

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

Award No. 25935  
Docket No. 45476  
03-1-01-41-U-2614

The First Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of Engineer D. W. Thurston for removal of Discipline, claiming all lost time (including time attending the investigation, fringe benefits, and clearing this notation of discipline from Engineer Thurston'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.

Following an Investigation conducted on September 1, 2000, the Carrier sent a letter to the Claimant dated September 8, 2000, informing him that he had been assessed a Level 1 reprimand for failing to sound his train whistle when approaching a track gang on May 22, 2000.

The record shows that the transcript of the Investigation was not provided to the Claimant or the Organization until after September 12, 2000, as indicated by the postmark on the certified letter mailed to the Claimant.

In its on-property appeal, the Organization objected to the discipline on both procedural and substantive grounds. Among its arguments was the contention that the Carrier failed to comply with the requirements of System Agreement - Discipline Rules when the Claimant was not provided with a copy of the Investigation transcript in a timely manner. The Carrier responded by arguing that the delay was harmless and non-prejudicial to the Claimant and the Organization. The Carrier also argued that the discipline was proven on the merits and should be upheld.

The second sentence of Paragraph 8 states:

"Copies of transcript will be furnished to the engineer and the BLE Local Chairman no later than the date discipline is issued."

The first sentence of Paragraph 9 reads:

"A written decision will be issued no later than 10 days after completion of the hearing."

The foregoing Agreement provisions, when read in conjunction with one another, plainly express the requirement to furnish the transcript of the Investigation to the charged employee and his or her representative at the time the discipline is assessed and within ten days as provided in Paragraph 9. On this record, the Organization has established that these procedural requirements were breached when the Carrier did not provide the Claimant or his representative with a copy of the Investigation transcript at the time the discipline was issued or within ten days of the Investigation Hearing.

It should be emphasized that this is not a case of first impression. First Division Award 24180 and Public Law Board No. 5430, Award 2, both involving these same parties, have reached the same conclusion under nearly identical Agreement language. In sustaining the claims, both prior Awards specifically rejected the Carrier's theory that this was a "minor" error that did not call for a sustaining Award. In First Division Award 24180, the Board stated:

“ . . . This expression of intent is not conditioned upon only those instances in which ‘harmless error’ or lack of ‘prejudice’ is argued to be missing. It is, instead, a ‘statute of limitations’ the parties openly developed for their continued conduct. A failure to comply with either of the above-cited Agreement sentences flaws the discipline. Accordingly we will order that the discipline assessed be rescinded.”

Similar reasoning is seen in Public Law Board No. 5430, Award 2. There, the Board concluded:

“ . . . by adopting the Carrier’s position would have the effect of amending the provisions of Article 44 by creating certain exceptions to the existing rule. No matter how reasonable these exceptions might be, the Board simply does not have the authority to change existing agreements or establish new rules.”

The conclusions set forth above are not palpably erroneous and should be followed. The Carrier failed to meet the procedural requirements set forth in the parties’ Agreement and on that basis, the claim will 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 26th day of November 2003.