

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 24962
Docket No. 44673
98-1-97-1-U-1994

The First Division consisted of the regular members and in addition Referee Rodney E. Dennis 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 A. L. Kochanowicz for removal of Level 4 Discipline under the Carrier’s unilaterally imposed ‘UPGRADE’ discipline policy and all lost time associated therewith including time spent at the investigation.”

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 February 1, 1996, Claimant went on duty as an Engineer in the Council Bluffs, Iowa, terminal. Upon reporting to work, Claimant and a crew member boarded their engine, which had been delivered by the Hostlers to a track near the yard office. The record indicates that neither Claimant nor the other crew member noticed anything unusual in front of or behind the engine while approaching the unit. After checking the

daily calendar inspection and ascertaining that the unit was ready to go, Claimant took his place at the control stand. At this point, Claimant saw the Switchman Helper on his job approaching the engine. Because the weather was bad (a blowing snow storm was in progress) Claimant decided to back the engine eastward toward the Helper to save him from walking through the snow. In the process of backing up the engine, it went over a derail. The engine had moved about ten feet before being derailed. Carrier alleges that the engine also backed over a blue flag in the process. As a result of the incident, Claimant was charged as follows:

"Please arrange to report to the Superintendent's Conference Room, Council Bluffs, Iowa, at 9:00 AM on February 13, 1996, for formal investigation to develop the facts and place responsibility, if any, in connection with the report that at approximately 0825, February 1, 1996, while employed as a crew member on Job YCB02-01, you allegedly ran over derail and blue flag on Balloon Track, Council Bluffs, Iowa, allegedly causing damage and derailment of Unit 2009."

An Investigation of the matter was held on March 6, 1996. A transcript of that Investigation has been made a part of the record. As a result of the Investigation, Carrier concluded that Claimant was guilty as charged and assessed a Level 4 penalty under Carrier's "UPGRADE" disciplinary program. In addition to the Level 4 discipline assessed, Carrier also revoked Claimant's Engineer certificate for 30 days in accordance with FRA regulations.

The Board reviewed the record and has concluded that Carrier's decision to assess a Level 4 penalty and suspend Claimant's certificate for 30 days was arbitrary and capricious, given the facts in the record. There is no question that Claimant moved the engine without authorization from the Conductor and that he ran over a derail. That point is not in contention. The point in contention is whether there was a blue flag in place and whether the engine also ran over the blue flag during the movement that derailed it.

The Board carefully reviewed the facts, testimony, and arguments in the record concerning the blue flag. It is a fact that a blue flag was found on the ground between the rails. But there is no evidence in the record to support Carrier's contention that the blue flag was erect when the engine moved over it. Carrier assumed that because it was found between the rails on the ground that the engine must have backed over it. The

evidence in the record on this point is not sufficient to support Carrier's required burden of proof on this issue. Lacking sufficient evidence to persuade the Board that the blue flag was in fact properly erected behind Claimant's engine, the Board is compelled to support the Organization's position on this point. The Board, therefore, will reduce Claimant's discipline from Level 4 to Level 3, as is appropriate for an Engineer who runs over a derail.

The question of pay for lost time shall be held in abeyance pending the result of any appeal of Claimant's certificate revocation. If the FRA overturns the revocation, Claimant shall be paid for all lost time not imposed as a result of the Level 3 discipline he received. If the revocation is upheld by the FRA, no backpay is awarded.

AWARD

Claim sustained in accordance with the Findings.

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 21st day of December 1998.