

PUBLIC LAW BOARD NO. 5681

Parties: Brotherhood of Locomotive Engineers  
and  
Union Pacific Railroad Company

Statement of Claim:

Claim of Engineer R.K. Ellis of Kansas City for pay for all time lost and all entries of this discipline (30 day suspension) to be removed from his personal record.

Background:

The Claimant Engineer, with a 1952 seniority date, was assessed a 30 day actual suspension for allegedly sleeping while on duty while working as a crew member on December 9, 1993, at 6:00 AM at MP9 on the Marysville Subdivision, on Job LAK 32-09. The Claimant's discipline was assessed on January 13, 1994 after a duly noticed Investigation held on January 5, 1994.

Rule 602 the Sleeping on Duty Rule states in part:

"  
... Engineers who are in a reclined position with eyes closed will be considered in violation of this rule."

The charges were brought against the Claimant and the members of the crew as a result of an efficiency test made by Manager of Train Operations S.A. Hampton and Manager D.D. Reeves, Manager of Operating Practices. Both of these two Carrier officers were listed to appear as witnesses at the Investigation issued to the Claimant and the members of his crew.

At the January 5, 1993 Investigation Manager Hampton was not present and the Claimants made a timely and vigorous objection at

the beginning, and again, at the conclusion of the Investigation, to the absence of Mr. Hampton since he was a witness who could testify about the matter under investigation. The Hearing Officer denied the request of the Claimant's Representative to cancel the Investigation. The Hearing Officer also denied the Representative that the Investigation be postponed until Mr. Hampton could appear.

The Hearing Officer maintained that Manager Reeves was present to testify about the matter under investigation and thus the Claimant had adequate opportunity to cross examine a Carrier officer about what transpired on the morning in question.

Manager Reeves stated that after Mr. Hampton and he left Conductor Kline in the carman's shanty they drive to the track where the Claimant's engine was parked. Mr. Reeves said it was about 7:12 AM when he climbed on the engine and entered it by the back door. Mr. Reeves stated he saw Brakeman Cross stretched out on the seats (the locomotive has a middle seat). Mr. Reeves stated he did not see Brakeman Cross' eyes (Tr 38, 39).

Mr. Reeves also testified that as soon as he entered the cab the Claimant came up to a sitting position. He grabbed his teeth, threw some water on them, and put them in his mouth. The Manager stated he did not see the Claimant with his eyes closed or did not see him asleep (Tr 41). He testified that the Claimant told him he had been asleep. Manager Reeves asserted that the Claimant told him "that you caught me. I was asleep. What is going to happen now?" or words pretty close to that (Tr 42). Mr. Reeves added that

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the Claimant was not laughing but he was grinning since the Claimant is a good natured individual and is always smiling (Tr 42). Reeves added that he took the Claimant seriously.

On cross examination Manager Reeves conceded that an employee could be in a reclining position but if his eyes were not closed he was not in violation of Rule 602.

#### Carrier's Position

The Carrier states there is no evidence in the record of the Investigation that shows the Claimant was denied of any procedural rights denying him due process. Moreover there is substantial evidence in this record to show that the Claimant was guilty of sleeping on duty and therefore he was properly disciplined.

The Carrier states that the Claimant admitted to Mr. Reeves that he had been sleeping on the job and he cannot now pass off his admission as a statement made in jest.

The Carrier states the record shows the Claimant was not attentive to his duties. The Supervisor believed that the Claimant was sleeping on the job and he gave every appearance of sleeping, and he could not disabuse the Carrier of its impression by asserting that he was making his statement in jest on such a serious charge. The Carrier states that the Claimant's past personal record also reveals that sleeping on the job was not foreign to his work record.

The Carrier states the record of this dispute supports its position rather than the Claimant's and therefore the Board should deny the claim.

Organization's Position

The Organization maintains that the Carrier's case against the Claimant is procedurally defective and lacks merit substantively. The Carrier's case is deficient because it failed to provide Manager Hampton, an essential witness to the events in question, at the Investigation. It adds the testimony of Manager Reeves did not produce evidence to show that the Claimant was sleeping on the job. Mr. Reeves did not see the Claimant either in a prone position or with his eyes closed. Consequently, there was no probative evidence that the Claimant violated Rule 602. The Organization adds that the Carrier has misplaced its judgment or improperly relied on a remark that the Claimant made in jest when he said he was sleeping and was Manager Reeves was going back to report to Superintendent Packard that ol' Red (the Claimant) was asleep. The Claimant stated he said this when the Managers were leaving the engine. He did not make this statement when he was initially confronted by the Carrier officer (Tr 59).

The Claimant asserted he was never in a reclining position but his seat leaned back. He was always sitting up in his seat and never was in a reclining position and he never had his eyes closed.

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The Organization asserts on the basis of this record, the Board should sustain the claim and make the Claimant whole.

Findings:

The Board, upon all the whole record and all the evidence, finds that the employee and Carrier are Employee and Carrier within the Railway Labor Act; that the Board has jurisdiction over the dispute and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds that the Carrier committed a major and material procedural error in its conduct of the January 5, 1994 Investigation when it failed to produce Manager Hampton as a witness to offer proof as to whether the Claimant was guilty of the charge filed against him. Mr. Hampton was an essential witness with alleged direct and immediate knowledge of the Claimant's purported misconduct. His testimony was necessary to enable the Carrier to meet its burden of proof of proving the Claimant guilty of the charges brought against him. The Organization and the Claimant were entitled to confront Mr. Hampton and cross examine him on his testimony which purportedly led the Carrier to cite the Claimant for Investigation as well as removing him from service.

The record of the Investigation reveals that Manager Hampton was the more aggressive investigator of the events that led to the charges against the Claimant. Conductor Kline stated that most of his conversation was with Mr. Hampton and Mr. Reeves only

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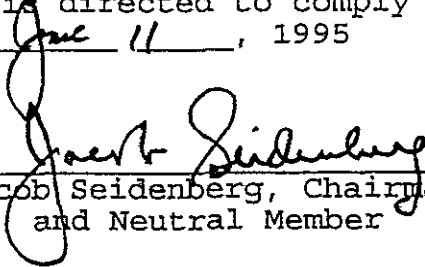
entered the conversation when there was mention of FRA personnel seeking to get the crew on rule violations. Mr. Kline added he really had no conversation with Manager Reeves (Tr 65). Brakeman Cross testified that Mr. Reeves had very little to say during their confrontations. Most of the conversation took place between Mr. Hampton and the Claimant (Tr 73).

In light of the fact that the record shows that Manager Hampton was the more active Carrier participant in the investigation, it was material error for the Carrier not to have Mr. Hampton available at the Investigation to prove the truth or falsity of the charges levelled against the Claimant. The Carrier's failure to produce this important and necessary witness denied the Claimant of his contractual right to a fair and impartial hearing.

In light of this finding, the Board does not find it necessary to reach the other issues raised in this case. It also finds that the discharge assessed the Claimant must be, and is hereby, vacated and the Claimant be made whole.

Award: Claim sustained.

Order: The Carrier is directed to comply with the Award, on or before June 11, 1995

  
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Jacob Seidenberg, Chairman  
and Neutral Member

May 10, 1995