PUBLIC LAW BOARD 6844

In the Matter of the Arbitration Between:
NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD CORPORATION (NIRC/Metra)

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN (BLE)

NMB Case No. 1
Claims of D.B. Little, B.D. Voss and E. Gavina
Dismissal, Violation of Rules 6.30 and 1.47 B-1

STATEMENT OF CLAIM: 1. The Carrier violated Rule 44 of the controlling Agreement, when on April 22, 2004, the Carrier erroneously dismissed Engineers D.B. Little and B.D. Voss and Candidate Engineer E. Gavina, without a fair and impartial hearing.

2. Accordingly, the Carrier should now be required to reinstate D.B. Little, B.D. Voss and E. Gavina, with all pay for time lost, all rights of employment restored and their personal records cleared of any notation of discipline.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimants employees within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the Parties, claim and subject matter herein, and that the Parties were given due notice of the hearing which was held on August 5, 2005, 2005, at Chicago, Illinois. Claimants were not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Engineer craft.

Claimant Donald B. Little was employed by the Carrier as an Engineer; he began service with a predecessor of the Carrier on June 7, 1974, and was promoted to Engineer effective October 1, 1982. Claimant Brian D. Voss was employed by the Carrier as an Engineer; he began service with the Carrier on February 5, 2001, and was promoted to Engineer on June 13, 2001. Claimant Ernesto Gavina, Jr., was employed by the Carrier as a Candidate Engineer; he began service with the Carrier on June 23, 1997, and was promoted to Candidate Engineer on September 8, 2003.

On February 23, 2004, Claimants were operating commuter trains on the Carrier's Milwaukee West Line, which runs between downtown Chicago and Elgin, Illinois. Engineer Voss operated Assignment No. 411, going on duty at 10:21 a.m. He operated Train No. 2243,

consisting of one engine and seven cars, departing Chicago Union Station at 5:41 p.m., running a westbound express (making no station stops) between Western Avenue and Franklin Park, then making most stops to Big Timber Road (Elgin), with a scheduled arrival time of 7:01 p.m. Engineer Little and Candidate Engineer Gavina operated Assignment No. 412, going on duty at 11:20 a.m. With Mr. Gavina at the controls and Mr. Little to his left in the cab car at the east end of the train, they operated Train No. 2246, consisting of seven cars, with cars three through five designated as passenger coaches, departing Big Timber Road at 5:10 p.m., running eastbound and making all stops, with a scheduled arrival time at Chicago Union Station at 6:33 p.m. The River Grove station is located at mile post 11.5.

The River Grove station consists of three tracks running east and west, a depot, two passenger platforms and a crosswalk. The northern-most track is the westbound main track - Track No. 1; the center track is the eastbound main track - Track No. 2; and the southern-most track is primarily used by freight trains - Track No. 3. The depot is on the north side of Track No. 1, approximately 100 feet west of Thatcher Avenue, which crosses all three tracks. One passenger platform is located on the north side of Track No. 1, running from the pedestrian crosswalk over Thatcher Avenue, by the depot, and continuing west for several hundred feet. A second passenger platform is located between Track Nos. 2 and 3. The crosswalk crosses all three tracks approximately 50 feet west of the depot. There is no fencing protecting any of the tracks and there are no signs warning passengers/pedestrians to watch for approaching trains. When stopped at the River Grove station, a seven or eight car train blocks both Thatcher Avenue and the pedestrian crosswalk. Disembarked passengers who wish to cross the tracks at either location must await the train's departure from the station in order to be able to do so. Looking east from River Grove, there is an unobstructed view (a direct line of sight) along the right-of-way for nearly one mile; the next station to the east, Elmwood Park, is located at mile post 10.2.

At approximately 6:00 p.m. or shortly thereafter on February 23rd, Train No. 2246 arrived at the River Grove station to discharge and receive its passengers. There is some dispute between the Parties as to precisely where the train stopped at the station. The Carrier originally contended that the center of the vestibule doors of the fourth (middle) car was spotted approximately 20-30 feet east of the center of the pedestrian crosswalk. On the third day of investigation, the Carrier revised this claim, contending that the center of the vestibule doors of the third car was spotted

on the western edge of Thatcher Avenue. This revision placed the front end (cab car) of Train No. 2246 further east (by approximately 31.5 feet) than originally estimated by the Carrier. The Organization contended that the train was stopped at the station further to the east. There is no dispute that, when stopped, Train No. 2246 blocked both Thatcher Avenue and the pedestrian crosswalk. Those disembarked passengers who wished to cross the tracks waited for Train No. 2246 to depart.

When the rear of Train No. 2246 passed the pedestrian crosswalk and Thatcher Avenue as it departed the station, the way was cleared for disembarked passengers to cross the tracks to the north platform and beyond. However, regular passengers, who knew that a westbound express - Train No. 2243 - passed the general vicinity of the station at about that time, waited to see if it was approaching. At least some of them heard and/or saw Train No. 2243 approaching from the west at a high rate of speed (68 miles per hour); written statements from two such passengers were obtained by the Organization subsequent to the investigation (Org. Exs. B and C). Mrs. Linda DeLarco, a disembarked passenger, was standing at the crosswalk with her two young children. One passenger standing nearby even warned Ms. DeLarco not to let her children go out on the crosswalk after Train No. 2246 departed because "the westbound express could be coming through." (Org. Ex. C, p. 1) However, a few seconds after the rear of Train No. 2246 passed the crosswalk and departed the station, Michael DeLarco, 10 years old, ran across the crosswalk toward the north platform (where he may have seen his father standing) and into the path of westbound express Train No. 2243, traveling at speed. The child was struck and killed instantly. Engineer Voss made an emergency brake application and emergency radio calls appropriate to the circumstances. Following the accident, Messrs. Voss, Little and Gavina were placed on paid leave.

