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NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25371

Docket No. 45075

02-1-01-1-U-2242

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 S. H. Beckman for removal of Discipline, claiming all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer Beckman's 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 May 17, 2000, the Carrier directed the Claimant to report for an Investigation on May 25, 2000. The notice charged the Claimant with failing to stop for a stop signal and passing the stop signal without authorization at 12:25 A.M. on May 12, 2000. The Hearing was postponed twice and held on June 15, 2000. On June 23, 2000, the Carrier advised the Claimant that he had been found guilty of the charge and had been assessed discipline at UPGRADE Level 4, a 30-day suspension.

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The Organization has raised several procedural issues and has argued that the Carrier failed to prove the charge by substantial evidence. We find it necessary to address only the procedural issues because they are 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. In the instant case, during handling on the property, the Carrier provided documentation that the transcript was completed and e-mailed to the Superintendent who imposed the discipline by 11:30 A.M. on June 22, 2000. Thus, the failure to date the transcript is irrelevant.

The Organization further argues that the Carrier violated the Agreement when it refused to send the General Chairman copies by fax or mail of the documents it intended to introduce at the Hearing, including the CAD report. The Organization maintains that the Carrier compounded its error when it denied the Organization's request for a recess to the following day to allow the General Chairman to review the CAD report and prepare for the Hearing. Instead, the Hearing Officer gave the Organization a 15 minute recess.

The Carrier responds that it complied with the Agreement by making the exhibits available for inspection by the Organization and that the Organization chose not to take advantage of this opportunity. In the Carrier's view, this is the only pre-Hearing discovery to which the Organization is entitled under the Agreement.

We agree with the Carrier. Section 7 of the Discipline Rule provides, "When request is made sufficiently in advance and it is practicable, the engineer and/or BLE representative will be allowed to examine material or exhibits to be presented in evidence prior to the investigation." Clearly, the Rule does not require that the

Engineer or BLE representative be furnished copies of material or exhibits and it does not require that the material or exhibits be delivered to the Engineer or BLE representative. In the instant case, the Carrier offered to allow the General Chairman to inspect the exhibits at the location where they were housed. The General Chairman chose not to exercise that option. The Organization observes that the General Chairman's office was approximately 100 miles from the location of the proposed inspection. That, in our view, is irrelevant. The Organization had the right to inspect the exhibits. It was the Organization's choice not to travel the 100 miles to exercise that right and not to send another representative to exercise that right. If the Organization wants a method of pre-hearing review that is more convenient for it, the Organization must negotiate for it with the Carrier. The Carrier offered to provide the Organization with all that it was entitled to under the Agreement and we have no authority to require the Carrier to do more. Although it is true that the Organization saw the CAD report for the first time at the Hearing that was the result of the Organization's choice not to inspect it previously as offered by the Carrier. Under those circumstances, it was reasonable for the Hearing Officer to deny the Organization's request to recess the Hearing to the following day to enable the General Chairman to inspect the CAD report in detail and prepare.

The Organization raises three other procedural objections which are far weightier. First, the Organization contends that the Carrier denied the Claimant a fair Hearing when it insisted on having the Dispatcher testify by telephone over the Organization's objection that the Dispatcher testify in person. Although telephone testimony is disfavored, its use does not per se deny an employee a fair Hearing. Each instance must be assessed on its own facts and circumstances. The clearest case for the use of telephone testimony arises where the witness would not otherwise be available and where the testimony is pro forma in nature, such as the authentication of a document. The greater the availability of the witness and the more substantive and material the testimony, the greater the likelihood that failure to produce the witness in person violates the employee's due process rights.

In the instant case, there was no showing that the Dispatcher was unavailable to testify in person. On the contrary, it appears that he had no conflicting obligations and could have traveled from Omaha, to Salem, Illinois, the site of the Investigation. Nevertheless, the Carrier maintains that the Dispatcher did little more than authenticate and reiterate information that was already contained on the audio tapes from the night of the incident.

The critical factual issue under Investigation was whether the signal was red or yellow when the Claimant passed it. Our review of the record reveals that the Dispatcher's testimony went beyond reiteration of what was contained on the audiotapes and concerned matters that bore directly on this crucial issue. For example, the Dispatcher was questioned about whether he was aware that the Claimant had passed the signal and entered the main line heading south prior to the time that the crew of a northbound train called it to his attention. He also was questioned concerning whether an alarm would sound if a train ran a red signal and was questioned on potential discrepancies between the audiotapes and the CAD report. Furthermore, the audiotapes did not reflect the time of each conversation recorded. Under these circumstances, we conclude that the Carrier erred in not producing the Dispatcher as a live witness and in insisting on taking his testimony by telephone.

