

PUBLIC LAW BOARD NO. 5335

AWARD NO. 2

Case No. 2

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 #700 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 15, 1990, Claimant was notified by Carrier to be present at a formal investigation to be held at 1:00 P.M. on November 21, 1990, and that he was being charged with violation of Rule 700 of the Consolidated Code of Operating Rules, Edition of 1980, for failure to factually document your service report 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 1:41 P.M. and concluding at 4:36 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 700 and, as a result, he was being suspended from work for a period of ten (10) calendar days, commencing Thursday, January 10, 1991.

The Organization appealed the Hearing Officers 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

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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, 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:

As in Case No. 1, the Carrier urges this Board to dismiss this claim under the Doctrine of Laches. For the same reasons expressed in Award No. 1, this Board declines to do so.

CARRIER'S POSITION:

During the investigation, Carrier submitted Circular No. Missabe 96-88, which reminded operating employees of the location at Proctor Yard in Duluth where terminal delay ends and begins. Carrier states that this circular clearly shows that for Claimant's assignment on November 7, 1990, that point was M.P. 9.25. Carrier points out that during the investigation Claimant admitted that he had not used M.P. 9.25, but rather the yard limit board, M.P. 11. Carrier further states that Claimant acknowledges having read this circular when he testified: "Obviously, I'm sure I read it when I . . . in 1988 when the circular was put out. . . ." Carrier further points to Claimant's testimony on page 31, where he stated that the written instructions to use M.P. 9.25 ". . . completely spaced my mind." Carrier argues that Claimant has had 20 years of service on the DM&IR; that he understands the rules and the need for accurate service documentation; that employees are responsible for knowledge of all operating rules and that they are required to keep abreast of circulars and bulletins and, in fact, are paid to do so by the Carrier.

Carrier states that the testimony in the hearing shows that Claimant reported on his service report that his initial terminal delay ran until 4:55 A.M., but that Carrier's records and testimony from the Assistant Chief Dispatcher show that Claimant's train had reached Carson (M.P. 12.4) with a train that was 7/8 of a mile in length, at 4:53 A.M. and therefore, even if Claimant had used M.P. 11 instead of the correct location (M.P. 9.25), he still had exaggerated his departure time.

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Carrier also contends that the Organization's attempt to explain away the time differential as being the result of discrepancy in Carrier's clock, which Claimant checked his watch by when he reported for duty, and the Dispatcher's clock, must be rejected because Claimant's time on his northbound move was significantly later than the Dispatcher's time and on the southbound move, it was significantly sooner.

Carrier points out that Claimant, by incorrectly reporting his time, was able to increase his own pay; therefore, there was financial motivation for him to falsify his time document.

Carrier submits that there was substantial evidence in the transcript to demonstrate Claimant's violation of Rule 700, which reads:

"700. Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or that do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will."

Carrier rejects certain procedural arguments raised by the Organization. Carrier states that the letter charging Claimant was sufficient in that Claimant and his representative understood the charge and both were prepared for their defense.

Carrier urges that the Organization's objections to the fact that a audio tape and speed tape were not available at the investigation are without merit. First, the audio tape had been erased (taped over in the normal recycling of tapes) before the Organization had made a request for it. Secondly, Carrier argues that the record shows that the speed tape had no relevance to the investigation.

Finally, Carrier points out that the Hearing Officer offered alternatives for obtaining evidence from absent witness, brakeman P. S. Malknecht, but the Claimant and Organization were not interested.

Carrier concludes by stating that they have met their burden of proof and that the discipline assessed Claimant was justified in light of Carrier's previous written warnings to Claimant regarding claiming unwarranted delay (December 15, 1987) and the need for Claimant to expedite his assignments and get out of town promptly (December 7, 1988). Therefore, Carrier seeks a denial or dismissal award.

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ORGANIZATION'S POSITION:

The Organization contends that the ten (10) day suspension, assessed Claimant following the December 6, 1990, investigation, was unwarranted. The Organization acknowledges that Claimant's time slip of November 7, 1990, contained mistakes, but that they were honest mistakes and not a deliberate attempt by the Claimant to cheat the Carrier. The Organization argues that upon discovering the errors in Claimant's time slip, the Carrier should have denied Claimant's terminal delay times and handled this matter through the grievance procedure rather than through the discipline process.

