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NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25366
Docket No. 45054
02-1-01-1-U-2243

The First Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of Engineer R. Jones for removal of Discipline, claiming all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer Jones' record."

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 15, 2000, the Carrier directed the Claimant to report for an investigation on February 23, 2000. The notice charged the Claimant with failing to secure the locomotive consist CNW 8681, UP 3842, and UP 514 prior to leaving the train on February 8, 2000. The Hearing was postponed to and held on March 1, 2000. On March 8, 2000, the Carrier advised the Claimant that he had been found guilty of the charge and had been assessed discipline at UPGRADE Level 3, a five-day suspension.

The Organization has raised two procedural issues and has argued that the Carrier failed to prove the charge by substantial evidence. We find it necessary to address only one of the procedural issues because that issue is dispositive of the claim.

The Organization argues that the Carrier failed to date the transcript of the Investigation. Consequently, in the Organization's view, the Carrier has rendered it impossible to determine when the discipline was issued in relation to when the transcript was completed. The Carrier responds that the Agreement does not require that it date the transcript, that there has been no practice of dating the transcript and that, if the Organization wishes to assert that the Carrier issued the discipline without first reviewing the record, the Organization had the burden to prove such a contention and failed to do so.

We agree with the Carrier that the Agreement does not expressly require the Carrier to date the transcript. A mere failure to date the transcript does not per se invalidate the discipline. However, the Agreement does provide, "Locomotive engineers will not be disciplined without first being given a fair and impartial investigation . . ." An essential component of a fair and impartial investigation is that any discipline imposed be based solely on the evidence developed at the investigation. Failure to base a decision to discipline solely on the evidence developed at the investigation renders the investigation a farce. As our prior Awards have recognized, the date the transcript was prepared can be crucial in determining whether a decision to discipline was based solely on the evidence developed at the investigation.

Where the Hearing Officer finds the facts and assesses the discipline, an assessment of discipline prior to the completion of the transcript must be evaluated on a case-by-case basis. Where the hearing is relatively brief and the evidence relatively straight forward, the Hearing Officer may be able to render a decision based on the evidence without waiting for the transcript. In the instant case, however, the Hearing Officer did not render the decision. Rather, discipline was assessed by the Superintendent. It would be impossible for the Superintendent to base his decision solely on the evidence developed at the investigation if he did not have the transcript of investigation at his disposal prior to imposing discipline.

The Carrier's assertion that there has been no practice of dating the transcript is contrary to the Board's experience with the Carrier. Indeed, in several cases, the relationship between the date the transcript was prepared and the date the discipline was imposed led the Board to conclude that the Carrier failed to base the discipline on the evidence developed at the investigation. See, e.g., First Division Awards 24874, 25043.

This case does not present a mere inadvertent failure by the transcriber to date the transcript. Rather it appears that the Carrier made a systematic change to how it has the transcript presented, i.e., it went from having the transcript dated to having it undated. The Organization contends that the Carrier made this change in a deliberate attempt to impede the Board from considering whether the decision-maker based the decision to discipline on the

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evidence developed at the Investigation. The Carrier has presented no alternative explanation for this systematic change with respect to the transcript.

Where the Hearing is short and straight forward and the Hearing Officer renders the discipline, the Carrier's failure to date the transcript may be irrelevant. Where, as in the instant case, an official other than the Hearing Officer made the decision to discipline, it is crucial to determine whether that official had the transcript available as the basis for his decision. The Carrier argues that the Organization has the burden to prove that the deciding official did not have the transcript available. But, because the Carrier has chosen deliberately to have its investigation transcripts undated, it has created a situation where all evidence of whether the deciding official had the transcript available to him rests solely in the Carrier's control. The Organization raised this issue during handling on the property. It would have been a simple matter for the Carrier to put this issue to rest by submitting evidence of when the transcript was prepared. The Carrier failed to do so and its failure to do so raises a reasonable inference that, had it produced such evidence, the evidence would have been adverse to the Carrier. Accordingly, we find that the Carrier failed to provide the Claimant with a fair Investigation and the claim must be 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 5th day of September 2002.

CARRIER MEMBER'S DISSENT
AWARD Nos. 25366, 25367, 25369, 25370, 25372
DOCKET Nos. 45054, 45059, 45069, 45070, 45076
Referee Martin Malin

This and several other awards rendered the same day are testament to the Organization's tenacity, and final success, in finding a sympathetic ear to their plea that the lack of a date on a transcript is a fatal flaw in the disciplinary process.

Since mid-1999, virtually every discipline submission submitted by this general committee has included a boiler plate argument that because the transcriber did not date the transcript, the discipline process was fatally flawed. Until this award their arguments were unsuccessful.

The following is from the Organization's submission in the case which resulted in Award 25147 dated July 13, 2000 (BLE v UP, Richter).

The transcript of the investigation is not dated. The Carrier failed to provide any evidence as to when the transcript record was prepared. Given that the Carrier has an agreement obligation to assess discipline based only on the evidence contained within the record, it has not provided proof for the record that it issued discipline after a careful review of the evidence contained in the record. If the transcript is not dated, the Organization, or any third party, would have no way of knowing if the Carrier fulfilled its contractual obligation to impose discipline based solely on the evidence in the record. In this case, as in all discipline cases, the burden of proof falls upon the Carrier. Failure to date the transcript produces a fatal flaw in the Carrier's case against Engineer J.L. Henderson.

The Board denied the case without even mentioning the procedural argument - and without Labor Member dissent.