The accident generated considerable media attention. Metra had experienced other accidents and fatalities in the recent past. Dennis Mogan, the Carrier's Director of Safety, concluded, as reported on February 25, 2005, as a front-page story in the media,[1] and not disputed by the Carrier, that Claimants had violated that rule:

[1]Safety Director Mogan's conclusion was repeated in subsequent reports of the incident prior to the investigation (see, e.g., Org. Ex. G, pp. 1, 5 and 6).

> . . . Dennis Mogan, Metra safety director, said rules were breached. The two engineers "saw each other, but they didn't communicate," he said. [*Chicago Tribune*, "Boy's death linked to engineer error; Rules breached, Metra official says," (Org. Ex. D)]

By identical letters dated March 2, 2004, (Car. Ex. B), Claimants were each charged with possible violation of Rule No. 1.47 B-1 of the General Code of Operating Rules, Fourth Edition, dated April 2, 2000, and Rule No. 6.30 of Canadian Pacific Railway Special Instructions Timetable No. 4, effective at 0001, Sunday, August 11, 2002 and were instructed to attend an investigation "to develop the facts, determine the cause and assess responsibility, if any in connection with your duties while working as Engineers and Student Engineer, respectively, . . . on Monday, February 23, 2004, specifically while operating Train Numbers 2246 and 2243 between approximately 6:00 p.m. and 6:10 p.m. at the River Grove station on the Elgin Subdivision."

Rule 6.30 (Receiving or Discharging Passengers) of the Canadian Pacific Railway Special Instructions Time Table No. 4, August 2002 (Car. Ex. E, p. 197), provides:

> When a passenger train is receiving or discharging passengers the following will apply:
>
> * Train, engine, or on-track equipment must not pass between the standing train and the station platform being used.
> * Train, engine or on-track equipment approaching on an adjacent track must not pass that train, unless one of the following safe guards is established:
>   1. Intertrack fencing is provided and affected pedestrian crossings are blocked, or;
>   2. A crew member is stationed at the rear of stopped passenger train to prevent pedestrians from crossing and pedestrian crossings are blocked.
> * A passenger train must not depart a station when a train or engine is seen approaching until the leading end of approaching train has passed rear of standing train, unless communication has been established to ensure safe guards.
> * At initial stations, when trains that are standing near crosswalks, a crew member must be

> in position to protect passengers against approaching movements on adjacent tracks.
>
> Train or engine on an adjacent track must ring bell approaching and passing a passenger train at a station and sounding engine whistle, as necessary.

Rule 1.47 (Duties of Trainmen and Enginemen), Section B.1, of the General Code of Operating Rules, Fourth Edition, April 2, 2000 (Car. Ex. E, p. 198), provides:

> The engineer is responsible for safely and efficiently operating the engine. Crew members must obey the engineer's instructions that concern operating the engine. A student engineer or other qualified employee may operate the engine under close supervision of the engineer. Any employee that operates an engine must have a current certificate in his possession.

An investigative hearing was, after two postponements requested by the Organization and mutually agreed upon, convened on April 7, and continued on April 8 and 13, 2004, at which the evidence described herein was adduced. Claimants each appeared at the hearing and testified on their own behalf. The Carrier relied primarily on the testimony of Metra's Chief Mechanical Office, Richard Soukup, Trainmaster, Tom Fowler, Senior Road Foreman David Stuts and others. The Hearing Officer, Mr. Don Orseno, not only conducted the hearing, but was the lead and only questioner of witnesses for Metra, propounding the questions, ruling on objections to his own questions and making rulings in response to the cross examination of Metra witnesses and on witnesses and subjects proposed by the Organization. The conduct of the second and third days of hearing was observed by Federal Railroad Administration, which regulates the Carrier's operations and which certifies (and decertifies) Locomotive Engineers.

By letters dated April 22, 2004 (Car. and Org. Ex. F, pp. 1-6), the Carrier notified Claimants that they had been found guilty of the charges and that they were dismissed from all service effective that date. The Organization submitted a timely claim protesting Claimants' dismissals as violative of Rules 43 and 44 of the Agreement (Car. Ex. G, pp. 1-4; Org. Ex. F, pp. 7-10). The dispute was progressed on the property in the usual manner, without resolution; and it was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that the record establishes Claimants' guilt of the charges against them by a preponderance of the evidence, thereby meeting its burden of proof. It asserts that Claimants were afforded a fair and impartial investigation, that the investigation developed that Claimants were guilty of the charges against them, and that the discipline assessed was warranted in light of the serious nature of the proven charges.

