CASE NO. 15
CLAIM NO. TC 103-71

NATIONAL MEDIATION BOARD

Nov 18 10 05 AM '71

AWARD NO. 15

NATIONAL RAILROAD ADJUSTMENT BOARD

PUBLIC LAW BOARD NO. 557

PARTIES TO THE DISPUTE: UNITED TRANSPORTATION UNION (E)
versus
PEORIA & PEKIN UNION RWY. CO.

EMPLOYES' STATEMENT OF CLAIM: Claim dated April 29, 1970, in favor of Engineer Lovelock, compensation for all time lost covering period of dismissal March 13, 1970, until reinstated April 30, 1970.

FINDINGS: At about 8:30 PM, March 4, 1970, when it was dark but otherwise clear, Claimant was working as an engineer on the 3:30 A-2 Assignment performing general yard switching at the south end of A Yard in this Carrier's East Peoria Yard, when his train of 13 cars made a forward movement at the No. 17 crossover through which a road crew of the Peoria & Eastern was pulling a train out of Track 22, south end of A Yard, and the lead car collided with the first of the P&E's two locomotives, just behind the cab, inflicting about thirty-five thousand dollars' damage.

An investigation was conducted March 9, 1970, by Trainmaster L. L. Miller of each of the members of this Carrier's crew, including the Claimant engineer. A purportedly complete transcript is attached as an exhibit both to the submissions of the Organization and Carrier. All parties acknowledge receipt of written notice of the hearing dated March 6, 1970, although a copy thereof is not part of the record.

Claimant objects that the recording tape from which the proceeding was transcribed was not made available notwithstanding his prompt request, because it had been erased immediately, which the Carrier insists is its practice.

The charges alleged failure to comply with Transportation Rules H, 13, 84 and 107, which respectively abjure employes to be "alert and devote themselves exclusively to the company's service * * ;" that "any object waved violently by anyone on or near the track is a signal to stop;" that "a train must not start until the proper signal is given," and that "trains or engines must run at restricted speed" in certain situations. Rule 84 is the one found to be particularly pertinent to the Claimant.

At the investigation, Claimant objected that he had had insufficient time to obtain members of the P&E crew as witnesses on his behalf, but when the hearing officer asked the Claimant's representative categorically if he wished to postpone it on these grounds, he said "not necessarily," if the other representative was agreeable, which he was; and the Claimant himself indicated willingness to proceed.

In this proceeding, however, Claimant tenders three statements by P&E crew members, two in affidavit form, and two of which aver that they saw an unidentified P&PU crewman give the Claimant engineer the so-called "kick signal" to proceed. The Carrier objects herein to these being considered by this Board, citing many First Division awards to the effect that it and all such boards are bound by the official record exclusively. (12072, 13356, 14693, 14863, 15101, 15319, 16265, 16848, 20742, 14690, 20645).

Foreman Adams and his pinpuller, one Roger A. Jordan, a helper, testified that they gave "violent stop signals" when they perceived that Claimant was shoving into the P&E engines, and Switchtender Harold Reed testified that Trainmaster Kendall remarked that the "washout" signals were being given but nothing was happening.

Mr. Jordan, who had been on the job only 4 days but had about two years' prior experience as a roadman on the GM&O, insisted that he was fully familiar with this Carrier's signals. He testified in detail that he lined the switch for the Claimant's train and relayed stop signals, when the collision seemed imminent, but he denied giving the "kick signal" to proceed.

Claimant testified in his own behalf that he kept alert to see all stop signals, but that he saw none until 30-40 seconds after he already had stopped upon impact. He insisted that he started his train upon seeing a kick signal, presumably from Mr. Jordan, consisting of "one single arm up and down * * ." (Tr. 27)

Claimant had at the time of the accident 41 years' service, and had been promoted in 1941. He had two 30-point demerits respectively in 1959 and 1961 for failure to take signals promptly. After his dismissal herein, Carrier reinstated him to service on April 30, 1970, so that, in effect, he received a disciplinary suspension of about six weeks.

