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**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25264

Docket No. 44839

01-1-99-1-U-2089

The First Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Union Pacific Railroad Company (former Chicago and
(Northwestern Transportation Company)

STATEMENT OF CLAIM:

“Claim on behalf of Engineer M. G. Miller, SS No. 485-58-0673, Union Pacific Railroad former Chicago and Northwestern Transportation Company, for compensation for all lost time including time spent at the investigation, that this incident be removed from the Claimant’s personal record, and that Claimant be removed from the Union Pacific Discipline System known as Upgrade when the Claimant was investigated on the following charge:

‘At approximately 1340 hours on November 13, 1998, while employed as Engineer on Train CATTO-11 you operated your train through a Form B without proper authority at approximately MP 325.0 to MP 318.0 on the Boone Subdivision.’

Claim premised upon 1996 BLE/UP System Discipline Agreement.”

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 November 18, 1998, the Carrier notified the Claimant of its offer of either a proposed discipline of Level 4 as outlined in its Waiver of Hearing Form or a notice to appear for an Investigation. The Carrier so notified the Claimant as a result of the following charge:

“ . . . that at approximately 1340 hours on November 13, 1998, while employed as Engineer on Train CATTO-11, you allegedly operated your train through a Form B without proper authority at approximately MP 325.0 to MP 318.0 on the Boone Subdivision. Your actions indicate possible violation of Rule 15.2, among others of the Union Pacific Rules effective April 10, 1994.”

The Carrier further notified the Claimant that depending on the results of the Investigation and Hearing, his qualification requirements for the position of Locomotive Engineer may be affected. The Claimant was being withheld from service pending the results of the Investigation.

After one postponement, the Hearing took place on November 24, 1998. On December 3, 1998, the Carrier notified the Claimant that the charges against him had been sustained. The Carrier found the Claimant in violation of General Code of Operating Rule 15.2 as promulgated by the General Code of Operating Rules effective April 10, 1994. The Carrier informed the Claimant this his personal record was to be assessed with a Level 4 discipline, which is 30-days off work without pay and requires that he pass the necessary annual Operating Rules exam in order to return to work and must participate in a corrective action plan upon return to work. The Carrier informed the Claimant that he was being suspended from the service of the Carrier effective November 14, 1998, through December 13, 1998, and would be allowed to mark up for service on December 14, 1998. In addition, the Carrier notified the Claimant that he no longer met the qualification requirements for the position of Locomotive Engineer and his certification was to be revoked for a period of one month.

The Organization filed a claim on behalf of the Claimant, arguing that the Carrier failed to prove the charge that the Claimant was guilty of the charge as stated. The Organization maintains that on November 13, 1998, the Claimant was approaching a Form B, which was listed as Track Bulletin Form B, No. 35258, on Line No. 1, Track No. 1; Line No. 3, Track No. 2 with Foreman Cavin. The Organization argues that the Claimant's Conductor, Mr. Stuart, requested permission to enter the B Order limits on both Line No. 2, Track No. 1, and Line No. 3, Track No. 2. The Organization maintains that a Mr. Christenson cleared the Claimant's train on both of those lines and that the Claimant's Conductor repeated the instructions to Mr. Christenson, who gave his "ok." However, the Organization argues that when the Claimant's train crossed over from Track No. 2 to Track No. 1, Mr. Christenson then maintained that he had not cleared the Claimant's train on Track No. 1, but only cleared the Claimant on Line No. 3, Track No. 2. The Organization asserts that the Claimant's Conductor testified to the fact that he was the one taking the instructions and getting the clearance on Form B and that he was sure that Mr. Christenson had cleared him on Lines 2 and 3. The Organization argues that the Claimant was not at fault and maintains that he was cleared on Lines No. 2 and 3. The Organization also argues that had the dispatcher tapes been brought into the Investigation, they would have exonerated the Claimant from any and all blame on this incident. The Organization further contends that a procedural error also occurred in that the Carrier was in violation of the BLE Discipline Agreement due to the fact that the Carrier failed to notify the Local Representative of the charges as prescribed by the Agreement and also failed to comply with the Agreement by not providing the Local Representative with the requested Carrier's internal and external documentation, as well as tapes from the dispatcher radios of the incident. The Organization also claims that the Carrier failed to bring in all witnesses with first-hand knowledge of the incident.

The Carrier denied the claim. The Carrier maintains that the Investigation produced clear and substantial evidence of the Claimant's culpability in connection with the charge brought against him. The Carrier argues that Rule 15.2 requires that before entering track bulletin limits, a crew member must attempt to contact the employee in charge by radio to avoid delay and report the train's location and the track being used. The Carrier asserts that the Claimant violated Rule 15.2 and was properly found responsible as charged. The Carrier argues that Mr. Christenson, acting on Foreman Cavin's authority, issued clearance to proceed east through the Form B proscribed limits only on Track No. 2 covering Line No. 3 of Form B No. 35258, and no authorization was given to occupy Track No. 1, covering Line No. 2 through the Form

B limits. The Carrier maintains that the Claimant and his Conductor relied upon observations and speculation that Mr. Christenson wanted them to proceed eastward on Track No. 1. The Carrier asserts that compliance with Rule 15.2 is critical to ensure the safety of employees, and the Claimant placed his crew in harm's way on the date in question. The Carrier also argues that it is only required to provide the Organization with documents and/or tapes it intends to introduce at the Hearing; but because the Carrier never intended to introduce the requested documents and tapes, it was not required to produce them for the Organization. The Carrier further contends that the Organization's contention that the Local Chairman hadn't properly been notified of the Investigation is ridiculous because it was the Local Chairman who requested the postponement of the Hearing. The Carrier contends that the Claimant received a fair and impartial Hearing and that the discipline assessed was justified.

The parties being unable to resolve the issues at hand, this matter came before the Board.

The Board has reviewed the evidence and testimony in this case, and we find that the Carrier has failed to meet its burden of proof that the Claimant acted in violation of the Rules on the date in question. Specifically, the Organization requested the tapes which might have helped resolve the conflict between what the Claimant stated was said and what the Carrier representative stated was said between the parties. Those tapes were not produced by the Carrier. The Organization properly objected to the Carrier's failure to provide the tapes. The Board finds that those tapes were an integral part of the Carrier's case; and since the Carrier failed to produce those tapes, it did not meet its burden of proof that the Claimant acted in violation of the Rules and the orders given to him by the Dispatcher.

Although the Carrier states that it does not have to produce those tapes if it is not using it as part of its own case, the Board disagrees. When the tapes can resolve the clear dispute between the parties, it is evident that those tapes must be produced upon a proper and timely request by the Organization. Those tapes would have aided the finder of fact in resolving the conflicting testimony presented at the Hearing. The Carrier failed to produce those tapes. Therefore, the Board must find that the Carrier has failed to meet its burden of proof in this case, and the claim must be sustained.

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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 17th day of September, 2001.