The Carrier argues that the evidence establishes that Train No. 2246 was, without question, stopped at the River Grove station receiving and discharging passengers and that Train No. 2243 was approaching the River Grove station from the east. It contends that the two trains pass on adjacent tracks in the general vicinity of River Grove every day and that, as part of the routine operation of their trains, each Claimant expected to meet the other train operating on the adjacent track. The Carrier also maintains that Claimants were also required, as a general matter, to observe the route ahead of them and that, since there is an unobstructed view in both directions for nearly a mile in the section of track just east of the River Grove station to Grand Avenue, the train operating in the opposite direction would be directly in the line of sight for each Claimant for some 4,500 feet. It points out that Mr. Voss testified that he saw Train No. 2246 when his train was traveling over Grand Avenue (Car. Ex. D, pp. 68-69) and contends, therefore, that Messrs. Little and Gavina were able to observe the express train approaching them on the adjacent track. It asserts that, since Train No. 2246 did not begin to pull away from the station until Train No. 2243 was 2,000 feet away, Little and Gavina had 25 seconds to observe that the express train was approaching. It further maintains that the distinctive headlight and ditchlights of the westbound train, combined with the evening darkness on February 23, provided optimum conditions for Claimants Little and Gavina to observe, while they were stopped at the station, that another train was approaching. It asserts that, if the crew of Train No. 2246 actually did not observe the other train approaching, it was only because they failed to look.

The Carrier further points out that Mr. Gavina testified that he, too, saw the express train approaching. It maintains that, although he was aware of the Rule 6.30 requirement to communicate with an approaching train, the evidence is that he did not contact the other train because he thought his train would be clear of the station before the other train arrived. (Car. Ex. D, p. 34) It contends that, despite the approaching express train and their failure to communicate with it, Messrs. Little and Gavina began to

pull away from the station, leaving the pedestrian crosswalk unprotected. It asserts that, as a direct result of their failure to comply with Rule 6.30, a pedestrian ended up in the path of the express train and was killed.

The Carrier further argues that Mr. Voss acknowledged that he observed Train No. 2246 but did not communicate with it. It contends that, instead, he determined that Train No. 2246 had already departed the River Grove station and that there was, therefore, no need to ascertain whether it had left the station or to communicate with it. It maintains that, since from his vantage point he was in fact unable to determine whether Train No. 2246 had cleared the station or not, it was the obligation of Mr. Voss to determine whether it was safe to proceed at the normal speed (close to 70 miles per hour) and to establish contact with the other train, but he made no such effort. The Carrier additionally asserts that when it became apparent, as he approached, that Train No. 2246 was not clear of the station, he did not react to the hazardous situation and proceeded through the station at a high rate of speed. It maintains that he was required to operate his train safely and in accordance with the applicable rules, but that he failed to do so.

The Carrier further argues that the discipline assessed to Claimants, *i.e.*, dismissal, was commensurate with the nature of their infractions. It contends that Claimants failed to properly perform their duties and failed to establish proper safeguards as they operated their trains through the River Grove station, thereby putting members of the public in grave danger.

As to the Organization's protests that the Carrier failed to meet its burden of proving Claimants' guilt and that it did not provide Claimants with a fair and impartial hearing because it prejudged their responsibility, the Carrier contends that they are without merit. With regard to prejudgment, it maintains that the extensive hearing record (3 volumes) and the time and effort that went into reviewing the events of the incident belie the Organization's assertion. Metra contends that there is nothing in the record to indicate that anyone involved in the Carrier's discipline process prejudged Claimants' responsibility or took any action that prevented them from receiving a fair and impartial investigation.

The Carrier further argues that, notwithstanding the Organization's repeated claims to the contrary, Rule 6.30 applies in the instant case. It maintains that the rule does not simply

apply when passengers are actually getting on or off a train or that, once the doors are closed and the boarding process is ended, an engineer is no longer obligated to take precautions for approaching trains and is free to depart and to leave the station unprotected. The Carrier contends that such a reading of Rule 6.30 would defeat its fundamental purpose, which is to protect the public in and around stations and that, in fact, the need to protect disembarked passengers from approaching trains is most critical after boarding and disembarkations is finished and the train doors are closed. It asserts that is why the rule specifically provides that a train "not depart a station" unless steps are taken to ensure the safety of those at the station and requires that protection be maintained until the approaching train has passed the back of the train at the station or be provided by communication between trains.

The Carrier further argues that the Organization's claim that a freight train on an adjacent track kept Messrs. Little and Gavina from seeing the westbound express is similarly disingenuous. It maintains that the record indicates that the nearest freight train was west of River Grove and there is no credible evidence placing a freight train in a position that blocked Claimants' view of Train No. 2243. Additionally, the Carrier asserts that, even if there had been a freight train on the adjacent track, the line of sight to the east from River Grove was straight for nearly a mile and would not have prevented the crew from seeing the approaching express train. It further contends that, even if their view to the east had been obstructed, the safe course of action would have been to first ascertain the location of the oncoming express train and, if necessary, to provide safeguards for the station prior to departing, which they also did not do.

The Carrier further argues that the Organization's attack on the reliability of the expert evidence used to determine the location of the trains as they passed each other, based on witness accounts, is without merit. It contends that the data from the event recorders, the most reliable evidence available because they are totally objective, established that the front of the westbound express (2243) passed the rear of the eastbound train (2246) 57 feet east of the crosswalk at River Grove, thereby placing both trains within the station and leaving the crosswalk open just as the westbound express train passed the Station. It asserts that the witness accounts cited by the Organization, which placed that point further to the east of the station, are not reliable because the witnesses had no reason to pay any attention to the precise

point where the two trains passed each other and, in any case, the witnesses themselves did not agree on a specific location.

