

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

Award No. 24935

Docket No. 44577

98-1-96-1-L-1891

The First Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

(Brotherhood of Locomotive Engineers

**PARTIES TO DISPUTE:** (

(Union Pacific Railroad Company (former Missouri  
( Pacific Railroad)

**STATEMENT OF CLAIM:**

“Claim of Engineer D. A. Slicker for removal of Level Four under the Carrier’s unilaterally imposed ‘Upgrade’ Discipline Policy, as well as compensation for Claimant’s attendance at the investigation, and the clearing of Claimant’s record for alleged failure to comply with the requirements of a yellow-red flag at approximately Milepole 186.75 in the Sedalia Subdivision on March 30, 1995.”

**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.

The Carrier assessed Claimant, an Engineer with 22 years of experience, with a Level 4 on the Carrier’s Upgrade Progressive Discipline Policy because Claimant allegedly passed a yellow-red flag without reducing the speed of his train to restricted

speed on March 30, 1995. The flag, which Claimant's train ran through, constituted an efficiency test. As a result of the assessment of discipline, the Carrier, pursuant to Federal Railroad Administration (FRA) regulations, revoked Claimant's Locomotive Engineer's Certification.

On behalf of Claimant, the Organization argues that the efficiency test was not conducted fairly and realistically; that Claimant was distracted by a male pedestrian walking along the tracks at the location of the alleged yellow-red flag; the locomotive from which he was operating the train had several blind spots; and, both Claimant and his Conductor did not see the yellow-red flag which strongly suggests that the flag was not visible.

The Carrier contends that the record contains substantial evidence that the yellow-red flag was easily visible to Claimant; it was securely bolted to a milepost marker; Claimant should have been sufficiently alert to observe the flag; and, the test was properly performed.

This Board need not address any of these contentions on the merits because this case must be decided on a procedural issue raised by the Organization.

Claimant received proper written notice that he allegedly failed an efficiency test and that an Investigation into the matter would be held on April 11, 1995. The Carrier convened the Investigation on April 11, 1995. The transcript of the Investigation contains numerous gaps because the tape-recording machine malfunctioned. Some of these gaps are merely a word or two but one gap is lengthy. While it is difficult to quantify the exact length of the gap, it appears as though the gap may be equivalent to 30 pages of transcript. A large portion of Claimant's testimony and the Conductor's testimony was unrecorded, and thus, not transcribed.

Despite the incomplete transcript, the Manager of Train Operations who had presided over the April 11 Investigation, assessed Claimant a Level 4 discipline on Upgrade. The Manager notified Claimant of the disciplinary decision via letter dated April 20, 1995.

Next, the Carrier notified Claimant, by correspondence dated April 24, 1995, that it intended to reconvene the Investigation on April 28, 1995 to "clarify" the transcript of the proceedings.

Over the vigorous objections of Claimant's representative, the Carrier reconvened the Investigation on April 28 with the Manager of Train Operations as the presiding officer. It attempted to recreate both Claimant's and the Conductor's testimony. Both again testified about the charged offense. On May 9, 1995, the Carrier sent the Organization's Local Chairman a transcript of the April 28 proceeding.

Article 44(1) of the applicable Agreement provides that the Carrier must afford Claimant a fair and impartial Investigation. Article 44(5) provides that the Carrier will furnish the Local Chairman with a copy of the record at the time discipline is issued. The Rule goes on to provide for a ten-day period during which the parties may consider corrections to the transcript.

We find that the Carrier breached both Article 44(1) and 44(5).

The Manager of Train Operations assessed the Level 4 discipline against Claimant on April 20, 1995. Article 44(5) provides that the Carrier should have concurrently furnished the Local Chairman with a complete record of the Investigation. Of course, the Carrier could not do this because, due to the recorder malfunction, the April 11 Hearing transcript was far from complete. Thus, the Carrier breached Article 44(5).

The presiding officer deprived Claimant of a fair and impartial Investigation because he assessed the disciplinary sanction even though large portions of Claimant's testimony and the Conductor's testimony did not appear in the record of the April 11 Investigation. The inference arises that the deciding official reached a decision on Claimant's guilt without reviewing the record. The Carrier argues that the deciding official was also the presiding Hearing Officer and so, he was fully aware of the testimony that was inadvertently excluded from the record. If true, there would be no reason to reconvene the Hearing. Rather, the Carrier disingenuously completed the Hearing transcript in an attempt to validate the discipline that it had already imposed. Moreover, it is difficult to believe that the Hearing Officer's memory is perfect. Put simply, the Hearing Officer could not reach the conclusion that there was substantial evidence supporting the discipline on the record as a whole when he could not possibly have viewed the entire record because a complete record did not exist.

First Division Award 24760, is not analogous to the facts herein. Award 24760 concerned a late delivery of a transcript. In this case, the Carrier not only failed to

timely deliver a transcript but also it assessed discipline even though the record was not fully memorialized. Also, the Carrier could not deliver the Local Chairman a complete transcript at the time the discipline was issued because the Carrier did not possess such a document. Public Law Board No. 5430, Award 2. Moreover, the Carrier could not assess discipline on an incomplete or unfinished Investigation record. Public Law Board No. 905, Award 1.

The Carrier's breach of the Article 44 procedural safeguards prejudiced Claimant. The deciding official reached a decision without considering the record as a whole. Regardless of what evidence Claimant proffered at the April 28, 1995 Hearing, the deciding official was in a tenuous position where he had to disregard any exculpatory evidence since he had already determined that Claimant was guilty.

While we are sustaining this case due to the Carrier's procedural error which prejudiced Claimant, we do not have the authority or jurisdiction to undo the revocation of his Engineer's Certification. Therefore, this Board orders the Level 4 discipline to be expunged from Claimant's record but, Claimant's entitlement to compensation is contingent on whether his certification revocation was reversed by the FRA. First Division Award 24846.

Finally, this Board denies the Organization's requests for its costs associated with defending Claimant, for punitive damages and for a minimum of \$10,000.00 in compensatory damages. To reiterate, the claim is sustained with respect to the disciplinary notation and any backpay is contingent upon Claimant's qualification to perform service as a Locomotive Engineer.

#### 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 14th day of July 1998.