

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25388
Docket No. 45052
02-1-01-1-U-2238

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 C. K. Moss for removal of Discipline, claiming all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer Moss' 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 8, 2000, the Carrier directed the Claimant to report for an Investigation on February 14, 2000. The notice charged the Claimant with failing to stop for a blue signal and derail in the derailing position, causing derailment of unit UP3461 at the west end of Armourdale Yard on February 4, 2000. The Hearing was postponed twice and held on March 2, 2000. On March 9, 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.

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 and 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

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 23rd day of October, 2002.