Finally, the Carrier argues that, faced with compelling evidence, the Organization inappropriately seeks to blame it for encouraging a "culture emphasizing speed and on-time performance" and the lack of warning devices for the accident. While it admits that it highlights on-time performance, the Carrier maintains that it neither advocates nor tolerates disregard for operating and safety rules for the sake of on-time performance and that it places greater emphasis on safety, not on-time performance. As to the lack of warning devices at the crosswalk, the Carrier notes that Rule 6.30 does not make any exception for stations with automatic warning devices and that, whether crossings are equipped with warning devices or not, employees are required to establish and maintain safeguards. It contends that, in any case, such devices provide a warning, not a barrier, and that is why it was important for the train in the station, *i.e.*, Train No. 2246, to physically block the crosswalk when the express train was approaching.

The Carrier urges that the claim be denied and the dismissal of the three Claimants upheld.

The Organization argues that the Carrier failed to meet its burden of proving the charges against Claimants. It contends that Claimants did not violate either Rule 6.30 or Rule 1.47, Section B.1, which would have made them responsible for the death that ensued, that they did not receive a fair and impartial investigation in accordance with the provisions of Rule 44 because their guilt was prejudged and that they should not have been disciplined at all but that, if they did violate the rules, the discipline assessed against them was unreasonably harsh, arbitrary and disparate.

In specific, the Organization argues that Rule 44 (Discipline) requires that an employee "not be disciplined or dismissed without first being accorded a fair and impartial investigation . . ." It contends that the investigation in the instant case was held solely in order to build a record for a preconceived result and was neither fair nor impartial. It notes that Claimants' guilt was pronounced in the press by Metra's Director of Safety, not only before the investigation was conducted, but before charges were even brought against them. Citing authority, it maintains that the claim must be sustained because the Carrier blatantly prejudged Claimants' culpability before the Organization was even allowed to present their primary defense. It asserts that, as a result, the

formal investigation became a perfunctory exercise to justify a pre-ordained result.

The Organization further argues that the Hearing Officer, during the investigation, advocated in favor of the Carrier's position, accepted hearsay testimony for the record and refused to allow direct testimony concerning the same topics and refused to accept evidence, thereby narrowing the scope of Claimants' defense, all in violation of his role as a gatherer of facts. It maintains that an example of the Hearing Officer advocating for the Carrier's position is when Hearing Officer Orseno interrupted cross-examination of a Carrier witness to debate the meaning of Rule 6.30 with Organization Representative Charlie Lough (Car. Ex. C, pp. 77-82; Org. Ex. J).

The Organization further argues that the Hearing Officer accepted hearsay testimony offered by the Carrier but refused to allow direct testimony offered by the Organization concerning the same topics. It contends that examples of such conduct include his permitting Trainmaster Richard Oppenheim to testify about reports which he did not prepare concerning events he did not see regarding freight trains passing through River Grove at critical times (Car. Ex. E, pp. 91-100; Org. Ex. K) and his accepting into evidence a written statement from one freight train's crew, but refusing to produce the crew members who authored the statement or any of the freight trains' crews (Car. Ex. E, pp. 99-104; Org. Ex. L). It maintains that the crews were material witnesses, as borne out by the fact that their written statement was made part of the record (Car. Ex. E, p. 234), and that they should have been produced for examination and cross-examination. Citing authority, the Organization asserts that the discipline of Claimants should be set aside because the Carrier relied upon hearsay evidence and denied the right of cross-examination concerning the evidence.

The Organization further argues that the Hearing Officer refused to accept evidence from Claimants and, thereby, narrowed the scope of their defense. It contends that examples of such conduct include when Mr. Orseno refused to accept evidence showing that even recorder information is not always reliable (Car. Ex. D, pp. 26-27; Org. Ex. N) and when he refused to accept evidence showing ambiguity had arisen and clarity had been adversely affected in the meaning and interpretation of Rule 6.30 (Car. Ex. E, pp. 22-25; Org. Ex. O). Citing authority, the Organization maintains that the Hearing Officer should have allowed such material to be entered and weighed its value later, rather than arbitrarily excluding it.

The Organization further argues that an indication of the prejudgment and inadequacy of the investigation was the absence of any actual objective eyewitnesses. It contends that the Carrier built a record based entirely on hearsay and the reconstruction and supposition of one expert, but made no attempt to have anyone present who actually saw what happened. The Organization maintains that, while it sought out and obtained actual eyewitnesses, the Carrier dismissed their statements, when proffered, on the basis that eyewitnesses are unreliable. It asserts that, had the Carrier been interested in conducting a full and fair investigation, it would have attempted to procure material witnesses.

As to the merits, which it contends should not be reached, the Organization argues that the Carrier did not meet its burden of proving the charges against Claimants. It asserts that, according to Rule 6.30, whether a train must remain in a station depends upon whether it is receiving or discharging passengers. It maintains that, on February 23, 2004, Train No. 2246 had completed discharged and receiving passengers and, therefore, was not restricted from departing the station. It contends that the intent of Rule 6.30 is to protect passengers/pedestrians in and around stations and that everything Claimants did was consistent with that intent.

The Organization further argues that Claimants Little and Gavina both testified that they did not immediately see Train No. 2243 because another movement, Engineer Ruth's train, was also in front of them as they made their stop in River Grove. It maintains that Engineer Ruth's statement (Car. Ex. G, p. 5; Org. Ex. F, p. 11) supports their account and that his statement is better evidence than the hearsay provided by the Carrier at the investigation. The Organization asserts that, when they saw the express train, they had already departed River Grove and adjudged that they would be clear of the station in sufficient time for the people at the station to see the on-coming train and that, similarly, when Mr. Voss saw Train No. 2246 depart River Grove, he too believed there would be sufficient time for the people at the station to see him approaching. It contends that the statements of Ms. Bolton and Ms. Caburnay corroborate Claimants' accounts that there was sufficient time between the departure of Train No. 2246 and the passing of Train No. 2243, that Train No. 2243 was seen and heard approaching and that the people about the station were not imperiled.

