for the alleged violation of Rule #820 of the Consolidated Code of Operating Rules, Edition of 1980.
(From Organization's Submission)

FINDINGS:

Upon the whole record, after hearing, the Board finds the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law No. 89-456 and has jurisdiction of the parties and the subject matter.

By letter dated November 14, 1990, Claimant was notified by Carrier to be present at a formal investigation to be held at 10:00 A.M. on November 21, 1990, and that he was being "...charged with violation of Rule No. 820 of the Consolidated Code of Operating Rules, Edition of 1980, for failing to expedite departure of your train without avoidable delay on the 4:00 A.M. Minorca Road Extra on Wednesday, November 7, 1990."

After two (2) Organization requests for postponement were granted, the formal investigation was held on December 6, 1990, beginning at 10:03 A.M. and concluding at 12:43 P.M.

By letter dated December 20, 1990, Carrier's Hearing Officer advised Claimant that, based upon the transcript of the formal investigation, he had been found to have violated Rule 820 and, as a result, he was being suspended from work for a period of ten (10) calendar days commencing Monday, December 31, 1990.

The Organization appealed the Hearing Officer's decision through the normal appeal procedure, including conferences with the Superintendent and the Director of Personnel and Labor Relations. The Organization's final appeal was denied by the

Director of Personnel and Labor Relations by letter dated April 4, 1991.

On May 23, 1991, the parties wrote an agreement to establish this Public Law Board to handle this case and a companion case, also involving the same claimant. On December 4, 1992, the Organization requested the National Mediation Board to appoint a neutral member to serve as Chairman of the Board.

On January 28, 1993, the National Mediation Board made such appointment. Hearings were held in Duluth, Minnesota on March 23, 1993.

PROCEDURAL ISSUE:

The Carrier raised a procedural issue which must be addressed before proceeding. Carrier urges that this case be dismissed under the Doctrine of Laches because the Organization, following execution of an agreement to establish this Public Law Board, with Cases No. 1 and 2 listed on Attachment "A" thereto, allowed 18 months to pass before taking any further affirmative action to actually arbitrate these cases. Carrier maintains that this elapsed time is excessive and demonstrates that "...little importance is attached to the dispute by the Organization." Carrier cites Award 1-20650, which reads in pertinent part below, to support its position:

> "... acquiescence arises where a person who knows that he is entitled to enforce a right neglects to do so for such a length of time that, under the facts and circumstances of the case at hand, the other party may fairly infer that he has waived or abandoned his right."

The Organization counters by arguing that 18 months was not an inordinate delay and that the cases were handled as expeditiously as possible in light of the fact that the Organization had a new General Chairman, who was a working chairman.

The Board notes that the parties agreed to establish this Board by agreement, dated May 23, 1991. Paragraph (D) of such agreement provided for the procedure to be followed to select a neutral member for this Board. The record is void of any information regarding what, if any conferences or discussions were held by the parties to select such neutral member. Because both the Carrier and the Organization are parties to this agreement, they have a mutual responsibility to follow the procedures which they have agreed to. The agreement provides that if the parties are unable to agree upon a neutral member, "...either member of the Board may request the National Mediation

Board to appoint the Neutral Member and Chairman." The Carrier contends that the Organization, as the moving party, has the responsibility to expedite cases to be arbitrated. The Board does not disagree with this position of the Carrier. However, the Board is of the opinion, that once the Organization requests the Carrier to join with them in establishing a public law board and the Carrier agrees to do so, as in this case, the parties to the agreement establishing such board then have equal responsibility in seeing that the process established by such agreement is expeditiously followed. If Carrier believed that the elapsed time following the May 23, 1991 Agreement was placing it in an adverse position, it had the right to make a request to the National Mediation Board to appoint a neutral member, the same as the Organization, yet they elected not to do so. A party to an agreement may not sit upon their rights and then contend that they have been disadvantaged as a result of their decision to not exercise such rights. Under the circumstances, this Board cannot conclude that this case, and it's companion case, should be dismissed under the Doctrine of Laches.