The Organization next argues that the Carrier failed to provide an expert to interpret the CAD report. We agree. The CAD report was the critical piece of evidence on which the Carrier relied in finding that the Claimant ran the stop signal. The only witness who explained the CAD report was the MOP. He admitted, however, that he had no expertise in reading CAD reports and that without such expertise an individual could not be expected to understand the report. He further admitted that his entire testimony was based on information told to him by the individual in charge of the Signal Department on the night in question. Thus, the MOP did not testify from personal knowledge and this impeded the Organization's ability to cross-examine him. Indeed, at various points in his testimony, the MOP was unable to answer questions that were posed because he lacked the expertise and had not raised those matters with the individual whose assessment he was repeating. Here too, we see no reason why that individual, who had the expertise, could not be produced as a witness. We find that the Carrier erred in its failure to produce the expert whose interpretation of the CAD report it relied on in finding that the Claimant ran the red signal.

Finally, the Organization argues that the discipline was issued without a proper review of the record. As indicated above, the transcript was e-mailed to the Superintendent on July 22, 2000, and the letter imposing discipline was issued the following day. Evidence in the record reflects that the Superintendent faxed the notice of discipline to the transcriber at 10:00 A.M. on July 23.

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.

However, the record reflects that the Superintendent had the transcript for a full day before he issued the discipline. The Organization observes that the transcript ran approximately 400 pages, but we see no reason to assume that the Superintendent failed to read it before making his decision. However, as the Organization points out, the Superintendent did not have the Hearing exhibits when he made his decision. This failure, standing alone, would not mean that the decision was not based on the record because frequently the exhibits are read verbatim into the transcript. However, in the instant case, the Superintendent did not have the CAD report at the time he made his decision. As discussed above, the CAD report was crucial to the case against the Claimant. All the Superintendent had to go on was the explanation of the CAD report given by the MOP, an explanation that was not based on the witness' personal knowledge and merely consisted of a hearsay recounting of what he had been told by the relevant signal system expert.

We need not decide if any of the three procedural errors standing alone would provide sufficient ground for setting aside the discipline. Rather, we find that the cumulative effect of the three procedural errors denied the Claimant a fair and impartial Hearing. Accordingly, the discipline cannot stand.

It appears from the record that, as a consequence of this incident, the Claimant's FRA certificate was revoked. Therefore, the Claimant shall not be entitled to compensation for time held out of service during the period of his license revocation

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unless and until his certificate revocation is overturned. The Claimant shall be entitled to compensation for any time held out of service beyond the period that his certificate revocation was suspended.

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 5th day of September 2002.

CARRIER MEMBER'S
CONCURRENCE & DISSENT
AWARD No. 25371 - DOCKET NO. 45075
Referee Martin Malin

The Carrier dissents with regard to the alleged procedural errors, however, concurs strongly with the finding that the discipline agreement does not require sending or furnishing to the General Chairman material to be used in a hearing.

A handwritten signature in cursive script, appearing to read "J. G. Albano".

James Albano
Carrier Member

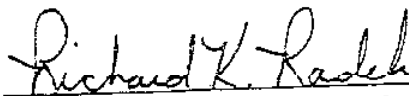
NATIONAL RAILROAD ADJUSTMENT BOARD FIRST DIVISION

CONCURRENCE & DISSENT OF LABOR MEMBERS

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Referee Martin Malin

We concur with respect to the Majority's findings regarding the procedural issues that the decision to sustain the claim was based on; however, we respectfully dissent with respect to the dicta concerning the issue of the Carrier's obligation to provide the Organization meaningful opportunities to review their evidence prior to an Investigation. The Majority's view reads Section 7 of the System Discipline Agreement too narrowly and ignores the holding of Referee Simon in recent Award No. 25299, where he found that:

"We do not read the Rule as strictly as the Carrier would wish. The right to examine documents is not much of a right if they are not readily accessible. Given the vastness of the territory covered by this Carrier, it would certainly be possible for documents to be located anywhere in the country. Furthermore, there may be cases where the Organization would want others to review the documents prior to the investigation. We believe the right to examine includes the right to access, and that would require the Carrier to provide copies of the documents, in some manner, to the Organization. Under this interpretation, the Carrier is still not obligated to furnish documents that will not be used in the investigation, or when it is not practicable to do so.


Richard K. Radek, Labor Member


Marcus J. Ruff, Labor Member