The Organization further argues that Mr. Soukup's expert reconstruction based on data recorder downloads, which he interpreted to indicate that the front of Train No. 2243 passed the

rear of Train No. 2246 at a point only (first) 32 feet or (later) 57 feet east of the crosswalk where the child ran, is impossible on its face. It maintains that, with Train No. 2243 moving at 102 feet per second, there was insufficient time - half a second - for the child to see his father, escape his mother and run across the eastbound track and platform into the path of the westbound express. It asserts that the two trains did not pass one another where Mr. Soukup claimed, but east of Thatcher Avenue where the Claimants and the eyewitnesses said they passed. Such location indicates that the train had already left the station. It contends that the accident occurred, not because of a violation of the rules, but because of a moment's thoughtlessness on the part of a child.

Without conceding that Claimants violated any rules, the Organization argues that, even if the Carrier had proven the charges against them, permanent dismissal was too harsh a penalty. It contends that Claimants were all model employees with excellent personal records: Mr. Little was one of the finest engineers in Carrier's service, a trainer and mentor engineer; Mr. Gavina had come up through the ranks, demonstrating exceptional responsibility and reliability; and Mr. Voss's record was unblemished in service for two railroads during his career.

The Organization maintains that in another case, involving an admitted violation of Rule 6.30, Carrier imposed only a one-day overhead suspension and that dismissal of Claimants cannot be justified. Citing authority, it asserts that discipline for commensurate offenses, discipline records being equal, should not be disparate as it is in the instant case and Claimants should be returned to service and receive no more than the discipline imposed in the other case. The Organization argues that the Carrier's claim, that this disparate treatment argument is new and should not be considered, is without merit because it did not learn about the other case until June 2005, well after the handling of the instant case concluded in October 2004, and it was, therefore, not possible to include it in the instant handling. It maintains that it raised the argument as soon as it could.

The Organization urges that the claims be sustained and Claimants' dismissals rescinded and that they be returned to service with all pay for time lost, all rights of employment restored and their personal records cleared of any notation of discipline.

DISCUSSION AND ANALYSIS: This proceeding reviews a tragic situation which everyone involved regrets. The incident took the life of a child, caused unspeakable pain for his family, as well as pain for all of the employees involved. The are lessons to be learned by all involved. The incident also resulted in Claimant's loss of employment. This proceeding is to determine whether their dismissals were proper.

The Carrier had the burden to establish Claimants' guilt of the charges against them, considered on the record as a whole, and to establish that the penalty of dismissal was appropriate. The Carrier asserts that it did so by a preponderance of the evidence; the Organization maintains that it did not. It was also the obligation of the Carrier to afford Claimants a fair and impartial hearing. That requires, in part, that the Carrier did not prejudge the guilt of Claimants and that it afforded them a full opportunity to present, and have the Carrier consider, evidence in their defense. That obligation is underscored by the fact that the Hearing Officer charged with providing the fair hearing is an officer of the Carrier, sitting to gather a full and complete factual record.

The Board is not persuaded that the Carrier satisfied its obligations to afford Claimants due process, a fair hearing and full and open consideration of the evidence before reaching a determination with respect to Claimants' guilt. For that reason, the claims must be sustained.

Background

The Carrier was obligated, pursuant to Rule 44, Section (a), to afford Claimant a fair hearing:

> An employee will not be disciplined or dismissed without first being accorded a fair and impartial investigation.

A fair hearing not only requires the absence of actual bias but also an effort to prevent even the probability of unfairness. Therefore, it was the obligation of the Carrier not to prejudge Claimants' guilt, but to determine that solely on the basis of evidence adduced in the investigative hearing. Claimants were charged with violation of Rule 6.30, a safety rule which, in its essence, is designed to protect disembarking passengers from crossing into oncoming rail traffic at stations which possess little or no warning systems. However, a week before Claimants were even presented with the charges against them, for violating

safety rules, the Carrier's Director had already publicly pronounced the guilty.

A similar situation to the instant case arose in Public Law Board 4450 Award No. 85:

> . . . After the accident under investigation but weeks before the hearing commenced, the following news report about the incident . . . appeared in the August 7, 1996 edition of "The Oregonian":
>
> > The conductor and the engineer on the westbound train failed to heed a signal warning that the track wasn't clear, said Ed Trandahl, a Union Pacific spokesman in Omaha.
> >
> > Investigators determined the signal was working and the train had plenty of time to stop, Trandahl said. He doesn't know if either of the employees will be disciplined.
>
> It is not open to reasonable debate that this is persuasive evidence that Carrier blatantly prejudged Claimant's culpability before the Organization were [sic] even allowed to present his primary defense at the hearing . . . [Dana E. Eischen, Chairman] [February 28, 1999] [Org. Ex. H]

As a result of the handling in the above-described case, the Board sustained the claim, finding that the carrier failed to provide claimant with a fair and impartial investigation.

The Statute provides the mechanism for the determination whether employees have violated rules; the Agreement between the Parties sets forth the procedures. The Safety Director was speaking to the media on behalf of the Carrier; he clearly had authority to do so. He was speaking about safety rules in his capacity as Metra's chief safety official. His conclusion cannot but have had a prejudicial effect on the Hearing Officer's view of the case or on the perception of the official who decided Claimants' guilt.

