

PUBLIC LAW BOARD 6657

In the Matter of the Arbitration Between:
WHEELING AND LAKE ERIE RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

NMB Case No. 1
Claim of G. T. Dombek
45-Day Actual Suspension

STATEMENT OF CLAIM: Claim of Engineer G. T. Dombek to be made whole for the period of time he was withheld from service, that he be additionally compensated for the purposes of profit sharing as if he had been in continuous service, that he be considered in continuous service for the purposes of health and welfare benefits, and that any mention of discipline assessed him resultant from this formal investigation be expunged from his record with no mention of this incident remaining therein.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant employee 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 September 23, 2003, at Cleveland, Ohio. Claimant was 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's craft.

On May 14, 1999, Claimant was an engineer assigned to Train No. 262-14 together with Conductor Wayne Pamer. They departed east from Brittain Yard on the Akron Subdivision with a train destined to Canton Junction on the Cleveland Subdivision. Track Warrant No. 332 (Carrier Exhibit 1, p. 67) was issued at approximately 7:30 a.m. which provided Claimant with authority to operate from Mogadore Junction Switch to Canton Junction. At approximately 8:45 a.m. Track Warrant No. 339 (Carrier Exhibit 1, p. 70) was issued and provided Claimant with authority to operate between Mogadore

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Siding and mile post 38. The crew was never given authority to operate on the main track between the two switches.

By letter dated May 17, 1999, Claimant was directed to attend a formal investigation in connection with the following charge:

"[T]o ascertain the facts and determine your responsibility, if any, in connection with the alleged failures listed below while you were on duty as [a member] of the 262-14 train working in the vicinity of Mogadore, Ohio, on May 14, 1999, when at approximately 0915 hours you allegedly occupied the main track without authority."

The specifically alleged failures included: "failure to be authorized by track warrant for use of the main track"; "failure to comply with instructions in a track warrant"; "failure to be responsible for the safety and protection of your train and observance of the rules"; and "failure to obey all rules and instructions.

The hearing was held on May 21, 1999, during which both Claimant (Carrier Exhibit 1, p. 50) and Conductor Pamer (Carrier Exhibit 1, pp. 41-42) acknowledged that their train operated on the main track between the switches at Mogadore although the track warrants did not provide the required authorization to do so.

By letter dated June 8, 1999 (Carrier Exhibit 2; Organization Exhibit A), Claimant was informed that he was disciplined with a 45-day actual suspension and in due course, the Organization presented the instant claim for Claimant's discipline to be expunged and for him to be made whole. As resolution of the matter could not be reached on the property, it was presented to the Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that the record contains substantial evidence of Claimant occupying the main track without authority. It contends that use of the main track in the

vicinity of Mogadore, Ohio, is only permitted when authorized by track warrant and that there is no dispute that Claimant occupied the main track without authority because he admitted it. It maintains that this was not the first time Claimant had operated in this area and that he knew he was operating in a track warrant controlled territory, having had a similar incident approximately one month earlier involving the same locomotive and the same conductor.

The Carrier further argues that the transcript of the investigation (Carrier Exhibit 1) clearly illustrates all of Claimant's "due process" rights as provided for under applicable rules of the Agreement were fully protected and the hearing was conducted in a fair and impartial manner. It contends that Claimant was given proper notice of the charges, sufficient time to prepare a defense, the opportunity to produce and examine witnesses and evidence, and that he was timely notified about the imposition of discipline.

The Carrier argues in addition that the Organization's allegations regarding violations of Article 19 (Discipline and Investigation) of the Agreement (Organization Exhibit B) are without merit. It maintains that operating on a main track without authority is such a serious offense that Federal regulations require that an engineer's certificate be suspended for a specified period of time, and that it was proper to suspend Claimant pending the results of the investigation. The Carrier also contends that it was not required to provide Claimant's union representative with a copy of the notice of investigation but points out that it did inform Claimant, as required, that "You may be represented by your duly accredited BLE representative; arrange for representation if you so desire"; that, while it did not cite the rule numbers that Claimant allegedly violated, it did provide direct excerpts from the rules; and that, because the incident involved "serious acts or occurrences," it was not required to give 15 days' written notice to effect the discipline.

Carrier argues that Claimant's actions -- operating on a main track without authority is very serious and that a 45-day actual suspension is the appropriate penalty for Claimant's actions. It asserts that the discipline imposed was neither arbitrary, capricious nor excessive and asks the Board to deny the claim in its entirety.

The Organization argues that Carrier failed to provide Claimant with a fair and impartial investigation, evident when it issued the excessive discipline of 45-days actual suspension to Claimant. It asserts that the notice of investigation was inadequate, in that it did not, as required by Article 19, Paragraph (d) (1), of the Agreement, give a "description of the act or occurrence which is the subject of the investigation, stating alleged rules involved without prejudging employee, but used as a format to prepare the defense," and clearly handicapped Claimant and his representative in their preparation of an adequate defense.

