

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 928

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
and) Case No. 413
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)) Award No. 413

Martin H. Malin, Chairman & Neutral Member
M. B. Kenny., Employee Member
L. C. Hriczak, Carrier Member

Hearing Date: August 15, 2003

STATEMENT OF CLAIM:

Claim of Amtrak Passenger Engineer T. D. Ellsworth, for the rescinding of the sixty (60) days suspension as stated in the decision letter of May 24, 2002, under the signature of General Manager, Intercity William J. Lerch, with full compensation for time lost, full credit toward vacation entitlement, health and welfare benefits during the period held out of work, and clear Claimant's personal record of any reference relative to the alleged violation.

FINDINGS:

Special Board of Adjustment No. 928, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On April 11, 2002, Claimant was directed to report for an investigation on April 15, 2002. The notice charged Claimant with violating Amtrak Standards of Excellence, Attending to Duties, and CSX Rules 509 and 555C. The charges specified that on April 9, 2002, while assigned as Engineer of Amtrak Train 40, the train operated into the 707 limits of a CSX Foreman between MP BG 74.6 and BG 72.4, New Castle Subdivision, on Track 2 without permission.

Following two postponements, the hearing was held on May 17, 2002. On May 24, 2002, Carrier advised Claimant that he had been found guilty of the charges and assessed a sixty day suspension. Claimant's locomotive engineer's certification was revoked for thirty days.

On April 9, 2002, Claimant was serving as Engineer on Train 40. The train approached a restricted area on CSX tracks. The CSX Foreman had track authority for track numbers 1 and 2

between MP BG 74.6 and MP BG 72.5. Claimant's train was traveling eastbound on track 1. Claimant radioed the Foreman and requested permission to enter the restricted work limits. The CSX Foreman granted permission for Train 40 to proceed through the entire limits at maximum authorized speed. At approximately MP BG 73.9, Train 40 crossed over to track 2. Claimant did not request permission from the CSX Foreman before crossing over to track 2. It is the failure to request such permission that is the basis for the charges and the discipline at issue.

Claimant, the Assistant Engineer whose claim is before this Board in Case No. 412, and the Conductor each testified that they understood the CSX Foreman's granting of permission to proceed through the entire limits to encompass both tracks 1 and 2. Therefore, they did not believe they needed to request further permission before crossing over to track 2. The CSX Foreman testified that his intent was to authorize Train 40 to pass only on track 1 and that he expected that the crew would request further permission before crossing to track 2. One of two Amtrak Service Managers who testified opined that each track was a separate work limit and that a grant of permission on one track did not extend to the other track.

The Hearing Officer found the testimony of the Service Representative and the CSX Foreman to be more credible than Claimant and the other members of the crew. He concluded that the crew was required to obtain further permission before crossing to track 2 and that the charges were proven. We recognize that because the Hearing Officer observed the witnesses first hand, his credibility determinations are entitled to substantial deference. However, as we view the case, the critical issue is not one of comparative credibility. Rather, the critical issue is whether Carrier proved that Claimant and the other members of the crew knew or should have known that the grant of permission for the entire limits was limited to track 1 and that they had to request further permission before crossing over to track 2. Upon a careful review of the record, we find that Carrier failed to prove this critical fact.

CSX Rule 509 provides, "Engineering department supervisors issue instructions relating to safety of the track and bridges. Train crew members must comply with the instructions when issued to them." CSX Rule 555C provides:

The engineer and conductor are responsible for:

1. The safety of the train, and
2. The observance of the rules.

They must take every precaution for protection in the event of conditions not provided for by the rules. This does not relieve other employees of their responsibility under the rules.

Engineers and conductors must:

1. Ensure that their subordinates are familiar with their duties;
2. Determine the extent of their experience and knowledge of the rules; and
3. Instruct them, when necessary, how to perform their work properly and safely.

On their face, Rules 509 and 555C do not speak to whether where limits cover two tracks, authority to the extent of the limits refers only to the track on which the train is traveling at the time authority is requested or applies to both tracks. The Service Representative conceded under

examination by Claimant's representative that no CSX rule required the crew to identify the track it was on and the direction of its travel. He further conceded that if the engine crew followed the instructions of the Foreman, the crew complied with Rule 509.

The record further reflects that the CSX Foreman cleared a west bound train for the entire limits on track 1 one minute after he cleared Train 40. The Foreman conceded that he knew Train 40 would have to cross over to track 2 but maintained that he expected that Train 40 would request permission before crossing over to track 2. Nevertheless, when Train 40 crossed over to track 2 without permission, the CSX Foreman did nothing to stop the train.

Considering the record as a whole, we find that Carrier failed to prove that when the CSX Foreman gave Train 40 authority for the entire limits, the crew knew or should have known that the entire limits were limited to track 1 and required further request for permission before crossing over to track 2.

Because Carrier failed to carry its burden of proof, the claim must be sustained. However, Claimant's certification was revoked for thirty days and the record contains no evidence that Claimant appealed the revocation of his certification. Consequently, any compensation for time lost must be limited to thirty days, i.e. the period of the suspension not covered by the certification revocation.

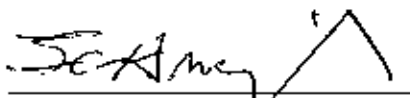
AWARD

Claim sustained in accordance with the Findings.

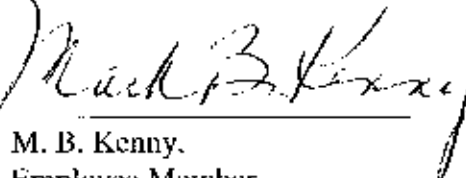
ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Martin H. Malin, Chairman


I. C. Hriczak,
Carrier Member

I DISSENT.


M. B. Kenny,
Employee Member

Dated at Chicago, Illinois, August 27, 2004.