

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25989
Docket No. 45472
04-1-01-1-U-2610

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. L. Thielemann for removal of Discipline, claiming all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer Thielemann’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, the Claimant was assessed a Level 4 discipline – a 30-day suspension – as a result of his failure to stop for a red flag while operating under restricted speed during an efficiency test. 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, First Divisions Awards 24874, 24935, 25043, and Public Law Board No. 787, Award 4, Public Law Board No. 2898, Award 6, Public Law Board No. 6040, Award 13, and Public Law Board No. 5295, Award 25.

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. Accord, First Division Awards 25366, 25367, 25369, 25370, 25372, 25388, and 25389.

It appears from the evidence that the Claimant's certification revocation was reversed by the FRA. Accordingly, the Claimant shall be entitled to compensation for the time held out of service and the discipline removed from his record.

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.

Carrier Member's Dissent to Awards 25987, 25988, and 25989

The majority states that while there is no agreement requirement that the investigation transcript be dated, the lack of a date on the transcript supports a finding of fatal procedural error because there is a negative inference to be drawn that the Superintendent might not have reviewed the transcript of the investigation prior to issuing discipline.

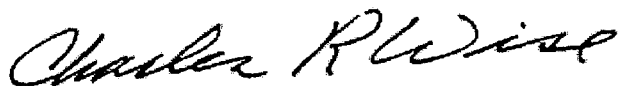
It is noted, the agreement requires a copy of the transcript to accompany the discipline letter, and in each case involved, that was done, showing the transcript was in the Superintendent's office for at least some period of time before the notice of discipline was prepared. The majority should have considered this fact a positive inference that the transcript was in fact reviewed, thus bringing the two sides arguments back into balance. This would have lead to a better decision, which would have been to review the facts of the case to determine if there was any apparent support for the Organization's assertion that the transcript was not reviewed. The decisions should each have read:

"The Board has reviewed the transcript and finds nothing to support the Organization's assertion that the Superintendent may not have reviewed the transcript. Rather, the facts contained in the transcript tend more to support a finding that the decision of the Superintendent was based on a review of the transcript and, in addition, was not arbitrary, capricious or unjust. A standard this Board has espoused since its founding."

Or in the alternative:

"The Board has reviewed the transcript and finds support for the Organization's assertion that the Superintendent may not have reviewed the transcript. The facts contained in the transcript do not support even an arguable basis for the decision of the Superintendent. This being the case, the organization's procedural argument concerning a fair and impartial investigation is sustained."

Without considering alternatives such as the above, the Board only encourages spurious assertions of procedural error.



Charles Wise
Carrier Member