CARRIER'S POSITION:

It is Carrier's position that the record clearly shows that Claimant's actions on the 4:00 A.M. Minorca Road Extra on November 7, 1990, resulted in excessive delay to his train, and as conductor, he bears responsibility for this excessive delay, in violation of Rule No. 820 of the Consolidated Code of Operating Rules, which reads as follows:

> "820. Members of the crew must by personal attention make every effort to insure departure of their train without avoidable delay. They must expedite the movement of trains and performance of station work."

Carrier's charge of excessive delay was based upon Claimant's service slip from that date which claimed 55 minutes (4:00 A.M. - 4:55 A.M.) initial terminal delay.

Carrier argues that Claimant performed certain inspection tasks which Carrier did not require or desire Claimant to perform. Claimant's train had been inspected by carmen prior to the departure time, yet Claimant checked the last five (5) cars instead of just the rear car while performing the rear-end set and release air brake test, which was all that was required under Carrier's operating rules. Then Claimant checked his entire train for set handbrakes and piston travel.

Secondly, Carrier argues that Claimant chose to reserve to himself the task of securing a track warrant, although Carrier's rules permit any crew member to secure track warrants. Carrier

contends that if Claimant had allowed another crew member to attempt to contact the train dispatcher to secure a track warrant at 4:15 A.M., instead of waiting until Claimant boarded the engine, the crew might have gotten prompt permission to proceed.

Finally, Carrier refers to a previous handling with Claimant involving a charge of excessive delay, which was resolved in a pre-conference before a formal investigation, in December 1988. Carrier states that during such conference, Claimant and his representative had agreed to a standard of 30 minutes as being an expected and reasonable time allowance for getting trains out of town. Carrier contends that the 55 minutes reported by Claimant on his service slip is nearly twice the "standard" of 30 minutes and thus constituted an excessive delay, in violation of Rule 820. Based upon Claimant's employment record, the discipline of suspension for ten (10) days was warranted. Carrier argues that it has met its burden of proof and seeks a denial or dismissal award from this Board.

ORGANIZATION'S POSITION:

The Organization submits that Claimant complied with Rule 820, and argues that Carrier has not met its burden of proof. The evidence which Carrier relied upon was circumstantial and was based upon presumption, not facts.

The Organization argues that Carrier's Assistant Superintendent's testimony that the crew should only take ten (10) minutes to leave the yard office is merely Carrier's arbitrary interpretation and is not based upon any rule. The Organization contends that the fifteen (15) minutes which Claimant required before departing the yard office was necessary for him to properly prepare for his tour of duty and was reasonable, not an excessive, amount of time. The Organization further contends that the Assistant Superintendent's testimony on preparation time was not credible, as evidenced by his testimony during cross-examination.

The Organization points to the fact that Claimant used his personal vehicle to go from the yard office to the rear of his train for the initial air brake test and then again used his vehicle in making an observation of his train, rather than walking the train or having the train pull forward and then backing up to pick up the Claimant. According to the Organization, this demonstrates that Claimant was trying to expedite the departure of his train, rather than delay it. The Organization states that while Claimant's method of preparing his train for departure may have been different than the way other Carrier officers may have done it, Claimant's method was a conscientious one and was rational.

The Organization takes exception to Carrier's insistence that crew members look only at the last car when making a set and release initial air brake test. The Organization contends that Carrier's approach is contrary to all sound practices. Claimant and his fellow crew members are responsible for seeing that their train is safe to depart the terminal. The Organization contends that Claimant's actions in checking the last five cars to be sure there were no hand brakes set and observing his train as he drove his vehicle to the head end of the train was not only conscientious, but consistent with other Carrier rules, such as Rule 109(A), 109(B) and 713(E), which all deal with train crew members making walking and/or roll-by inspections of their train.

The Organization also objects to the Carrier holding the Claimant responsible for the delay resulting from Claimant's inability to get a response from the dispatcher to obtain a track warrant. The Organization argues that Carrier's contention, that if another crew member had attempted to contact the dispatcher the delay might have been avoided, is mere speculation by the Carrier. The Organization defends Claimant's decision to obtain the track warrant personally and contends that it demonstrates Claimant's responsible attitude. Besides, Claimant did not, by order or direction, "disallow" any other crew member from taking the track warrant.