The Organization severely criticizes the conduct of the investigation, saying that the tape should have been kept available for doublechecking the transcript; the P&E crew should have been called by the Carrier under its obligation to seek out all the facts; much hearsay was permitted in the testimony; leading questions were asked by the examining officer, and in general, that the conduct of the investigator was prejudicial to the Claimant. The Carrier denies each of these accusations.

This Board is absolutely prevented by the long-standing precedents of many decisions by the First Division from considering at this time the ex parte statements of the members of the P&E crew, because it is confined to the record herein and they are not part of it. This is not a reflection upon the veracity of the statements, but the absence of an opportunity for cross-examination prevents any dimension being given to the statements. For instance, just what was the vantage point of each of the P&E crew members?

The Claimant and his representative were given the opportunity at the hearing to take a postponement so that these witnesses could be produced, but they agreed to go ahead. It may seem harsh at this stage that such acquiescence on their part should preclude this being urged as error, but this is the universal rule followed in all proceedings of this nature.

Absence of the tape from which the transcript was taken also is not reversible error in the absence of specific allegations of mistakes in the transcript. This also is a universal rule, and it applies both to stenographers' notes and tapes. The Carrier acknowledges that it was error for a copy of the notice of hearing not to appear in the record itself, but this is not prejudicial however improper it may be procedurally, because the Claimant readily acknowledged receipt of the notice.

The conduct of the hearing itself was not perfect, but then few such proceedings are, because as a practical matter the hearing officers function collaterally to their main duties and few are experts in this regard. The asking of leading questions (i.e., the form of the question suggests the answer) also is not good form by any means and does occur to some extent in this record, but again, careful examination fails to indicate that these lead to prejudice.

The Organization strenuously objects to what it considers prejudicial remarks by the hearing officer, indicating in its estimation, prejudgment on his part. It is true that there is unfortunate indication that the hearing officer did tend to quarrel at times with the Claimant and his representative, and that at one point he accuses the Claimant of being overly "dramatic," in his testimony, without the cold print of the transcript indicating what must have been a tone of voice or some other transcient mannerism. Yet again this does not appear to be a fatal deficiency in the proceeding.

The sole question is whether the Claimant started his train without receiving a signal to do so. He undoubtedly is convinced that he saw one, and alert cross-examination by his representative of the relatively inexperienced Mr. Jordan establishes something of an issue of fact whether or not his signal was ambiguous, but again the full purport of decisions for many years by the First Division precludes this Board from resolving such an issue of fact, even to the extent that it exists herein.

The Organization explains that its General Chairman who acted as the Claimant's representative was relatively new and inexperienced, but in this record it pardonably is too modest. Actually the representative did an exemplary job on behalf of his "client," and undoubtedly it may be credited in large measure for the substantial reduction in his penalty from outright discharge to a disciplinary suspension of six weeks. Nor should he or the Claimant chastise themselves for not insisting upon a postponement of the hearing, because the social pressures always militate toward "getting along with it" once the principals are convened. Many an appeal has been lost by the most seasoned "defendants" in all kinds of proceedings, because they elected not to be so obtuse as to put everyone out by their insistence.

It would be proper, of course, for this Board to weigh the quantum of the penalty, and in this instance outright discharge would indeed appear harsh despite the considerable monetary loss involved, in view of the Claimant's very long service with just two demerits of thirty points each along the way for similar offenses. But the Carrier already has perceived this and modified the penalty. Even though the Board might be inclined, in the first instance, not to inflict even so severe a penalty as six weeks' suspension, it does not have the prerogative merely to "shave" such disciplinary actions and thereby simply to substitute its own view for that of the Carrier. Therefore, the disciplinary action cannot be reversed or modified at this stage, and the claim must be denied.

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AWARD: Claim overruled.

John F. Sembower
Neutral Member

H. G. Kenyon
Organization Member

Francis Mueller
Carrier Member