SPECIAL BOARD OF ADJUSTMENT NO. 1063

Case No. 12
Award No. 12

PARTIES TO DISPUTE:

Brotherhood of Locomotive Engineers
and
Norfolk Southern Railway Company
Norfolk and Western Railway Company, et al.

STATEMENT OF CLAIM:

Claim of Pocahontas Division Engineer J. L. Chapman for removal of 10 days deferred suspension and pay for all time lost.

OPINION OF BOARD:

On August 24, 1991, Claimant was assigned as Engineer to Crew U34 which was scheduled to work at Amonate Mine. In the course of doubling 38 loads to 19 loads on the Front Track it was necessary to make several attempts to effect a coupling on a 1.5% grade. Just how many attempts, is one of the many questions left unanswered by the transcript. In any event, on August 26, 1991, the Carrier first became aware of burnt rails at the site of the Amonate Mine. Upon investigation it was reported there were five separate burn marks on both the north and south rails, each of which nearly matched the burns on the opposite rail, which required 97' of new rail on the south track and 84' of new rail on the north track. Following discussion with the crew members of Crew U34, a formal investigation was convened to determine Claimant's responsibility, if any, for damage to rail at Amonate Mine on August 24, 1991. Claimant was found guilty as charged and assessed 10 days deferred suspension.

In the course of the investigation the Carrier witness testified that Claimant admitted to him that he had damaged the rail at Amonate. The Claimant denied this assertion at the trial. The Claimant did admit to making two attempts to move the train but in his words, "ran into a stone wall." The Conductor states that possibly three attempts were made. The number is significant because the inspection by the Assistant Supervisor of Tracks disclosed five separate burn marks of various lengths and depths. Incriminating evidence points to Crew U34 as the responsible party as there was no proof of another crew being in the vicinity of Amonate Mine during the period in question. Thus, it becomes a question of determining the truthfulness and credibility of the various witnesses, which as we have stated many times, is a function of the Trial Officer. Unfortunately the Trial Officer offered a disclaimer saying:

> "I'm not here to determine anyone's credibility.
> I'm here to get the facts."

Thus, in this particular case and for the reasons alluded to, we are constrained to make those determinations which normally reside with the Conducting Officer.

It is apparent the Carrier's primary witness was relying upon a statement which was allegedly made to him by Claimant several days after the incident but presumably in the presence of other witnesses including Engineer B. E. Burnette. That testimony follows:

> "At approximately 2:30 p.m. on that same date of August 26th, 1991, I was in the process of leaving the Yard Office with the U36, Mr. J. L. Chapman. Mr. Wright and Mr. Oder, to relieve out U34, and as we were in the process of leaving Yard Office, we were met by the U35, Conductor D. A. Sanders, Engineer B. E. Burnette, and Brakeman. I then approached Mr. Burnette and asked him how bad was the track damaged at Amonate Mine and he told me it was damaged bad. At that time, Mr. Chapman said: Mr. Stepp, sir, Saturday, at approximately 12:05, while I was in the Front Track at Amonate, I burnt the rail approximately 2 feet, and I said: Mr. Chapman, are you telling me that you damaged the rail at Amonate? He said: yes sir. I said: sir, is this the first time that you have made this...."

The Claimant categorically denies this testimony and in fact, accused Carrier's witness of lying. The Conductor appeared at the trial and his testimony corroborates that of the Claimant more or less. No attempt was made to call Engineer Burnette by either side which appears rather strange since he was supposedly in the area when Claimant offered his unsolicited confession of guilt. The plot thickens further when it was revealed the Carrier's primary witness was not aware Claimant and his crew were at the Amonate Mine the following day, i.e., August 25, doing shifting, apparently without incident. This is pretty remarkable considering the testimony of the Assistant Track Supervisor who stated "I've been at this job for 20 months and this is the worst engine burns I've seen."

Sorting out the facts in this case has been a compelling challenge. The Carrier has the burden to prove by substantial evidence the truth of the charges. We are not entirely satisfied they have met this burden. Conversely, we are not certain Claimant didn't contribute some of the burn marks found on the rail, although the evidence is more circumstantial than direct. Under the circumstances we feel a Reprimand placed on Claimant's record will remind him of the necessity for carefully monitoring the engine performance of the Units under his control and we will expunge the 10 day deferred suspension.

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FINDINGS: The Agreement was violated.

AWARD: Claim Sustained.

ORDER: The Carrier will make the Award effective within thirty (30) days of the effective date.

Dated at Norfolk, Virginia, this 15th day of June, 1993.

W. F. Euker, Neutral Member

S. R. Budzina, Carrier Member

E. E. Watson, Organization Member

Carrier File: EE-RI-91-2
Org. File: D-448-91-2