The Organization also makes reference to the amount of delay experienced by other crews. Even though other crews have taken an equal or greater amount of time to depart the terminal, no other crews have been charged or disciplined for excessive delay to their trains. In addition, the Organization argues that the fact that Claimant was the only member of the crew charged with a violation of Rule 820, even though Rule 820 states that all crew members are responsible for not delaying their trains, demonstrates that Carrier has singled out the Claimant for disparate treatment and that the Carrier had pre-judged the Claimant.

Finally, the Organization seeks to have Carrier's discipline of Claimant set aside because the Carrier failed to give Claimant a fair and impartial hearing. The Organization contends that Claimant was deprived of the opportunity to present certain testimony and evidence which would have bolstered his defense. First, the Organization objects to the fact that Carrier did not make audio tapes of radio transmissions and engine speed tapes available at the hearing, even though the Organization says they requested them. Secondly, the brakeman on the crew, P. S. Malknecht, was not present at the hearing. The Organization contends that Carrier has a responsibility to make certain that all witnesses having knowledge of the events under investigation are available to testify and also to provide the audio and speed

tapes, as requested. By failing to do so, the Organization argues Carrier did not afford Claimant a fair and impartial hearing and the discipline assessed by the Carrier must be set aside.

The Organization also contends that Carrier erred in considering the previous incident in 1988 in assessing discipline against Claimant. They argue that the Carrier could not rely on the 1988 handling because following the pre-conference, Carrier canceled the investigation. Claimant received no discipline and signed no letter which would have permitted Carrier to make an adverse entry on his record.

In conclusion, the Organization argues that Carrier did not meet its burden of proving that Claimant violated Rule 820, did not grant Claimant a fair and impartial hearing and that Claimant actions on November 7, 1990, were in compliance with Carrier rules.

OPINION OF THE BOARD:

The Board will first address the Organization's procedural objections. With regard to the absence of brakeman Malknecht at the formal investigation, the record of the hearing shows that brakeman Malknecht was on vacation at the time of the hearing. Carrier's Hearing Officer raised this matter both at the beginning and near the end of the hearing. He offered two options to Claimant and his representative: (1) Mr. Malknecht could submit a written statement which would be made a part of the hearing record or the hearing could be recessed and reconvened with Mr. Malknecht present so that he could be questioned as a witness. Claimant stated:

> "I think, being as I'm the one that's charged, I'll take responsibility. I was the conductor on the job. With the testimony I've heard here today, I don't know that there's anything Mr. Malknecht could add to it . . . ."
> (Tr., page 48).

When the Hearing Officer asked Claimant's representative if he was in agreement with the Claimant's position, his representative replied:

> "I stand by my summation or my summary. It is Don's option to release Paul from testifying. As far as any reconvening, I don't see any need to. In other words, whatever I put into my summary, stays. I'm still objecting to the fact that the witnesses were not made available. I'm not contesting Don's ability to and wish to eliminate Paul as a witness at this particular moment." (Tr., page 48).

It is the Board's opinion that every effort should be made to have all witnesses present at a hearing; however, in some cases that may not be possible. The Board believes the Carrier made a good faith offer to Claimant and his representative to enable them to obtain testimony from Mr. Malknecht by recessing and reconvening. Claimant clearly indicated that he did not desire to avail himself of that opportunity. Claimant's representative had the right to accept Carrier's offer to recess and reconvene, but instead acquiesced to Claimant's decision to not accept Carrier's offer. In so doing, the Organization clearly waived its right to object to the fact that Mr. Malknecht did not appear to offer testimony at the hearing.

As to the speed tape, the record is void of any information as to when or if the Organization requested Carrier to produce the engine speed tape. Carrier denies receiving any request for the speed tape prior to the hearing. This Board cannot resolve disputes in facts which have not been documented in the record. The Board has no basis to uphold the Organization's procedural objection regarding the speed tape.