In the instant award, despite acknowledging there is no agreement requirement for a date on the transcript the Referee apparently could not bring himself to review the record of handling on the property to determine if the facts supported the finding of guilt or if the Claimant's ability to defend himself against the charges had somehow been affected by the lack of a date on the transcript. Contrast this philosophy with the more "real world" approach evidenced by Board Award 25091, February 28, 2000, with Ref. Dennis, which held, albeit with dissent:

This Board has considered all procedural arguments presented by the Organization and does not find them of sufficient severity to modify Carrier's decision. The facts of this case were simple and straightforward. Claimant failed to report an injury and withheld information about that injury when being examined for a second on-the-job injury. This information was clearly gleaned from the investigation and from the documents in evidence in the case. Failure to have the transcript of this hearing before it when discipline was assessed does not justify overturning Carrier's action. Claimant in this instance was guilty as charged. Dismissal from service cannot be considered arbitrary and capricious.

This award clearly recognizes the industrial disciplinary process is better served by determining if alleged procedural errors are in fact of substance.

In this case, the agreement requires the following with regard to transcripts:

8. The investigation will be recorded and transcribed. Copies of transcript will be furnished to the engineer and the BLE Local Chairman no later than the date discipline is issued. If the accuracy of the transcript is questioned and the investigation was electronically recorded, the tapes shall be examined and, if necessary, the transcript will be corrected.

9. A written decision will be issued no later than 10 days after the completion of the hearing. The notice will be sent by US Mail to the last known address of the engineer and to the BLE Local Chairman.

These provisions were fully complied with in this case. The Organization did not contend either of these provisions was violated. In fact, if one wants to be highly technical, there is no contract provision requiring the transcript to even be reviewed before issuing discipline, only that the hearing be "fair and impartial", which matter is not dependent on a date on the transcript of that hearing.

In the "real world" it is recognized that disciplining employees "just for the hell of it" would be a strikingly dumb way to do business, if only considering the costs involved, not to mention the affect on employee morale. Carrier officers do not take discipline lightly, issuing discipline without due consideration, as this referee apparently believes. The Organization should have been held to a higher

standard of proof to show the lack of a date on a transcript violated the Carrier's agreement with them and so affected/tainted the discipline process as to be fatal to the issuance of discipline.

J. G. Albano

James Albano
Carrier Member

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**CONCURRENCE OF LABOR MEMBERS
AND
RESPONSE TO CARRIER MEMBER'S DISSENT**

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Referee Martin Malin

The Dissenter to this Award complains that the Employees have "finally" found a "sympathetic ear" in connection with the issue of the need for disciplinary decisions to be based on the record developed at the Investigation. It bears noting that in his Dissent, the Carrier Member continues to mischaracterize the Employees' position in connection with this issue, referring to the lack of a date on the transcript as the "fatal flaw" urged by the Employees.

Even a casual reading of the Award in this Docket, which devotes several cogent and well reasoned pages to this issue, makes it clear that the lack of a date on the transcript is not deemed, per se, a fatal error. What is deemed fatal, because it precludes a "fair and impartial" proceeding, is for the decision maker to assess discipline without first having read the entire record of the Investigation. As the Majority correctly understood, the date that the transcript was prepared was the evidence that would establish that the decision to discipline was based on the record, where the question is raised on the property, and the Carrier's decision to stop dating the Transcripts was part of an attempt to frustrate this line of inquiry. The Majority correctly drew a negative inference from the Carrier's failure to date the transcript and refusal to produce evidence to establish when it was produced and available for review.

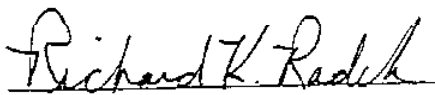
With respect to the Dissent's implication that the Majority has made a novel determination with respect to this issue, it also bears noting that in addition to this Division's Awards Nos. 24874, 24935, 25043 and 25299, this issue has also been decided the same way by many, many other tribunals deciding cases involving the operating crafts in this industry, many of them on this property. See, Award No. 1 of PLB 674 (Seidenberg); Award No. 4 of PLB 787 (Moore); Awards Nos. 23, 25, 26, 32 and 131 of PLB 5912 (Lynch); Award No. 57 of PLB 5390 (Fisher); Awards Nos. 74 and 79 of PLB 4897 (Lieberman); Awards Nos. 88 and 90 of PLB 4897 (Lynch); Awards Nos. 14 and 15 of PLB 6041 (Fletcher); Award No. 13 of PLB 6040 (Eischen); Award No. 5 of PLB 6149 (Cook); Award No. 25 of PLB 5295 (Richter); and Award No. 1 of PLB 6283 (Muessig). The overwhelming majority of referees and neutrals who have visited this

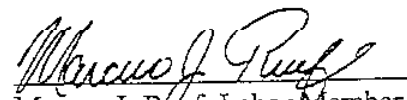
issue have decided it in the same manner as the majority herein. This Award is sound and should be followed.

With respect to the Dissenter's citation to Award No. 25091, it must be remembered that the Referee in that case reversed himself on this issue, having rendered Award No. 25043 (cited above) just six months earlier, in a Docket involving the same claimant, because the Carrier Member of the Division present at the hearing made an unsupported allegation referenced in our Dissent:

"Regrettably, it appears that the Referee was influenced by the Carrier Member's argument, advanced for the first time at the Referee Hearing, that the Organization was intentionally complicating and lengthening the Transcripts of disciplinary matters so as to make it harder for Carriers to render timely disciplinary decisions! The utter bankruptcy of such reasoning warrants no further comment."

Finally, we feel constrained to address the Dissenter's claim that Carrier does not discipline employees "just for the hell of it," noting the financial costs and poor employee morale associated with such a practice. The Awards rendered by this Division, which sustain a substantial portion of the discipline cases occasioned by this Carrier, indicate, whether by design or otherwise, that is just what is happening.


Richard K. Radek, Labor Member


Marcus J. Ruff, Labor Member