

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25027
Docket No. 44740
99-1-98-1-U-2027

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

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

STATEMENT OF CLAIM:

Claim of Engineer G. B. Rice for removal of Level 4 Discipline under the Carriers "UPGRADE" discipline policy and all lost time associated therewith, including time spent at the investigation and with seniority and vacation rights unimpaired.

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.

Claimant G. B. Rice, Engineer, was assigned to Train CHNL-16 on the Chicago Sub Division in Chester, Illinois. His train was operating under a Track Bulletin Form B No. 67137. This track bulletin prohibited entering limits between Mile Post 325.50 and 333.50, between 0700 hours and 1430 hours, without permission of the person in charge. In this instance, that person was Track Supervisor (Foreman) L. D. Taylor who was in charge of a thirty-man rail gang assigned to work in the limits of the Track Bulletin.

At about 9:00 A.M. on November 17, 1996, Train CHNL-16 entered track limits between MP 325.50 and 333.50 without getting permission from the person in charge. The train proceeded about one mile into the perimeter at MP 326.5 before it was brought to a normal stop. The train had been proceeding under a slow order when it entered the limits of the track order. As a result of this incident, an Investigation into the matter was held. As a result of that Investigation, Claimant was found guilty of failing to comply with the terms of Track Bulletin Form B No. 67137 by entering the limits of the order without proper authority. As a result of those findings, Claimant was assessed a Level 4 penalty under Carrier's "UPGRADE" Discipline Policy. This resulted in a thirty-day Suspension without pay and a loss of Claimant's Engineer license, together with other requirements associated with a Level 4 discipline.

A protest of this action was filed by the Organization. It was denied at all levels of Carrier's review and placed before this Board for final resolution.

This Board has reviewed the record in detail before it. As a result of that review, the Board has concluded that Claimant did in fact progress his train beyond the limits of the Track Bulletin Form B under which he operated. That was a violation of the Track Bulletin. There is no question about that fact. What is in question, however, is the level of discipline administered to Claimant, given all of the pertinent facts surrounding the incident.

It is clear from the record that the Track Supervisor (Mr. Taylor) who was responsible for the area encompassed by Track Bulletin No. 67137 failed to put in place the yellow and red flags required when a section of track is protected by Track Bulletin Form B, as was the situation here.

The section of the General Code of Operating Rules most pertinent to this case are quoted below:

15.2. Protection by Track Bulletin Form B

Display yellow-red flags as specified in Rule
5.4.3 (Display of Yellow-Red Flag).

While trains are within the limits during the time stated in
track bulletin Form B, they must:

- Move at restricted speed.
- Stop short of a red flag.

C. Stop Column

When "STOP" is written in the Stop column, a red flag must be displayed at the beginning of the limits. The train must not enter the limits until authorized by the employee in charge.

5.4.3. Display of Yellow-Red Flag

A. Restriction Specified in Writing

Two Miles Ahead of Restricted Area. Yellow- red flags warn a train to be prepared to stop because of men or equipment. To make sure the train is prepared to stop at the right location, employees must display a yellow-red flag 2 miles before the restricted area.

It is clear from the language of the above-quoted rules that Carrier considered the placing of warning red and yellow flags at the entrances to the restricted area critical. As stated in Rule 5.4.3, "to make sure the train is prepared to stop at the right location, employees must display a yellow-red flag 2 miles before the restricted area." In the instant situation, there were no flags displayed. This Board is not persuaded that Claimant should have been disciplined to the maximum allowed under the Upgrade system when a very major element of the Track Bulletin Form B protection was missing. The flags were not posted. In the every-day practice of running trains, signals and warning flags of all types are used to alert an Engineer of impending danger. Those warning flags were not present in this situation.

This Board is also impressed with the Organization's argument that the person responsible for placing the flags at the limits of the area protected by the Form B failed to do so. He had more than ample time to have the flags put in place and chose not to do so because he could not get clearance to put a high railer on the track to take the flag where they should have been posted. The Board finds this lack of diligence on the part of the Supervisor disturbing. He failed to fulfill a major safety responsibility. The

record clearly indicates that the Supervisor did not receive discipline for his failure to install the warning flags properly.

In reviewing the total record of this matter, this Board concludes that Carrier acted in an arbitrary and capricious manner when it assessed Claimant a Level 4 discipline when the warning flags were not posted to warn him of the upcoming restricted area, as is required. The Board also concludes that the two major characters in the case were treated in a disparate manner. Claimant received thirty days off. A Supervisor who failed to post warning flags that would have properly alerted Claimant was not disciplined. The Board finds this unfair.

Based on the Board's review, it finds that justice would be served by reducing the Level 4 discipline to a Level 2.

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 16th day of June 1999.