Hearing Officer Advocated for the Carrier

The transcript of investigation clearly establishes that during the hearing, Hearing Officer Donald Orseno repeatedly acted

not as a neutral gatherer of facts, as the role of Hearing Officer requires, but as the advocate for the Carrier. His conduct of the hearing is replete with petty, and many not-so-petty, rulings against the Organization. He refused, for example at the outset of the hearing to allow the Organization to tape record the proceeding. In one instance, when Organization Representative Charlie Lough sought to enter into the record a public timetable about which he was questioning Conductor Brian Benes, Mr. Orseno argued with Mr. Lough about its relevance and how it related, if at all, to the provisions of Rule 6.30 (Car. Ex. C, pp. 77-83). Ultimately, he refused to enter the public timetable into the record.

When questioning Claimant Little, Hearing Officer Orseno concluded that Claimant did not understand Rule 6.30:

> . . . [Y]ou've looked at the rule, you read the rule, and I'm asking you if you understand the rule. I don't believe you have understood the rule as it's written ... [Car. Ex. D, p. 104]

In the role of Hearing Officer, it was not for Mr. Orseno to reach conclusions concerning testimony, certainly not before he heard it all.

When Mr. Lough objected to Chief Mechanical Officer Richard J. Soukup's testimony concerning the location of the two trains, Hearing Officer Orseno conducted an extended debate with Mr. Lough concerning the accuracy of the event recorder downloads (Car. Ex. E, pp. 41-49). After Mr. Lough commented that the Carrier's calculations of distance were sometimes inaccurate, pointing out (and the Carrier has never disputed) that the accuracy of the downloads from Train No. 2246 were never verified, he referred to a March 2004 memorandum from Mr. Soukup to Mr. Orseno (Car. Ex. E, p. 232). This document indicated that the wheel diameter conversion, a critical element in determining the distance between the two trains and the exact point at which they passed, had been calculated incorrectly and enclosed corrections to the previous data. Mr. Orseno quickly elicited testimony from Mr. Soukup to the effect that this correction had nothing to do with the accuracy of download information. He did not, however, dispute Mr. Lough's suggestion that distance calculations, based on those downloads, are sometimes incorrect or that the accuracy of 2246's downloads were never verified.

Hearing Officer Improperly Included Faulty Evidence in the Record

"Hearsay" is a statement, other than one made by the declarant while testifying at a trial or other quasi-legal hearing, offered in evidence to prove the truth of the matter asserted. It occurs when a witness testifies about something someone else told them or said they saw or heard, not about something they personally saw or heard. It is objectionable because it deprives the other side of an opportunity to confront and cross-examine the "real" witness who originally saw or heard something.

Rule 44, Section (d), of the Agreement generally discourages the use of hearsay evidence in disciplinary investigations:

> Except as to records or documents or copies thereof which have been notarized, no oral or written statements or testimony taken at any time or place other than during the investigation will be recorded in the transcript, nor will it be considered as evidence by reviewing agencies, unless the person or persons, making such oral or written statement is present at the investigation to testify that the statement made is his, and the signature, if any, or the written statement is his, thereby giving either the Carrier's representative or Employees' representative an opportunity to interrogate such witness. [Car. Ex. A, p. 2]

The transcript establishes that the Hearing Officer repeatedly permitted the entry of hearsay evidence favorable to the Carrier into the record:

- Mr. Soukup testified about the accuracy of event recorder downloads and their verification (Car. Ex. D, pp. 7-17). The Organization objected to entry into the record of a "certificate of calibration," a document (Car. Ex. E, p. 217) which was not notarized, from W.H. Leary Company, Inc., an outside contractor, purporting to show that a calibration was done on August 1, 2003. The document was prepared by Brian Gore, an employee of the contractor, who was unknown to the witness. The document was entered into the record over the Organization's objection. Later in the day, a second, notarized copy of the same document (Car. Ex. E, p. 218) was entered into the record (Car. Ex. D, p. 85)

- Mr. Soukup testified about a conversation he had with a Bach-Simpson Corporation employee concerning the accuracy of certain of its equipment and the standard deviation of its data (Car. Ex. E, pp. 27-29). His testimony was permitted over the Organization's objection, even though Mr. Soukup could only repeat the other employee's statements to him but could not vouch for the truth of the information he provided.

- Trainmaster Richard Oppenheim testified about freight trains that used Track No. 3 at about the same time and date as the incident under investigation (Car. Ex. E, pp. 91-101). He had no information of his own knowledge respecting freight train movements at that time. The Organization objected to his referring to a document (Car. Ex. E, p. 233), indicating that only two freight trains were anywhere close to River Grove at the time of the incident, which was not notarized, entitled "Metra [Tower] B-12 Freight Movements," and, later, to its entry into the record (Car. Ex. E, p. 127). Mr. Oppenheim testified about asking Canadian Pacific Terminal Manager Jim Emkow to identify freight trains on Track No. 3 in the area of River Grove at about the same time and date as the incident and asking him to interview the crew members of the freight trains and reporting back to him on the conversations with them. The crew members of one of the freight trains provided a notarized statement (Car. Ex. E, p. 234). Neither Mr. Emkow nor the crew members of either freight train testified and none was available for cross-examination.

