

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25991
Docket No. 45584
04-1-01-1-U-2683

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 K. D. Pickett for removal of discipline, claiming all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer Pickett’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 Investigation, the Claimant was assessed a Level 4 30-day suspension under the Carrier’s UPGRADE Discipline Policy. The discipline was based on the Carrier’s determination that on January 8, 2001, the Claimant operated his train past a red signal and into the power switch that was lined for opposing traffic, in violation of Carrier Operating Rules.

The case comes to the Board on the basis of the Organization's claim of various procedural errors and substantive deficiencies in the Carrier's proofs. Because we find that one of the procedural issues disposes of the instant claim, we will not reach the merits.

The Organization contends 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's response is two-fold. First, it 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 reject the Carrier's position. It is true, as the Carrier points out, that the Agreement does not expressly require that it date the transcript. Nevertheless, 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.

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, the Carrier did not supply that particular piece of evidence during the on-property handling of the case.

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 during the handling of this case on the property 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.

The Carrier's second argument does not change the result. In oral argument before the Board, the Carrier attempted to present new evidence which, in its view, established that the transcript was reviewed by the Carrier officer prior to issuing a decision. The Carrier's de novo arguments and evidence come too late to be properly considered. As an appellate tribunal, the Board has long held that the parties must present their cases on the property. Failure to do so cannot be cured at the Board level where new evidence may not be considered.

Under these circumstances, 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.