The Organization also acknowledges that Claimant used M.P. 11 for his departure and arrival times for purposes of the terminal delay rules, but argues that M.P. 11 was the point where he had been counseled to show his times by conductors who were "old-timers" when Claimant began working as a brakeman for the DM&IR twenty years ago. The Organization further contends that Claimant probably missed seeing Circular No. Missabe 96-88 because he was working on the Iron Range Division at the time it was issued and the Iron Range Division did not have this circular in its Bulletin Book. The Organization contends that this is not an "excuse", but a rational explanation.

The Organization states that if Carrier records are correct that Claimant's train passed Adolph on its northbound trip at 4:46 A.M., then they would have reached M.P. 11 at 4:48 or 4:49 A.M. and that a 3-minute discrepancy in clocks would explain part of the discrepancy (up to 4:51 or 4:52 A.M.) and that Claimant's rounding his time up to 4:55 A.M. explains the rest of the discrepancy. The Organization argues that a similar 3-minute discrepancy in clocks can explain the difference in times on the southbound trip.

The Organization raises an issue concerning payment under "intermediate terminal delay rules"; however, the record does not show that this issue was properly raised during the investigation and was not handled in the usual manner on the property, therefore, this Board may not consider it.

As to the charge that Claimant violated Rule 700, the Organization argues that Carrier has not satisfied its requirement for proof. The Organization contends that the Carrier, in order to prevail, must demonstrate that Claimant deliberately attempted to deceive the Carrier in order to enrich himself. The Organization submits that throughout the investigation, Claimant was completely honest with the Carrier, freely acknowledging that he had used M.P. 11 rather than M.P. 9.25 and admitting that his service report contained errors. The

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Organization contends, however, that the record shows no intent by Claimant to cheat the Carrier, rather, the discrepancies on his time report were the result of errors, misjudgment and confusion.

The Organization also urges the Board to set aside the discipline assessed Claimant because he was not given a fair and impartial hearing. They argue that Carrier's Hearing Officer improperly used material from previous pre-conference discipline proceedings to adduce Claimant's guilt in this case. They argue that Carrier had an obligation to make the audio and speed tapes available at the investigation and that the failure to do so prejudiced Claimant's ability to defend himself. They also argue that the Carrier improperly denied their request to have brakeman Malknecht available at the investigation as a witness. The Organization also raises a question regarding the Carrier not producing a Carrier Officer to testify about the accuracy of Carrier's signal clocks; however, this question was not raised on the property and, therefore, cannot be considered here.

Likewise, the Organization submitted a group of letters which they described as "character references". The Board notes that all of these letters were dated in 1993 and, therefore, could not have been handled on the property. The Board cannot consider them.

Finally, the Organization submits three Public Law Board Awards (Award No. 135 of PLB 2049, Award No. 16 of PLB 1845 and Award No. 10 of PLB 1558) which, it argues, supports the Organization's position in this case.

The Organization requests a sustaining award and for Claimant to be made whole and for all mention of this matter to be expunged from Claimant's record.

OPINION OF THE BOARD:

The Board will first address the Organization's contention that Claimant was not afforded a fair and impartial hearing. The Organization maintains that the Carrier improperly used material from previous pre-conference discipline proceedings as the basis for their finding Claimant guilty of the charge in this case. The Board does not agree. There is nothing in the record to show that Carrier used Claimant's prior record to determine guilt, but rather, after Carrier made its determination of guilt, to decide the amount of discipline to assess Claimant. This is not improper under the agreement.

The Organization raises the issue of Carrier's failure to produce audio and speed tapes. The Organization has not been

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able to demonstrate what relevance these tapes could have had to this particular investigation. The Board does not find that the absence of these tapes prejudiced Claimant's ability to prepare and present his defense.