The Organization further argues that Claimant's removal from service prior to the conduct of the investigation was improper, because the alleged violation presented no risk of accident or injury, that the discipline was served prematurely (fewer than 15 working days after written notice was issued), and that Carrier's failure to provide it with notice violated the Agreement and past practice.

Finally, the Organization argues that mitigating circumstances made the penalty imposed excessive. It points to Claimant's clear discipline record and his admission that the two track warrants did not provide him with the authority to occupy the main track. It notes that Claimant did have authority to occupy all trackage in the surrounding area, that the Conductor was relatively inexperienced, and that the reason authority to occupy the track in question was not issued was due to the limitations of a computer-aided train dispatching system, not any prospective conflict in movement.

BLE maintains that the Carrier failed its obligation to impose corrective discipline, making evident Carrier's intent was to punish Claimant, not to guide him in the performance of his work. The Organization urges that a sustaining Award be issued.

DISCUSSION AND ANALYSIS: Based on careful consideration of the record, the Board concludes that there is substantial credible evidence to support Carrier's action. The evidence establishes that Claimant did, in fact, occupy the main track in the vicinity of Mogadore, Ohio, without authority. The Board is also persuaded that the Carrier fully protected Claimant's due process rights and the provisions of Article 19 of the Agreement.

The Organization concedes, and Claimant and the Conductor both testified, in the record, that the authority received on May 14, 1999, in the form of two track warrants, did not encompass the Cleveland Subdivision between the north and south switches of Mogadore Siding. It suggests several factors that should excuse or mitigate Claimant's "insignificant oversight," including: (1) the warrants that were issued made it impossible for any other trains or movements to conflict with his operation between the switches, (2) the inexperience of Conductor Pamer, and (3) the reason authority to occupy the main track was not issued was because of the limitations of the computer system, not any prospective conflict in movement.

The Board is not persuaded that Claimant's oversight was insignificant. Operating on a main track without authority is a serious offense, so serious that Federal regulations require that an engineer's certificate be suspended for a specified period of time (30 days).¹ This is especially so since the record indicates (Carrier Exhibit 1, p. 54) that Claimant was involved in a similar

¹"In the case of a single incident involving violation of one or more of the operating rules or practices described in paragraphs (e) (1) through (e) (5) of this section [paragraph (e) (4) includes "Occupying main track or a segment of main track without proper authority or permission"], the person shall have his or her certificate revoked for a period of one month." 49 CFR Sec. 240.117(g) (3) (i)

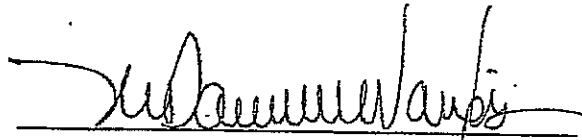
incident at Mogadore, Ohio, approximately one month earlier, involving the same locomotive and the same conductor.


The Board has considered the Organization's complaint that the Carrier violated Claimant's due process by denying him a fair and impartial investigation. The Board is not persuaded. The notice of investigation gave Claimant sufficient notice as to what was being investigated and enabled him and the Organization to prepare themselves for the investigation. The Carrier was not obligated to identify every rule that was allegedly violated by number, and the notice did contain direct excerpts from the rules. The main offense charged was serious and warranted suspension pending the results of the investigation and justified acting without giving 15 days' written notice to effect the discipline. The Carrier was obligated to inform Claimant of his right to union representation, which it did; it was not required to provide the union representative with a copy of the notice of investigation.

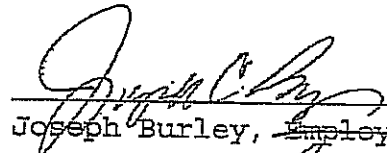
As to the penalty imposed, the Board is not persuaded by the Organization's essentially minimizing Claimant's conduct, suggesting that his actions were an "insignificant oversight." Under Federal regulations occupying a main track without authority requires that an engineer's certificate be suspended for one month, a recognition of the potentially serious safety and operating consequences of violation of the rule. The Board concludes that, given Claimant's clear disciplinary record and his admission of responsibility, a 45-day actual suspension is excessive punishment for the offense and that a penalty of a 30-day actual suspension is appropriate under the circumstances. The Award so reflects.

AWARD: The Organization's claim is sustained in part and denied in part. Claimant is guilty of violating the rules as charged. His conduct warranted discipline; however, the penalty assessed is excessive and is reduced to a suspension of 30 days actual. Claimant shall be made whole for wages and benefits lost as result of the difference between the penalty assessed and the penalty sustained.

Dated this 27th day of May, 2004.


M. David Vaughn, Neutral Member


Paul Sorrow, ~~Carrier~~ Member
Employee


Joseph Burley, ~~Employee~~ Member
Carrier

