

PUBLIC LAW BOARD NO. 4450

AWARD NO. 85
NMB CASE NO. 85
UNION CASE NO 11046A
COMPANY CASE NO 1024735

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(Western Region)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

Request on behalf of Engineer J C Aycock appealing the UPGRADE Level 4.5 Discipline assessed against his personal record and request the expungement of discipline and pay for any and all time lost with all seniority and vacation rights restored unimpaired. This action taken as a result of formal investigation held August 22, 23, and 26, 1996.

OPINION OF BOARD: On July 19, 1996, Engineer J. C. Aycock ("Claimant"), with 25 years of service as an Engineer--8 years in the territory in question--was called on duty at Nampa, Idaho at 1100 Mountain Daylight Time. He worked as the Locomotive Engineer on the OGRBA-17, a loaded soda ash unit train with 100 loads and 14,775 tons, west bound between Nampa and La Grande, Oregon. A total of 9 locomotives on the train were distributed in three sets, one on the lead, one near the middle and one on the rear of the train, operating in Distributed Power ("DPU") mode controlled from the lead locomotive, the LP 9390.

At 2:35 p.m., at Weatherby, Oregon, the OGRBA-17, westbound on the main track passed the signal at the west end of the siding at West Weatherby running into the side of the SENPV-18, an east bound mixed auto and COFC/TOFC train with 41 cars and 7 locomotives, operating in conventional (none-DPU) mode. The OGRBA was operating at about 25 miles per hour on an

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ascending grade and the speed was reduced but Claimant's braking effort was insufficient to stop the train before the collision occurred.

The SENPV-18 was struck at about the 21st rear car and derailed the 21st through the 17th rear cars, 4 of which were auto carriers and 3 of which were on their side. The fourth load of autos was leaning. The rear 16 cars were still on the track as were the lead 20 cars and locomotives of the SENPV. The lead locomotive of the OGRBA, was leaning at a 30% angle and the second locomotive was derailed. Conductor R. E. Miller on Claimant's train was seriously injured and, according to Carrier's evaluation, property and equipment damage exceeded \$150,000. Claimant was withheld from service commencing July 19, 1996 and served with a notice of proposed discipline and waiver of investigation on July 22, 1996, which he declined.

Following due notice and a three-day hearing conducted August 22,23 and 26, 1996 by MTO Gary Donner. On the basis of the hearing record, Carrier assessed Claimant a Level 4.5 UPGRADE suspension by letter of September 5, 1996, as follows:

While you were employed as Engineer on the OGRBA-17 at approximately 2:30 p.m., MT, on July 19, 1996, near MP 376.2, Weatherby, Oregon, Subdivision No. 451, your actions contributed to the collision of the SENPV-18 and the OGRBA-17 at west switch Weatherby, Oregon, which resulted in lost time injury and damages in excess of \$150,000. Your actions were in violation of Special Instructions, Item 17, Rule 245Q, of System Timetable No. 2, effective October 29, 1995, and Rules 9.5, 1.1.2 and 5.16 of Union Pacific Rules, effective April 10, 1994.

For the alleged rule violations, Engineer Aycock, served a 60 day suspension from service from Saturday, July 20, 1996, through Tuesday, September 17, 1996. Engineer Aycock's locomotive engineer certification was also revoked for one (1) month as provided in CFR Part 240.307 and 240.117, Paragraph G.

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Prior to and throughout the hearing, BLE representatives timely raised and preserved objections to the fairness and impartiality of the proceedings. By letter of August 19, 1996 and enclosure, Vice General Chair Bakker requested that Boise Service Unit Superintendent J. W. Heavin, in the interests of fairness and impartiality, designate someone other than MTO Gary Bonner to service as the Hearing Officer for Engineer Aycock's investigation:

Dear Jerry;

In reference to the investigation of Engineer J. C. Aycock, it has come to this committee's attention that Mr. Gary Bonner shall be the conducting officer.

The B. L. E. Finds that due to statements made by Mr. Bonner in sworn deposition that all Railroad employees lie, and the attached letter to Mr. W. B. Hulse confirming these statements in writing by Mr. Bonner disqualify him from being a fair and impartial conducting officer. The B. L. E. is requesting that Mr. Bonner not conduct this hearing.