The Board is persuaded by numerous Awards which have set aside discipline when a carrier has relied upon hearsay evidence and denied to a claimant the right to cross-examine witnesses concerning that evidence. (See, for instance, First Division Award No. 24718 [Dana E. Eischen, Referee, January 14, 1997], sustaining a claim protesting a carrier's use of recollections of oral interviews and typed transcripts but not producing critical material witnesses for cross-examination, and First Division Award No. 23755 [Rodney E. Dennis, Referee, February 12, 1985], sustaining a claim protesting the use of written statements and testimony of witnesses who related what other people told them but not what they knew first-hand). The introduction of Messrs. Soukup's and Oppenheim's recollections of their conversations with other people, both Carrier employees and others, and their interpretations of other people's statements, over the objections

of Claimants' representatives, and without producing those critical material witnesses for cross-examination, constituted an unacceptable use of hearsay evidence and was in direct violation of the clear and unambiguous language of Rule 44, Section (d).

The Hearing Officer's admission of suspect evidence favorable to the Carrier is even more erroneous in light of his unwillingness to let the Organization submit direct and other evidence to contravene the Carrier's evidence, as described in the next section.

This conclusion alone dictates the outcome of the instant case. Whatever one might otherwise think about the persuasiveness of the illicitly introduced statements, neither Carrier nor this Board is free to consider them as evidence under the strictures of Article 44, Section (d). Nor can the Carrier evade the prophylactic effects of that Rule by the simple ploy of having the written statements signed and notarized.

Hearing Officer Improperly Excluded Probative Evidence

Rule 44, Section (b), of the Agreement, in pertinent part, provides:

> Such ten (10) day notice to appear for investigation will give the accused a reasonable time to prepare his defense . . . and to secure the presence of any defense witnesses he may desire. [Emphasis added.] [Car. Ex. A, p. 1]

Section (b) does not provide the Hearing Officer with discretion to deny the presence of defense witnesses or to deny the presentation of evidence which the Organization reasonably believes necessary to establish defenses to the charges.

Section (c), in pertinent part, provides:

> If additional employee witnesses are desired by the employee or his representative, written advice of such desire shall be filed with the officer calling the investigation . . . Such notice shall be given . . . to permit proper notice being given to the requested witness. The Company will arrange for the attendance of any such employee able to attend.

The purpose of this language is to enable the Carrier to provide notice to requested defense witnesses, not to provide to the Hearing Officer discretion to deny claimants access to witnesses or to object to the relevance of their testimony.

The transcript of the investigation demonstrates that Hearing Officer Orseno repeatedly refused to accept probative evidence from the employee representatives and, thus, narrowed the scope of Claimants' defense:

- He refused to enter into the record a copy of the public timetable (Car. Ex. C, pp. 77-83).

- He refused to enter into the record a copy of First Division Award NO. 25393 to rebut Carrier's contention that event recorders were always accurate (Car. Ex. D, pp. 24-27)

- He refused to enter into the record the former rules on the property concerning communication between trains, intended to show how ambiguity might have arisen and clarity adversely affected in the meaning and interpretation of Rule 6.30 (Car. Ex. E, pp. 22-25).

The Board is persuaded by Awards which have set aside discipline where a carrier excludes evidence, rather than allowing material to be entered into the record and determining its value later. (See, *e.g.*, PLB 6041 Award No. 5 [John C. Fletcher, Neutral, March 26, 1998], sustaining a claim where the hearing officer "improperly limited the scope of the Claimant's defense," and finding that a "hearing officer is not privileged to steer an investigation to only that evidence and testimony that favors the charges" and is required "to develop all of the facts, including those that may lean toward an exoneration of the charged employee.") As indicated in the previous section, the conduct of the hearing officer in dealing with the Organization's presentation of its case is particularly egregious in light of his broad admission of suspect evidence favorable to the Carrier. The Carrier may not exclude evidence and limit cross-examination and other challenges and then rely on limitations in the record to establish guilt.

Miscellaneous Concerns

The Board is also troubled by numerous examples of Hearing Officer Orseno's manifest hostility toward Claimants and their

representatives, as demonstrated by arbitrary decisions and his often argumentative, contentious and sometimes sarcastic questions and comments:

- Trainmaster Tom Fowler was the second witness called to testify on Carrier's behalf (Car. Ex. C, pp. 66-67), yet he did not appear on the list of Carrier witnesses provided to Claimants (Car. Ex. B).

- Soon after the conclusion of Conductor Benes' testimony (Car. Ex. C, pp. 68-90), Trainmaster Fowler was recalled to testify because, according to Mr. Orseno, "there's still some confusion as to what Mr. Benes stated" (Car. Ex. C, p. 105). If Mr. Orseno, was confused by what Mr. Benes stated, surely Mr. Benes was a more appropriate witness through which to clarify his own testimony.

- After Claimant Gavina testified that the third coach on Train No. 2264 was spotted on Thatcher Avenue (Car. Ex. D, p. 48), Mr. Orseno asked Claimant: "Why did we hear previous testimony from the conductor that places the train in a much different location than where you're placing the train?" (Car. Ex. D, p. 53)

- After Claimant Little completed a brief response to a question posed to him by Hearing Officer Orseno, Mr. Orseno quipped "Finished?" (Car. D, p. 118). A few moments later, the following exchange between them ensued:

  Q: . . . Does this have anything to do with say, January 7, 2004?
  A: My response would be that a person looking at that document could assume that the safety and efficiency would be the same any other day.
  Q: You can assume that?
  A: Yes, I said they could assume.
  Q: You assume they could assume? [Car. D, pp. 118-119]

- On five separate occasions[2] within a one to two minute period of time, Mr. Orseno asked Claimant Little

