

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25963
Docket No. 45497
03-1-01-1-U-2630

The First Division consisted of the regular members and in addition Referee Lynette A. Ross when award was rendered.

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

STATEMENT OF CLAIM:

“Claim in behalf of Conductor T. Fabela, 333-80-1361, Chicago Service Unit, Union Pacific Railroad Northern Region, for compensation for any and all lost time including time spent at the investigation, expunge any and all reference to this incident from claimant’s personal record and that claimant be removed from the Union Pacific System known as Upgrade when he was investigated on December 19 and December 23, 2000 on the following charge:

‘your alleged failure to comply with verbal instructions given by the East Dispatcher relating to a crossing malfunction at MP 28.5 (Sunset Blvd) on the Geneva Sub while you were employed as Conductor on 1X20 at approximately 21:00 hours on December 14, 2000.’

Claim premised upon UTU Schedule Rule 23(c).”

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 December 14, 2000, the Claimant was assigned as the Conductor on Train 1X20, which the Engineer operated on Track 2 on the Carrier's Geneva Subdivision. On the claim date, the weather was inclement because of heavy snow and it was evening. The crossing gates at Sunset Road, Milepost 28.85 had malfunctioned and as Train 1X20 approached the crossing, Train Dispatcher 11 radioed the crew and issued them a directive to stop the train before going through the crossing. According to the Claimant, they approached the crossing at approximately 15 mph and were prepared to stop when the Claimant observed that a Signalman stationed at the crossing gates appeared to be simultaneously holding a vehicle at the crossing and waving Train 1X20 through. Without stopping, the Engineer operated Train 1X20 through the crossing and continued to Wheaton.

According to the record, Signal Foreman P. J. Anderson noticed Train 1X20's approach to the crossing and asked the Signalman whether the train had stopped short of Sunset Road. When the signalman responded that the crew had not stopped, the Signal Foreman interviewed the Claimant and the Engineer at Sunset Road. At the conclusion of the interviews, they were removed from service and notified that an Investigation was being scheduled.

The Investigation began on December 19, 2000 and was recessed in order to obtain a cassette tape of Dispatcher 11's instructions to the crew. The Investigation was then resumed on December 23, 2000. Pursuant to a letter dated December 26, 2000 from General Superintendent D. K. Barnes, the Claimant was informed that he was guilty of the charges and was assessed a Level 2 discipline in accordance with the Carrier's UPGRADE Policy. As a result, the Claimant was required to serve one day off with pay to develop an action plan to prevent future Rule violations.

During the various levels of the Organization's on-property appeals, it was argued that the Carrier's procedural handling of this case was fatally flawed. The Organization submits that the postponement of the December 19, 2000 Hearing was unilaterally decided by the Carrier as opposed to mutually-agreed upon by the

parties, and that the Claimant, who had been removed from service on the incident date, suffered monetary harm as a result.

Entwined in the Organization's position that the Carrier did not prove the Claimant's guilt of the charges by substantial evidence is the Organization's second procedural objection concerning the Carrier's alleged failure to call pertinent witnesses. In perhaps its most strenuous procedural objection, the Organization submits that the Carrier failed to conduct a fair and impartial Investigation when it refused the Local Chairman's request that the Signalman employed at the crossing at the time of the incident be called in to testify. In the Organization's view, the Claimant believed that as the train approached the crossing, he was prepared to stop but the Signalman working there appeared to be flagging traffic and motioning Train 1X20 to proceed through the crossing. As a result, the Engineer operated the train cautiously and without incident through the crossing, albeit without stopping first.

The Organization opines that the Signalman's actions effectively relieved the crew from complying with Rule 6.32.2, which, under the circumstances, required that they stop and protect the crossing, by flagging it if necessary, before occupying it. Therefore, the Organization stresses that the direct testimony of the Signalman as opposed to the hearsay testimony of the Signal Foreman was essential to determine whether the Signalman gave the Claimant and Engineer an indication that the Signalman was protecting the crossing. See First Division Award 25383.

Finally, the Organization alleges that the Carrier issued the discipline prior to the Carrier's receipt of a complete transcript of the Investigation, and that the degree of discipline assessed was inconsistent with the Carrier's UPGRADE policy because the Claimant was withheld from service for 16 days. As a result, the Organization requests that regardless of whether the Board should sustain the instant claim, the Claimant is entitled to payment for the 16 days lost, on a make-whole basis.

It is the Carrier's position that, in its handling of the case, the Carrier committed no procedural errors that would warrant the overturning of the imposed discipline. The Carrier states that the postponement was necessary in order to secure the Train Dispatcher's tapes of the "mandatory directive" he issued to the Claimant and Engineer and that the arrival of those tapes was delayed because of a severe snowstorm that had interfered with their delivery. In the Carrier's view, the transcript of that tape constitutes substantial evidence that the Train Dispatcher

clearly instructed the Claimant and Engineer to stop and protect the Train 1X20 at the Sunset Road crossing.

The Carrier argues that it is undisputed that the Claimant's train did not stop, rather it continued over the crossing at between 14 and 15 mph in violation of the "mandatory directive" specified by Operating Rule 2.14. Therefore, the Carrier argued that it carried its burden of proving the Claimant's guilt by proffering substantial evidence that he failed to adhere to the Train Dispatcher's directive, and that the discipline assessed for the proven offense was not arbitrary, capricious or unreasonable. See First Division Award 13142.

After affording this case a thorough review of the parties' procedural and substantive arguments, the Board finds that the Organization's second procedural argument, concerning the Signalman's absence from the Investigation, is persuasive and on point with First Division Award 25383. In that on-property Award, the Organization requested the testimony of a track foreman, who was present at the scene of an incident involving the crew's alleged failure to stop in advance of a stop board. In that case, the foreman supposedly allowed the train crew to pass the stop board, thereby occupying a main track without proper authority.

In the instant case, the record is clear that during the December 19, 2000 Hearing, the Local Chairman made several requests for witnesses, including the signalman, who was an eyewitness. When the December 19, 2000 Investigation was reconvened, the requested witnesses were not present.

While, as the Carrier points out, the Dispatcher's tape may have provided irrefutable evidence that the Claimant failed to comply with the "mandatory directive" issued to the Claimant and Engineer, the majority finds that, based on the circumstances of this case, the Carrier should have made arrangements for the Signalman's attendance at the Hearing. The record reveals that the Signalman was a material witness to the incident and might have offered exculpatory testimony. The Organization's request that he should appear was reasonable and the fact that the Carrier did not make him available despite the Organization's repeated requests constituted a serious procedural deficiency on the Carrier's part that compromised the Claimant's right to a fair and impartial Investigation. Thus, the majority finds that a sustaining Award must be issued here.

Therefore, the Board holds that the discipline must be removed from the Claimant's record. With respect to the Organization's arguments made on behalf of the Claimant for the awarding of backpay for time lost over the 16-day period, the Board hereby directs the Carrier to compensate the Claimant accordingly.

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 18th day of December 2003.