Finally, with regard to the absence of brakeman P. S. Malknecht as a witness, the record once again shows that Carrier offered the Claimant and his representative two options to enable any necessary testimony or evidence from Mr. Malknecht to be entered into the record. Claimant, at page 59 of the transcript, stated:

"As far as I'm concerned, he was my brakeman. I'm responsible for it. I'd say the heck with it. Unless the Company wants a statement."

The Hearing Officer asked Claimant's representative (at page 60 of the transcript):

"Q. Do you concur with that Mr. Herold?

A. Yes sir."

The Board finds that the Carrier made a good faith offer to allow testimony and evidence from brakeman Malknecht to be entered into the record. Claimant and his representative declined to accept Carrier's offer, and in so doing, waived any right to take exception to the fact that Mr. Malknecht was not present as a witness.

In addressing the merits of this case, the Board finds that the record clearly demonstrates that the times, which Claimant placed upon his service report as departure and arrival times at Proctor Yard, for purposes of initial and final terminal delay pay, were clearly inconsistent with Carrier's dispatcher records. The Organization's contentions regarding the inaccuracy of Carrier's clocks being the proximate cause of some of this discrepancy is not convincing. On departure, Claimant's time was later than Carrier's records and, on arrival, his time was earlier. The accuracy of Carrier's clock in the yard office, with which Claimant compared his watch when he went on-duty, could not have been the cause of this discrepancy.

Claimant acknowledged using the yard limit board (M.P. 11) for reporting his departure and arrival times. The Claimant's use of M.P. 11 rather than M.P. 9.25 is seen as the cause for most of the discrepancy in time. Considerable testimony exists in the record that crews have used M.P. 11, perhaps incorrectly, for a substantial period of time, without the Carrier taking exception to it. Under cross examination by the B.L.E. representative, Carrier's Assistant Superintendent testified:

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"Q. . . . When did you first notice that the conductors were not using 9.2?

A. When did I first notice it? I assumed they were, Mr. Briski." (Tr., page 11).

* * *

"Q. Why didn't you get in contact with Mr. Long or Engineer Myrdahl about this discrepancy in time?

A. Mr. Briski, this did not come out until this morning. That they put out at 9.2. I assumed they put out at 9.2 before the hearing this morning. I had no idea they didn't put out at 9.2 until we went through a hearing this morning." (Tr., page 12).

Based upon the testimony, the Board finds it reasonable to conclude that Claimant and his fellow conductors had been "putting out" at M.P. 11 for a substantial period of time and, because all crews use M.P. 10 for timekeeping purposes, to show their departure and arrival at Proctor Yard, Carrier was unaware that this practice existed.

The Board also notes testimony in the record concerning Claimant's recording of times on his service report. With regard to his departure time (4:55 A.M.), under questioning by the Hearing Officer, Claimant testified:

". . . And I sat down and looked ahead and I had to reach back to put out at 55. What I considered a reasonable time of putting out because it was just about, it was north Munger or at that road crossing, we just got across the road crossing, and holy christ, I forgot to put out. So I wrote down 55 and I estimated it back. Okay. Does that answer your question? I had to put something down there." (Tr., page 31).

Similarly when asked about the fact that his service report showed that the train had been stopped at M.P. 14 because of a "dynamiter" at 1:30 P.M. and he then reported arrival at M.P. 11 at 1:35 P.M., Claimant stated:

". . . So I guess I just used 14 'cause it was there. Okay? So we were a lot closer to the yard board than what Milepost 14 reads. I probably could have used 13 or whatever." (Tr., page 31).

Also, Claimant's representative questioned Carrier's Assistant Superintendent about the times shown by Claimant at M.P. 59:

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"Q. The reason I bring that up. There's a discrepancy on the timeslip there as to times. Now, it's been brought up that Don was not factual with his times. You made a point that he wasn't factual leaving town. You made a point when they arrived southbound into town. But there's also that discrepancy at 59, but you made no mention of that. Is there a reason why you did not?

"A. Is it at 59 where Don put down he arrived at 4:20 and left at 4:30?

Q. Yes sir.

A. We figured Don meant, we should know that Don didn't arrive there, he hasn't left town yet. He made it a 4 instead of a 6.