Finally, with regard to the audio tape of radio transmissions, Carrier stated in the record that audio tapes are routinely recycled on a seven day basis. Since Carrier had received no request for the audio tape to be made available within one week, the tape was re-used and the radio transmissions recorded on November 7, 1990, were copied over. The Organization representative requested the audio tape on November 17, 1990. The Board believes that when Carrier is contemplating disciplinary action in which radio transmissions may be pertinent to the matters under investigation, it would be prudent for them to preserve such tapes regardless of whether they have received a specific request to produce them. However, in this case, the absence of the audio tapes leaves the record with only the testimony of Claimant as to his efforts to reach the train dispatcher to obtain a track warrant. The Carrier has not seriously challenged Claimant's testimony, therefore it stands largely unrefuted. Under these circumstances, the Board cannot find that Carrier's inability to produce the audio tape at the hearing was prejudicial to the Claimant.

Moving to the merits, Carrier's Hearing Officer found Claimant guilty of violating Rule 820, based upon the following: (1) Claimant spent fifteen minutes in the Proctor Yard Office rather than ten minutes; (2) Claimant spent at least five minutes inspecting his entire train while the rest of the crew waited, which was not required by Carrier's rules and which was contrary to Carrier's wishes; and (3) Claimant delayed his train from 4:15 A. M. to 4:30 A.M. by refusing to allow the engineer or the brakeman to copy a track warrant.

It should be noted at the outset that Carrier's principal witness, the Assistant Superintendent, was not present when Claimant's crew prepared for and departed from Proctor Yard on November 7, 1990. He testified that he was on vacation at that time. Therefore, the Assistant Superintendent's testimony was limited to providing his opinion, based upon his years of experience, as to the amount of time it should normally take for a crew reporting for duty to depart the yard on their road assignment. His testimony is general in nature and he had no knowledge of any unusual circumstances or conditions which Claimant and his crew might have encountered on the morning of November 7, 1990.

With regard to the amount of time consumed by the Claimant in preparing to leave the yard office, claimant testified that he checked the register, registered out, checked his watch, went over the bulletin book, picked up his radios and picked up a supply of water to be placed on the engine. He testified that these activities consumed approximately fifteen (15) minutes and that he departed the yard office at approximately 3:45 A.M. The Board believes that Carrier must have more than generalities and time estimates upon which to conclude that Claimant's activities between 3:30 A.M. and 3:45 A.M. were improper and consumed an excessive amount of time. Since the record is void of any testimony or evidence which suggests that Claimant engaged in other-than-normal preparatory activities, the Board cannot find that the Carrier had sufficient evidence to conclude that Claimant's departure from the yard office at 3:45 A.M. was in violation of Rule 820.

Next, we look at the Hearing Officer's finding that Claimant delayed his train by five (5) minutes by doing unnecessary and undesired inspection of his train. Claimant testified that he was at the rear of his train before 4:00 A.M. and that he received a radio transmission from his head brakeman at 4:05 A.M. advising that the engine was on the train and that they could commence their initial terminal air brake test. He further testified that the air brake test was completed by 4:10 A.M. and that he proceeded to drive his personal vehicle to the head end, observing his train as he went. Although Claimant stopped twice to knock off sneaker brakes, he testified that he reached the head end at 4:15 A.M. and instructed the engineer to begin moving his train. Carrier's Assistant Superintendent testified that he believed that if the air brake test was started at 4:00 A.M., the air brake test could be completed and the crew ready to get their track warrant at 4:15 A.M. and that the rear brakeman could walk the train and be ready to depart at 4:20 to 4:25 A.M. By Claimant's testimony, the air brake test and inspection were completed at 4:15 A.M. and the train began moving. The Board cannot find any evidence or testimony to support Carrier's

Hearing Officer's finding that Claimant's actions in conducting the air brake test and inspection of his train created a delay in the departure of his train in violation of Rule 820.

