

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 24846

Docket No. 44559

97-1-96-1-U-1905

The First Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of Engineer G. W. LaRue for clearing of his employment record of assessment of Level 4 discipline under the Carrier's 'Upgrade' discipline policy and compensation for all lost time associated therewith."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On July 30, 1995, Claimant and his Conductor were operating Train No. 2 IIBMGP-27. They approached the north switch at Worthen, Arkansas. Claimant and the Conductor testified that the signal was lunar. As they approached the switch, however, the Conductor noticed that the switch was gapped. Claimant placed the train in emergency but was unable to stop completely in time to prevent the train from derailling. The Manager of Operating Practice testified that he interviewed Claimant and the Conductor and that they told him that at first they thought the signal was red

but then they thought that they had a lunar signal. The Signal Maintainer testified that he tested the signal after the accident and found no defects. He further testified that if the signal failed it would display red. He also indicated that the switch could be gapped a quarter inch and the signal would display lunar.

On August 2, 1995, Claimant was notified to report for an Investigation on August 10, 1995, concerning his responsibility, if any, in connection with the derailment. Following two postponements, the Hearing was held on August 18, 1995. On August 21, 1995, Claimant was advised that he was found to have run a red signal and that he was assessed discipline at Level 4, a 30 day suspension. Claimant's Engineer Certification was revoked for a period of one year.

The Organization argues that the claim must be sustained because Carrier issued the discipline before the Hearing record was transcribed. In the Organization's view, such action indicated that Carrier had prejudged the Claimant as guilty and did not base its decision on a review of the Investigation record.

The Organization also argues that Carrier failed to prove Claimant's responsibility by substantial evidence. The Organization contends that the only witnesses to the incident were Claimant and the Conductor and that both were adamant that they had a lunar signal. The Organization further observes that the Manager of Operating Practice agreed that Claimant was operating the train properly and was in a position to stop if he had seen a red signal. The Organization maintains that the tests on the signal, performed after the incident, cannot prove the condition of the signal at the time of the incident.

Carrier contends that it proved Claimant's responsibility by substantial evidence. Carrier urges that a signal cannot repair itself. Thus, if the signal had been defective at the time of the accident, the defect would have shown up in the post-accident tests. Moreover, in Carrier's view, if the signal had been defective it would have displayed red rather than lunar. Carrier observes that Claimant and the Conductor at first thought they had a red signal and that if they were confused by what appeared later to be a lunar signal, they should have proceeded more cautiously.

We consider the Organization's procedural argument first. Carrier issued its finding and imposed discipline before the record of the Hearing was transcribed. However, the Agreement does not require that Carrier await the transcript before

making its determination. The Hearing was short and the record was not complex. The same individual who served as the Hearing Officer made the findings and imposed the discipline. Therefore, although it would have been better practice to wait for the transcript, we cannot agree that Carrier's failure to do so violated the Grievant's due process rights or indicated prejudgment. See Third Division Award 25150.

Accordingly, we turn to the merits of the dispute. There is no dispute that Claimant was operating the train properly and was in a position to stop if he received a red signal. Claimant and the Conductor were quite certain in their testimony that the signal was lunar. There is no direct evidence to contradict them.

Carrier relies on the post-accident tests on the signal. Carrier infers that if the post-accident tests found no defects, the signal must have been working properly and, because the switch was gapped, the signal must have displayed red. During handling on the property, the Organization presented evidence that the signal had malfunctioned on other occasions. Furthermore, the Signal Maintainer testified that the switch could be gapped as much as a quarter of an inch and the signal still would display lunar. Under similar circumstances, other Awards have held that post-accident tests on a signal do not constitute substantial evidence that the signal functioned properly at the time of the incident. See, e.g., Public Law Board No. 2050, Award 49; Public Law Board No. 4656, Award 9. We find similarly in the instant case.

As a result of this incident, Claimant's certification was revoked for one year. Thus, even if Claimant had not been disciplined, he could not have worked. This Board has no authority to review certification revocations. Therefore, although we sustain the claim, Claimant shall be entitled to compensation for time lost only if his certification revocation is overturned by an appropriate authority.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division**

Dated at Chicago, Illinois, this 24th day of September 1997.