

## PUBLIC LAW BOARD NO. 5959

Case No. 48  
Award No. 48

Brotherhood of Locomotive Engineers )  
 )  
 vs ) PARTIES TO DISPUTE  
 )  
 CSX Transportation, Inc. )

## STATEMENT OF CLAIM

Request that Engineer J. O. Breeden, ID 004624, be restored to service with full seniority rights unimpaired, pay for all time lost, including health and welfare expense incurred until reinstated to service; and the removal of unfavorable entry from his service record; date of incident May 13, 1997.

## FINDINGS

This Board finds the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the dispute involved herein. The parties to said dispute were given due and proper notice of hearing thereon.

Claimant was dismissed from the service of the Carrier as a result of an investigation held on May 20 and 21, 1997. Carrier's letter of dismissal is undated. Claimant was removed from service on May 3, 1997 pending the investigation.

The Carrier returned the Claimant to service in January of 1998. Therefore this Claim is for time lost.

The facts of the case are that on May 13, 1997 at 2:00 A.M. two Carrier officials performed an efficiency test on train K95412, on which the Claimant was the engineer. The Carrier was testing to see if the train was being operated in accordance with Rule 93. The Carrier officers set up the test on a curve. They set up a T-shaped device in the tracks with red flags and two red lights powered by two AA batteries. The officials also had a radar gun to determine the speed of the train. Section II (2) of the Carriers' "Efficiency Test Instructions Manual" reads:

## 2. Operational Test.

An operational test is a planned procedure, conducted by one or more officers, to evaluate compliance with rules and instructions, without the employee's knowledge.

This type of test may involve factors such as the burning of fuses or the placement of torpedoes to bring certain Operating Rules into effect. Where signals are involved, testing officers must comply with FRA "Rules, Standards and Instructions for Railroad Signal Systems." Officers qualified to use shunt cables or appropriate Signal Department personnel, at the direction of the testing officer(s), will actuate signal apparatus for rules to be tested. Operational testing is not intended to entrap an employee into making an error, but is used to measure proficiency and isolate areas of non-compliance for corrective action. (Emphasis added)

As the train came around the curve the conductor saw the device and the Claimant put the train in emergency. However, the train hit the device, going a truck length beyond the stop point. The time table speed for the location of the test is 10 mph. The radar gun clocked the train at 8.2 mph.

The Carrier argues that the crew violated Rule 93 when it failed short of the obstruction. The Claimant testified because of the curvature of the track the locomotive headlight was illuminating the town. The Claimant testified to not seeing the obstruction till after it was hit. The Carrier argues vigorously that the train's failure to stop was the same as being involved in a collision. However, there was no testimony as to what the Claimant should have done to avoid hitting the obstruction.

Subsequent to this incident the Carrier eliminated some of the curvature in the track, and changed the obstruction device to simulate an end of train device.

The Organization argues the Claimant was improperly withheld from service pending the investigation, that the Carrier officials entrapped the crew and discipline was not warranted.

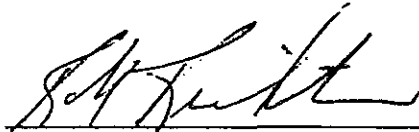
At the time of the incident Claimant had 27 years of service without any previous disciplinary action on his record. The position of the Organization is well taken. It is obvious from the


record that the Claimant was entrapped and does not warrant discipline. If the Claimant had in fact violated a rule during the test, the Carrier's own instructions say the employee should be instructed on what corrective action should be taken to improve performance.

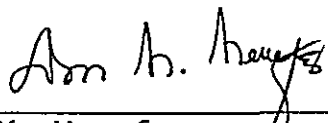
The Carrier was arbitrary and unduly harsh in this case. It was a gross miscarriage of industrial justice.

AWARD

Claim sustained. Carrier is ordered to comply with this Award within 30 days of its date.

  
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R. G. Richter, Chairman  
Neutral Member

  
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L. F. Kell, Jr.  
Carrier Member

  
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D. M. Menefee  
Employee Member

Dated 7/8/98