

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25988
Docket No. 45319
04-1-01-1-U-2613

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 B. E. Milroy for removal of discipline, claiming all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer Milroy’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 in this case was assessed a Level 2 discipline under the Carrier’s UPGRADE Discipline Policy for failing to comply with instructions to protect his assignment on a regular basis. The Organization protested the discipline on a number of procedural and substantive grounds. We need not address them all, however, as there is one issue in this case that is dispositive of the claim.

The Organization asserts that the Carrier omitted the date the Investigation transcript was completed by the transcriber in a deliberate attempt to evade an issue which has been the subject of many sustaining Awards. Specifically, the Organization contends that it is fatal error for the decision maker to assess discipline without first having read the record of the Investigation. By not dating the transcript, the Carrier is now attempting to frustrate this line of inquiry. In the Organization's view, the Carrier's refusal to produce evidence to establish when the transcript was completed and available for review should result in a negative inference being drawn against the Carrier and a finding that the Claimant was denied a fair and impartial Investigation.

The Carrier argues that the parties' Agreement does not require that it date the transcript. To the Carrier, it is fundamental that the Organization had the burden to prove as a prima facie matter that the Claimant was denied a procedural right guaranteed in the Agreement before the burden shifted to the Carrier to refute the Organization's evidence. Given the lack of a prima facie showing that discipline was not issued based on the facts developed in the record, the Organization's contention is without merit, in the Carrier's view.

After careful review of the matter, including the precedent Awards cited by both parties, we find the Carrier's position unpersuasive. It is true, as the Carrier points out, that the Agreement does not expressly require that it date the transcript. But there are numerous on-property Awards which have held that the Carrier has an Agreement obligation to assess discipline based on the evidence contained within the record. The rendering of a decision without the advantage of the transcript constitutes prejudgment and failure to provide a fair and impartial Investigation. See, on-property First Divisions Awards 24874, 24935, 25043, and Public Law Board No. 787, Award 4.

That principle is particularly applicable when the Hearing Officer does not render the decision. Where, as in this case, the discipline was assessed by the Superintendent, the transcript of the Investigation obviously becomes critical in determining whether discipline was warranted. The Superintendent did not hear and observe the witnesses as they testified, and thus a proper decision would have to be predicated on review of the Hearing transcript.

The date of the transcript would have provided a straightforward means of ascertaining whether the Superintendent had the transcript before rendering his

decision. Despite the fact that the matter was put squarely at issue on the property, the Carrier did not supply that particular piece of evidence.

Although the Carrier attempted to shift the burden to the Organization, the language of the Agreement requires that the Carrier provide a fair and impartial Hearing. When the Organization has challenged the Carrier on fairness grounds, and the evidence to support that assertion is under the Carrier's direction and control, the Carrier cannot shift its burden to the Organization. Rather, the Board has the authority to draw certain inferences adverse to the Carrier as the party refusing to disclose relevant information. In the instant case, the Carrier's refusal to submit evidence of when the transcript was prepared permits the inference that the evidence, had it been produced, would not have been favorable to the Carrier. On that basis, we must conclude that the Claimant was denied a fair and impartial Investigation in accordance with the Agreement. The claim will be sustained as presented.

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 10th day of March 2004.

