

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

Award No. 25129

Docket No. 44742

00-1-98-1-U-2030

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 Chicago and  
( North Western Transportation Company)

**STATEMENT OF CLAIM:**

"Claim in behalf of Engineer A. G. Davis, Union Pacific Railroad former Chicago and North Western Transportation Company, for compensation for all lost time including time spent at the investigation and that this incident be removed from claimants' personal record and that claimant be removed from the Union Pacific Discipline System known as Upgrade when he was investigated on the following charge:

"your failure to wear hearing protection as prescribed by Rule 71.2 of the Union Pacific Rules, while performing service as crew member of 2x89 at approximately 1:30 P.M., on July 9, 1997."

Subsequent to the investigation, in a letter dated August 22, 1997 from Superintendent M. A. Paras, claimant was disciplined with a Level 2 on the Union Pacific Upgrade Progressive Discipline Policy."

**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.

Pursuant to proper written notice dated July 14, 1997, the Carrier convened an Investigation to determine if the Claimant performed yard engine service on July 9, 1997 without wearing the prescribed hearing protection.

At the August 14, 1997 Investigation, the Director of Track Maintenance testified that he observed, through the window of the locomotive engine, that the Claimant was not wearing any hearing protection. The Director was somewhat vague concerning how far away he was from the Claimant. At one point, he testified that he might have been as close as 40 feet while he later attested that he might have been 75 feet away.

The Claimant insisted that he was wearing his ear protection devices at all times. He specifically testified that inasmuch as he could not see the Director, he doubted that the Director could directly observe him.

A Conductor, who had just yarded a hopper train, briefly conversed with the Director of Track Maintenance. The Conductor stated that the Director could not have been closer than 200 feet to the Claimant. The Conductor could not see the Claimant.

When the Director of Track Maintenance later confronted the Claimant and accused him of not wearing his hearing protection, the Claimant adamantly denied that he was not wearing the protection. The Director and the Claimant concurred that the Claimant was wearing his hearing protection when the Claimant and the Director had this conversation.

Following the Investigation, the Carrier assessed the Claimant a Level 2 on the Carrier's Upgrade Disciplinary Policy. The Carrier relies exclusively on the testimony of the Director of Track Maintenance to support the discipline.

The Carrier bears the burden of proving with substantial evidence that the Claimant was not wearing his hearing protection while operating his yard engine on July 9, 1997. In this particular case, the testimony of the Director of Track Maintenance, standing alone, does not constitute substantial evidence proving the Claimant's guilt.

Even if the Hearing Officer credited the testimony of the Director of Track Maintenance over the Claimant's denials, the testimony of an independent witness was unrefuted. The Hopper Train Conductor testified that, in all likelihood, the Director of Track Maintenance was not in a position to observe the Claimant, much less, to observe the presence or absence of earplugs. Even if the Director could observe the Claimant, the Claimant would have been more than 200 feet away, making it difficult to focus on whether the Claimant was wearing ear protection. The Board also notes that the Director gave vague and inconsistent testimony about how far away the Claimant was from the Director's location. In sum, the Director was not in a position to observe, with substantial certainty, that the Claimant was not wearing the prescribed hearing protection devices.

Inasmuch as the Carrier failed to meet its burden of proof, this claim is sustained.

**AWARD**

Claim sustained.

**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 15th day of May, 2000.