[2] "[H]ow is it possible you didn't see Train 2243?" (Car. Ex. E, p. 80, lines 17-18); "[H]ow is it that you did not see Train 2243?" (Car. Ex. E, p. 81, lines 8-9); "[H]ow is it you didn't see him?" (Car. Ex. E, p. 81, lines 19-20); "[H]ow did you not see the train prior to departing . . .?" (Car. Ex. E, p. 82, lines 12-13); and "[H]ow did you not see the train?" (Car. Ex. E, p. 83, line 16)

essentially the same hostile/badgering question: "How is it possible that you didn't see Train 2243?" Not satisfied with Mr. Little's responses to his repeated question, Mr. Orseno tells Mr. Lough: "I'm asking how when you're looking for these things you don't see the person, that's what I'm asking. I don't understand what is so hard about that, it's a simple question." (Car. Ex. E, p. 84)

Similarly, within a minute, Mr. Orseno twice asked Claimant Voss to explain why he was "not clear at all" about when the front of his express train passed the rear of Train No. 2246, but was "so clear" about the freight train on Track No. 3.[3]

- By letter dated March 10, 2004 (Car. Ex. E, p. 172), the Organization requested "records pertaining to a third train on No. 3 main at River Grove, IL, at the same time of the incident." By letter dated March 12, 2004 (Car. Ex. E, pp. 173-174), Mr. Orseno responded that it would not provide such information since the Organization had not indicated "how these records would be relevant . . ." On the third day of the investigation - April 13, 2004 - and more than a month after the Organization's request for such information, Trainmaster Oppenheim testified on that very issue (Car. Ex. E, pp. 86-103).

- A notarized statement from one freight crew that was in the general area of River Grove was entered into evidence (Car. Ex. E, p. 234) but not from the second freight crew. Additionally, given the date of the crew's statement - March 16, 2004 - the Carrier had almost a month before the statement was entered into evidence on April 13, 2004, to share the crew's statement with the Organization, which had submitted its request for such information on March 10.

- Mr. Orseno expressed to Mr. Lough, Claimants' representative: "You made objections on top of objections on top [of] objections throughout the whole proceeding ..."

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[3]You seem to have a very clear recollection of freight train CP 4415, and then in previous testimony when I asked you about passing the rear end of Train 2246, you seemed like you were not clear at all to the location. My question to you is, how are you so clear about a freight train on 3 main and you were not very clear about where you passed Train 2246?" (Car. Ex. E, p. 107) and "It seems like you're very clear about where the freight train was on February 23, 2004 . . . but when you were asked questions about specific locations where you passed the train, 2246, or when the train actually came into view, you were unclear about that. My question is, how can that be?" (Car. Ex. E, p. 108)

Such questions and remarks from the Hearing Officer, often constituting overt hostility and impeding the presentation of facts and defenses, have no place in an investigative proceeding. More substantively, such handling clearly deprived Claimants of the due process and fair hearing to which they were entitled by law and contract.

Conclusion

The role of the Hearing Officer is as a gatherer of facts and not as a prosecutor. It is imperative that the Hearing Officer search out the facts on all sides of the question at hand and that the Organization be allowed the opportunity to present exculpatory or mitigating evidence so that someone other than the Hearing Officer can decide whether the record supports the charges against Claimants. The Carrier appears to have forgotten that important distinction and the role it plays in ensuring that employees receive fair treatment.

The transcript clearly indicates that Hearing Officer Orseno, designated to perform the task by the Carrier, either did not understand or did not accept his role as a neutral gatherer of facts and that he fell short of producing a complete record. In instance after instance, he became an advocate for the Carrier, allowed faulty evidence into the record and excluded relevant and probative evidence which the Organization sought to introduce. The Board concludes that Mr. Orseno's conduct of the hearing deprived Claimants of the fair and objective hearing to which they were entitled.

The system utilized by the Parties is under the control of the Carrier - with hearings conducted by Carrier officials - and thus places special obligations on hearing officers to set aside bias and prejudgment. That is even more important where, as here, there had already been conclusions reached with respect to Claimants' guilt by the Carrier's top safety official, conclusions which were shared with the public through the media. The unfortunate conclusion reached from a review of the record is that this proceeding was a "railroad job".

In the final analysis, this claim must be sustained without passing on the merits of Carrier's determination that Claimants were culpable for the accident. However, the Board notes that the evidence excluded from the record was not trivial in nature, so the Board's conclusion that Claimants were denied due process and fair

hearing, permitting disciplinary determinations on the basis of a full and objective record, is not a mere technicality, but a substantive and serious abridgement of their rights. That result added three additional victims to what was already a tragic situation. The result is required because of the cumulative effect of Carrier's failures to provide Claimants with the "fair and impartial investigation" mandated by Rule 44. The Award reflects the Board's disposition of the case..

AWARD: The Organization's claim is sustained. The Carrier violated Rule 44 of the Agreement when it prejudged Claimant's guilt and did not provide them with a fair and impartial hearing. Claimants' dismissals shall be rescinded and they shall be returned to service with seniority unimpaired and be made whole for wages and benefits lost, all rights of employment restored and their personal records expunged of any notation of discipline. Nothing herein shall limit the Carrier's right to require counseling and retraining to ensure future compliance with safety rules. Claimants shall be afforded the opportunity to obtain counseling assistance with respect to the incident.

The Award shall be implemented within 30 (calendar) days of the date of its execution.

Dated this 31 day of August, 2005.

M. David Vaughn
Neutral Member

James Finn
Carrier Member

Richard K. Radek
Employee Member