Finally, in looking at Carrier's determination that Claimant delayed the departure of his train by fifteen (15) minutes by refusing to allow other crew members to copy a track warrant, we find that Claimant testified that after instructing the engineer to proceed, he drove his personal vehicle to the scale and boarded the engine at 4:25 A.M. After getting his clip board with track warrant forms, he began calling for the dispatcher at approximately 4:30 A.M. He testified that the train was still moving at this time. He called for the dispatcher three (3) times, without success. After waiting a few minutes, he tried three (3) more times, with equally no success in reaching the dispatcher. After another short wait, he began calling for the dispatcher a third time, reaching him on the second attempt in this sequence, at approximately 4:42 A.M. By this time, the train had had to slow down and eventually came to a halt, with the head end beyond M.P. 9.25 and short of the approach circuit at Adolph. As soon as Claimant reached the dispatcher and began to copy the track warrant, the train began moving again. The track warrant was completed at 4:44 A.M. and the train entered the approach circuit at Adolph at 4:46 A.M. and track warrant territory at Carson at 4:53 A.M. The Carrier's Hearing Officer did not take exception to Claimant's testimony regarding his inability to get in touch with the dispatcher between 4:30 A.M. and 4:42 A.M., but rather concluded that Claimant had refused to allow his engineer and brakeman to copy the track warrant and that had he done so, the other crew members could have been calling for the dispatcher between 4:15 A.M. and 4:30 A.M. and, therefore, might have been able to have copied the track warrant without delaying the departure of the train. First, the Board finds that under Carrier rules, any crew member can copy a track warrant, which in effect gives the conductor the discretion of copying the track warrant himself or having other crew members copy it. Claimant testified that he preferred to copy the track warrant himself, and therefore waited until he boarded the engine to contact the dispatcher. This decision by Claimant was not, in and of itself, a violation of Carrier's rules. Arguably, if Claimant had reached the dispatcher on his first attempt, there would have been no delay to his train. There is nothing in the record to show that Claimant could have known or should have known that he would have difficulty reaching the dispatcher to obtain his track warrant. The Organization has also argued that Carrier's assumption that if another crew member had attempted to contact the dispatcher earlier, they would have been able to get their track warrant without delaying their train, was mere speculation on the Carrier's part. The Board agrees with the Organization. There is no evidence in the record to support such

conclusion, in fact the Assistant Chief Dispatcher testified:

> "But, I was also busy on the Interstate Branch. At, between 4:20, 4:25, I was talking to an all-rail which was on-duty at South Itasca and I logged him onto my train sheet at 4:30 a.m. That's when he appeared on my CTC board, on the approach circuit. At 4:39 a.m., I logged a DWP train leaving Pokegama Yard onto my approach board on the CTC panel. I logged him onto my train sheet. So, excuse me, if they were calling me between that time, as far as I recall I was at the desk. It's possible that I may have been out to go to the bathroom too. . . ." (Tr., page 39)

Carrier's submission even states that: "Had the Dispatcher been contacted at 4:15 A.M., rather than at 4:30 A.M., the crew might well (emphasis of Board) have had prompt permission to proceed." Claimant is not omniscient. He had no way of knowing at precisely what time the dispatcher would be free to issue his track warrant. The Board believes it is unreasonable for Carrier, using 20 - 20 hindsight, to hold Claimant responsible for the delay caused by his inability to make contact with the dispatcher to obtain a track warrant, despite numerous efforts to do so.

Based upon all of the above, the Board finds that the Carrier has not met its burden of proof, in the record, to find Claimant guilty of violating Rule S20 on the morning of November 7, 1990, and the discipline assessed Claimant must be set aside.

The Discipline Rules and Procedures Agreement, dated February 2, 1982, provides for payment of a minimum of four (4) hours at the rate of pay applicable to the last service performed (Section E. 2.) and pay for all time lost for the period of time of suspension (Section F. 4.). The Board can find no rules support for that part of the Organization's claim seeking Crew Consist Payments and Productivity Sharing Allowance and credit for Railroad Retirement, Carnegie Pension Fund and/or Transtar Pension Fund along with payment being made by separate check. Therefore those portions of the claim are denied.

AWARD: Claim for removal of ten (10) day suspension from the record of Claimant D. J. Long and payment for all time lost resulting from such suspension is sustained. Claims for all other benefits not provided for in the Discipline Rules and Procedures Agreement are denied.

ORDER: Carrier is hereby ordered to comply with the above award within thirty (30) days from the date of this award.

R. E. Adams, Carrier Member

Bruce Wigent, Organization Member

Dissent attached

John F. Hennecke, Chairman and Neutral

Dated: May 21, 1993.