The sworn testimony has been requested and shall be made available at the earliest opportunity. Thank You for your consideration.

(Enclosure)

*Mr. W. D. Hulse
BLE Division 362
P.O. Box 2826
LaGrange, Oregon 97850*

June 20, 1996

Dear Mr. Hulse

Reference your letter dated May 23, 1996, file no. WBH-KCJ-0523-01 concerning the investigation of K. C. Jones which I conducted.

If this letter is meant to be an appeal of the discipline issued Mr. Jones as a result of this investigation, you have sent it to the wrong authority; to be valid it must be sent to Service Unit Superintendent J. W. Heavin.

If you still consider this letter, although sent to the improper authority, to be an appeal for removal of discipline in the K. C. Jones case, this appeal is denied.

Referring to the 2nd paragraph of your letter, which has nothing to do with the Jones case, but which

you have used to make personal accusations against me. You have taken several words out of context in a matter completely unrelated to and removed from any case except its own. These words were not what I would have said or meant, but were the result of relentless questioning by an attorney who's sole motivation was not to get to the truth, but to discredit everyone involved in the case in anyway possible. I withdrew my words after I said them and made this qualified statement on the record "I have known a lot of good employees that at one time or another have been caught in something, and they have fabricated the circumstances". I am accountable for my actions which have been fair, honest, moral, and seeking the truth in all matters; and not for words that I was tricked or bamboozled into saying by a merciless equivocating attorney.

*Respectfully (sic)
Gary Bonner*

Notwithstanding this objection, which was renewed and expanded upon at the outset of the hearing, MTO Bonner did conduct the proceedings as Hearing Officer, including dismissing the Organization's renewed motion that he recuse himself. Significantly, acting as Hearing Officer, Mr. Bonner refused to discuss the which documented his own prior sworn assertions that even "good" railroad employees "caught in something" will "lie" or "fabricate the circumstances". The following excerpt from pages 19-20 of the transcript of investigation shows Mr. Bonner's disposition of the Organization's objections to his serving as Hearing Officer:

Mr. A J Bakker: This is Local Chairman A J Bakker, Division 362, BLE. We have a objection that, Mr. Bonner, it states on this witness statement that you are the Hearings Officer. We find that you should disqualify yourself from being the Hearings Officer, based on the fact, under sworn testimony, that you have stated that all railroad employees are liars. You—second of all, you have stated, in a letter to Mr. W B Huise, confirming the fact that all railroad employees are liars. We have the court case; we have your testimony; we have the letter to Mr. Huise. We wish to enter that as an exhibit, and we, as an Organization, are asking you to remove yourself as the Hearings Officer, based on the fact that you cannot conduct a fair and impartial hearing, with the fact that everyone at this table, or in this room, for that matter, is a liar. You are not fair; you are not impartial with that thought in your heart.

Mr. G L Bonner: Are you done, Mr. Bakker?

Mr. A J Bakker: We were going to—we're going to put these objections in as—as—do you have the one that's marked?

.....

Mr. A J Bakker: Okay. And we are asking the -- the Organization -- or the Company to get a finding and find another -- another Conducting Officer at this time.

.....

Mr. G L Bonner: Okay. First of all, I object to your statement—it is irrelevant and misleading. We are here to conduct a fair and impartial investigation. The object is to discover all the facts about the matter under investigation. We must not indulge in supposed legal technicalities and techniques, in an attempt to confound the other parties in this investigation. We will proceed with this investigation, and I will advise all who are taking part to use your efforts to get at the truth so a decision can be made, and, if necessary, the true facts of this matter can be reviewed at a later time. I will continue as the Hearing Officer in this investigation; your request is denied.

Mr. A J Bakker: Mr. Bonner, have you made a statement, under sworn testimony, in a court of law in the United States of America, under the Constitution, that all employees are liars?

Mr. G L Bonner: No, Sir, I have not, and I'm not--

Mr. A J Bakker: Then I would like to

Mr. G L Bonner: going to answer any more questions, Mr. Bakker. I'm not here to answer questions. We're here to hold a fair and impartial investigation for these employees. So, we're not going to talk about your objection any longer

Mr. A J Bakker: As a fair and impartial Hearings Officer, you have to -- you have to be available to answer questions, you have to make an opinion on what -- what happens, what you see here, and do here, and if you've just told me that you have never made that statement in a court of law in the state—in the United States of America, that statement itself is—is—you have perjured yourself, because it says right here, and you signed it.