Q. I see. Are you, you were judging?

A. Well, I'm just, I'm looking, I'm just thinking that Don just put that down there. I'm not sure he possibly couldn't have but it doesn't affect the overall. He just put down a 6 instead of a 4 or 7 or whatever it was that he was at that point." (Tr., page 17).

Recording and reporting times is an important responsibility of conductors. The record discloses that Claimant was extremely careless in carrying out this responsibility. Claimant appears to have not properly recorded his times during his assignment and then later plucked times and locations out of thin air and placed them on his service report. However, Claimant was not charged with carelessness or dereliction of duty, he was charged with violation of Rule 700, specifically dishonesty. Lack of attention to duty and failure to keep proper record of times and locations are not synonymous with dishonesty.

The Board has thoroughly reviewed the three awards cited by the Organization. While Award No. 135 of Public Law Board No. 2049 (Gene T. Ritter) has some similarities to this case, the Board finds the decision in that award was based primarily upon the determination that the carrier did not afford the claimant a fair and impartial hearing, a situation not present in this case.

In Award No. 16 of Public Law Board No. 1845 (Nicholas Zumas), it was held:

"With respect to Carrier's finding that Claimant was dishonest, the Board is of the opinion that it is also without merit. Dishonesty is a wilful disposition to lie,

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cheat or defraud. There is no substantive evidence of probative value in this record to show that Claimant was dishonest. It is undisputed in this record that there was a practice of using the CNC crossing rather than the "T" Board as the point where terminal time commenced, and that Claimant was instructed by his Local Chairman that this was the practice and to continue doing so. While this may have been in error, and a valid basis for denying terminal delay time, it is insufficient, without more to show that Claimant wilfully intended to defraud Carrier."

In Award No. 10 of Public Law Board No. 1558 (Harold M. Weston), the Board stated:

"While we might disagree with Petitioner's interpretation of the rules just cited, in the absence of substantial evidence that it is supported by a clear past practice, we are not satisfied that Claimant's position in that regard is so frivolous and irresponsible as to warrant a falsification finding against him and the attendant reflection on his service record. The issue as to the proper amount of compensation to be paid in this situation should have been resolved in conferences or by the grievance procedure. Disciplinary action is not the appropriate method for settling the question."

The Board finds the reasoning in these awards to be compelling. While the record shows Claimant's service report to be filled with errors and discrepancies, the Board cannot find substantive evidence of probative value in the record to support a finding that Claimant wilfully intended to defraud the Carrier. With regard to Claimant's using M.P. 11 as the point for terminal delay time to end and begin, the testimony in the record indicates that the Carrier has shown complacency with regard to enforcing this portion of the Agreement. The Board concludes that it was unreasonable for the Carrier to suddenly initiate, without prior specific warning, disciplinary action against Claimant for using M.P. 11 instead of M.P. 9.25. Therefore, based upon this record, the claim for lost time and removal of this discipline from Claimant's record shall be sustained.

Even though the Board is sustaining this claim, it admonishes Claimant that, as a conductor, he has a responsibility to Carrier to be aware of and to follow the provisions of the agreement, regarding terminal delay, and to timely and accurately report his times on his service report. The Board finds Claimant's attentiveness to this portion of his duties to have been sorely lacking and Carrier has every right to demand that Claimant correct his poor performance of recording and reporting his and his crew's time on his daily service report.

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As in Award No. 1 of this Board, the claims for all other benefits not provided for in the Discipline Rules and Procedures Agreement are denied.

AWARD: Claim for removal of the 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.

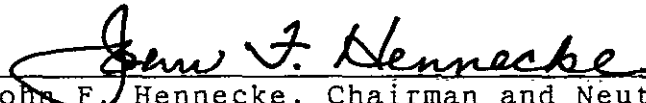
ORDER: Carrier is hereby ordered to comply with the above award within thirty (30) days from the date of this award.



R. E. Adams, Carrier Member



Bruce Wigent, Organization Member



John F. Hennecke, Chairman and Neutral

Dated:



, 1993