

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION

Award No. 25936  
Docket No. 45480  
03-1-01-1-U-2618

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 C. D. Carter for removal of discipline, claiming all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer Carter'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.

The Claimant and his crew were operating Train LSB50-24 on May 24, 2000. In so doing, they were required to switch through the Watseka, Illinois, interlocker to service an industry. An FRA inspector observing the train noted that the crew had left a car between the opposing signals of the TPW manual interlocker. The Claimant and his crew then returned, passing the absolute signal without permission and making a reverse movement within the TPW interlocker without

authority. The train then continued the reverse movement, thereby occupying the main track without proper authority.

The FRA inspector reported the matter to local management, and the crew was subsequently notified to report for Investigation.

On June 19, 2000, the Carrier conducted a combined disciplinary and decertification hearing. Following the Investigation, the Carrier found all three crew members culpable and assessed each employee Level 4 discipline under the Carrier's UPGRADE policy.

The Board here notes that the claims for the Conductor and the Brakeman involved on the date in question were progressed to Public Law Board 6099 by the United Transportation Union. In Awards 94 and 95, the Board concluded that the employees had failed to properly perform their duties by making prohibited movements. However, in both cases, the Board reduced the Level 4 discipline to Level 3 without further discussion or explanation.

In its argument to the Board, the Organization raised numerous objections, both procedural and substantive. Of particular relevance, however, is its contention that the Carrier's failure to produce the Dispatcher on duty at the time of the May 24, 2000 incident deprived the Claimant of a fair and impartial Investigation. The Organization argues that the Locomotive Engineer Review Board (LERB), after reviewing the same Investigation transcript as is currently before the Board for review, concluded that the Claimant "was substantially harmed by railroad's failure to call a dispatcher as a witness when his testimony was central to the dispute." To the Organization, the findings of the LERB are persuasive and should be adopted by the Board.

The Carrier, on the other hand, argues that the absence of the Dispatcher as a witness at the investigative Hearing did not deprive the Claimant of a fair and impartial Hearing. The Claimant admitted to the misconduct alleged in the charges, the Carrier reminds the Board. Moreover, the testimony indicates that the crew did not inform the Dispatcher that they were leaving a car in the interlocker. Under these circumstances, the Organization cannot successfully claim that the testimony of the Dispatcher would have added anything relevant to the record, the Carrier submits.

The Carrier further points out that the Board certainly has no obligation to follow the decision of the LERB, since that forum does not address issues arising under the Collective Bargaining Agreement.

In the absence of any proven procedural irregularities, it is clear to the Carrier that there is substantial evidence, in the form of the Claimant's own admission, supporting the charges herein. The Carrier maintains that discipline was properly assessed in accordance with its UPGRADE policy, and, therefore, the claim must be denied.

The Board is constrained to find that the imposition of discipline in this case is inappropriate on procedural grounds. The Carrier refused to produce the Dispatcher on duty at the time of the incident even though a written request for that witness had been made to the Carrier sufficiently in advance of the date of the investigation. Because the Dispatcher did not appear at the investigation, the record does not reflect the extent of his involvement in the movement at issue. The crew testified that the Dispatcher was not specifically informed that a car was left in the interlocker, but additional testimony on the record suggested that the Dispatcher was provided a full briefing in advance of the assignment and voiced no objections. Whether the Dispatcher knew or authorized the crew's movement was a legitimate area of inquiry that was highly relevant to the Organization's defense of the Claimant, as it provided a possible basis for mitigation of the discipline imposed. Indeed, prior Awards have recognized that the Carrier proceeds at its peril when it fails to call the Dispatcher when he or she is a material witness to the incident. Public Law Board No. 2448, Award 16; Public Law Board No. 4530, Award 2.

The Board is cognizant that it is in no way required to give deference or weight to the decision reached by the LERB overturning the Carrier's revocation of the Claimant's Engineer Certification in connection with this matter. The Board's function under the Railway Labor Act and that of the LERB remain separate and distinct. Nevertheless, our independent conclusion after careful consideration mirrors that of the LERB's decision. We find that the Carrier's refusal to produce the Dispatcher resulted in a failure to grant the charged employee with a fair and impartial Hearing.

The Awards of Public Law Board 6099 issued in connection with this incident do not change the result. Absent any expressed rationale for reducing the discipline of the Conductor and the Brakeman, we are unable to ascertain what factors led to

that Board's decision. We do know, however, that the purpose of an Investigation is to develop all of the facts surrounding the incident in question. The Carrier's conduct did not comport with that fundamental purpose, and therefore a finding of guilt and assessment of discipline cannot be upheld. The claim is hereby 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.