

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25023

Docket No. 44733

99-1-98-1-U-2007

The First Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Upper Lines)

STATEMENT OF CLAIM:

"Claim of Engineer H. A. Thompson for removal of Level 4 Discipline (30 days suspension), under the Carriers 'UPGRADE' Discipline Policy. Additionally, claiming all lost time associated with the aforementioned suspension as well as time spent at the investigation, fringe benefits, seniority and vacation rights unimpaired."

FINDINGS:

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 January 26, 1997, Claimant was working as engineer on Train NLIN-25 on the Chester Subdivision between Halsey Junction and Howardton Junction. That morning, Manager of Train Operations Hirtz was conducting "dark signal" efficiency tests in this territory. To perform this test, Hirtz shunted the track, which would cause

the signal at mile post 92.8 to go dark. Upon seeing the dark signal, the train crew is required to stop before passing it. The first two trains tested did stop for the dark signal, but Claimant's train did not. Claimant explained that both he and his conductor observed a clear signal as they approached it, released the train brakes and began to accelerate to approximately 34 miles per hour. They assert the signal went dark as they were approximately two hundred feet ahead of it, whereupon Claimant began to stop the train. At that point, it was not possible to stop the train without passing the signal. Following an Investigation, Claimant was assessed a Level 4 discipline in accordance with the Carrier's UPGRADE discipline policy. This discipline required Claimant to serve a thirty day suspension. Also as a result of this incident, Claimant's engineer certificate was suspended for a period of thirty days. That action was not appealed.

The facts in this case strongly resemble those presented to this Board in First Division Award 24316, also involving these parties. As in the instant case, the Carrier officer there shunted the track rather than remove the bulb from the signal. Significantly, in both cases, the testing officer was not in a position to see the signal aspect during the test. Although Hirtz testified he could see the signal lens for the first two trains, he admitted he could not see it for Claimant's train. Additionally, it is apparent Claimant had applied his brakes after encountering the approach signal in advance of the signal at mile post 92.8, in anticipation of getting a red signal there. As an engineer with 23 years of experience, it is not likely he would have accelerated unless he had observed a clear signal.

The Carrier has the burden of proof in this case. It relies upon the fact that two earlier trains observed a dark signal and that Claimant acknowledged the signal was dark when he went past it. Without Hirtz being able to testify he actually saw the signal, this is insufficient to establish that the signal was dark for the entire time. The charge against Claimant, therefore, was not proven and the discipline must be reversed.

It is undisputed, however, that the suspension of Claimant's engineer certificate had not been appealed by Claimant. This Board is without jurisdiction to modify that decision. Therefore, the Board finds that Claimant could not have worked during the period of his suspension, and he lost no time as a result. Our remedy, accordingly, is limited to removal of the discipline entry from Claimant's record without compensation for time lost, with the exception of time spent at the Investigation.

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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 2nd day of June 1999.