At page 529 of the transcript, Hearing Officer Bonner flatly refused to allow BLE to introduce into the record a certified stenographic transcription of his own prior prejudicial statements concerning the veracity of employee witnesses in disciplinary investigations.

A close examination of the hearing transcript shows several other instances in which the Organization's concerns that Mr. Bonner would be less than impartial in his conduct of the hearing appear to be borne out on the record. See transcript pages 10, 16, 224, 250, 252, and. In addition to these troubling lapses in procedural due process, this record also contains more undisputed

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evidence of fatal irregularity in carrier's handling of this case. After the accident under investigation but weeks before the hearing commenced, the following news report about the incident near Weatherby in Eastern Oregon 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 even allowed to present his primary defense at the hearing, i.e. testimony from the crew on the OGRBA stating that they were working on clear (green) signals west bound on the main line; that they had a clear indication at East Weatherby; that they were unaware that the SENPV was still entering the siding until they rounded a blind curve approximately 1300' from the west end and saw the signal at West Weatherby with a double red indication; and that the Engineer then placed the locomotives into full dynamic braking mode and attempted to place the train automatic brakes into emergency.

In the final analysis, this claim must be sustained without reaching or determining any of the controversial evidence concerning the merits of Carrier's determination that Claimant was culpable for the accident. That result is required because of the above-described fatal failure of Carrier to provide Claimant with the "fair and impartial investigation" mandated by the UP/BL System Discipline Agreement. On that basis, the claim is sustained and Carrier is directed to rescind the Level 4.5 UPGRADE disciplinary suspension of Engineer Aycock.

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As to whether back pay otherwise due and owing to a successful Claimant is payable during periods of FRA suspension or revocation, this Board adopts the position set forth in the following authoritative decisions of the NRAB First Division:

...[I]t is believed that carrier denied Claimant due process in this matter which is a violation of Claimant's Agreement right to a fair and impartial investigative hearing....Given the above reasons, this Board is compelled to rule that the pending claim, which has been filed in this matter, must be sustained as presented. Having made the preceding determination, however, the Board is also compelled to rule that we have no jurisdiction to remedy the FRA's 30 days revocation of Claimant's Engineer's Certification. Such a matter involves a statutory appeal procedure; and the questions of whether or not said revocation was proper, and whether or not Carrier will be required to reimburse Claimant for lost wages incurred during the period of said 30 days license revocation will ultimately depend upon a ruling by the FRA which that agency has the sole and exclusive jurisdiction to make.

NRAB First Division Award 24424 (Docket 44099), John J. Mikrut, Jr., Referee (Emphasis added).

The Board is aware that Claimant has appealed the FRA's 30-day revocation of his Locomotive Engineer's Certification. The Board has no jurisdiction to review the FRA portion of this case. The questions of whether or not the revocation was proper, and whether or not the Carrier will be required to compensate Claimant for lost wages incurred during the period of the license revocation are issues that must be determined by the FRA. the agency invested with sole and exclusive jurisdiction over such matters. See First Division Award 24424.

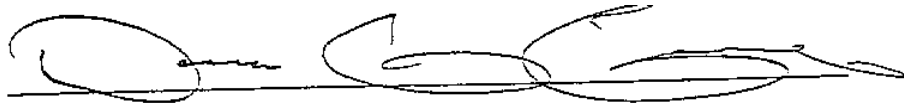
NRAB First Division Award 24782 (Docket 44492), Katherine Gerstenberger, Referee (Emphasis added).

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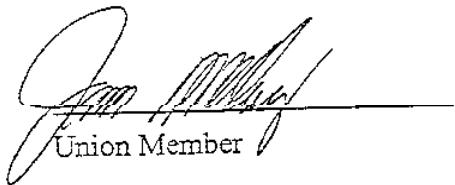
AWARD

- 1) Claim sustained.
- 2) Carrier shall implement this Award within 30 days of its execution by a majority of the Board.



Dana Edward Fischen, Chairman

Dated at Spencer, New York on February 28, 1999



Union Member

Company Member