Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 25994
Docket No. 45592
04-1-01-1-U-2688

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
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(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of Engineer W. R. McIntosh for removal of discipline, claiming all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer McIntosh'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 by letter dated November 30, 2000. The letter informed the Claimant that he violated various Carrier Rules by operating his train on October 20, 2000 past the DTC block and into the yard limits at Shreveport without the authority of the Yardmaster, resulting in the rear end collision of another train that was occupying the main line.

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 three-fold. First, it argues that the conductor involved in this same incident progressed a claim which was denied on the merits in Public Law Board No. 5613, Award 165. The Board in the instant case should similarly reject any procedural arguments and uphold the discipline imposed, the Carrier asserts.

The Carrier's contention is not persuasive. It is well-established that Awards in this industry are not governed by the doctrine of stare decisis. They do not constitute binding precedent, although an award may certainly be deemed highly persuasive or even controlling where the issues, the parties, and the contractual language are identical. The Award cited by the Carrier does not fit within that rubric. Public Law Board No. 5613, Award 165 involved parties different than those at hand. Moreover, the Board cannot ascertain from the Award whether the arguments advanced in that case were the same as those relied upon here. Given these differentiating characteristics, we do not find that Award controlling.

Second, the Carrier contends 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 third 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.

Carrier Member's Dissent to Awards 25991, 25993, and 25994

All of these appeals have sustained based on the Organization's bald assertion that the discipline might have been rendered prior to reviewing the transcript because the transcripts were not dated.

At the hearing, the Board was presented with evidence showing that the transcripts were received by the Superintendents' Offices prior to rendering the discipline. The Board refused to consider this evidence because it had not been handled on the property. However, as the Board was informed at the hearing of these cases, when the submissions were written, the then-existing, on-property awards between the same parties concerning the dating of transcripts, supported the Carrier. As a result of this verification of the Carrier's position, and its belief that the Board would acknowledge the principles of *res judicata* and *stare decisis* and would follow precedent of these awards, the Carrier, during its handling "on the property" and in its writing of its submissions, did not supply information as to when the transcripts were sent to the Superintendents' offices. These awards (which were attached as exhibits to the Carrier's submission) were as follows

Referee Eischen in Public Law Board 6040, Award 82:

"The case comes to this Board on the basis of the Organization's claim of fatal procedural error in the lack of a date on the transcript of proceedings and a plea that Carrier failed to carry its burden of proof. We are not persuaded that Claimant's right to a fair and impartial investigation was compromised in this case and there is more than sufficient evidence of record to support Carrier's determination of culpability."

First Division Award 25215, Referee Richter:

"First, the Organization argues that the Carrier violated the Agreement when it failed to date the transcript of the Investigation. However, it failed to cite a Rule that requires that the transcript be dated. It also has failed to show how the Claimant's rights were compromised by the lack of a date on the transcript.:

First Division Award 25216, Referee Richter:

"The Organization argues that the Carrier violated the Agreement when it failed to date the transcript of the April 9, 1999 Investigation. However, it failed to cite a Rule that requires that the transcript be dated. It also has failed to show how the Claimant's rights were compromised because the transcript was not dated."

First Division Award 25228, Referee Richter:

"The Organization argues the Carrier violated the Agreement when it failed to date the transcript of the April 5 Investigation. However, it failed to cite a Rule that requires that the transcript be dated. It also has failed to show how the Claimant's rights were compromised as the result of the lack of a date."

Subsequent to the writing of the submissions, other awards, obviously based on different philosophical grounds, came down from the Board, holding that despite the lack of a transcript-dating requirement in the agreement, the failure to do so and the failure of the Carrier to present proof that the transcript was received prior to issuance of the discipline was fatal to the case.

The Organization, in their submissions and handling on the property also cited none of these later sustaining awards, obviously because of the timing, yet was able to buttress their case at the hearing through the use of referee memoranda in which the later awards were presented. The Carrier, however, was not allowed to buttress its case by supplying the records showing the transcript had been received by the Superintendents prior to the discipline being issued. Obviously the playing field was not level.

In an appellate review of a railroad hearing where unsupported, "what if" assertions of procedural errors are made, they should either be thrown out *ab initio*, or at least considered from the standpoint of whether the asserted error, even if true, caused any harm to the claimant's right to a fair and impartial hearing. The Board has historically looked at substance as being more important than form when unsupported assertions of procedural error are made, recognizing the fact that these are not criminal, or even civil, cases and as such are not governed by the strict standards of judicial procedures, but by common sense and fairness to both parties. The awards cited above followed this historical pattern. In those decisions, the Board took note of the alleged errors, then reviewed the facts and found there was nothing to support the Organization's position.

Despite this historical background, in the instant cases it was determined, without even reviewing the transcripts (to determine if they were fair and impartial), that the cases were fatally flawed based on the mere possibility of prejudgment based only on the unsupported suggestion by the Organization that the Superintendent perhaps did not review the transcript before issuing discipline.

Contrast the instant awards with the findings from two awards where the Board followed its historical view of attempting to settle very similar disputes based on substance rather than supposition:

First Division Award 24846 (BLE v UPRR, Malin – 9/24/97);
First Division Award 25091 (BLE v UPRR, Dennis – 2/28/00)

*"**Carrier issued its finding and imposed discipline before the record of the Hearing was transcribed**. However, the Agreement does not require that Carrier await the transcript before making its determination. The Hearing was short and the record was not complex. The same individual who served as the Hearing Officer made the findings and imposed the discipline. Therefore, **although it would have been better practice to wait for the transcript, we cannot agree that Carrier's failure to do so violated the Grievant's due process** rights or indicated prejudgment. See Third Division 25150." **1-24846***
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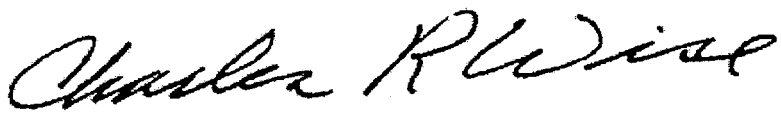
*"In the instant case, the Organization presented a procedural argument that this Board should not reach the merits of the case, since **Carrier Officials decided the outcome without benefit of the hearing transcript. The hearing transcript was not completed until after the Level 5 discipline was assessed.** It cites among other cases, a recent First Division Award involving all of the same parties that are involved in this case (Award No. 25043).*

This Board has considered all procedural arguments presented by the Organization and does not find them of sufficient severity to modify Carrier's decision.** The facts of this case were simple and straightforward. Claimant failed to report an injury and withheld information about that injury when being examined for a second on-the-job injury. This information was clearly gleaned from the Investigation and from the documents in evidence in the case. **Failure to have the transcript of this hearing before it when discipline was assessed does not justify overturning Carrier's action**. Claimant in this instance was guilty as charged. Dismissal from service cannot be considered as arbitrary and capricious." **1-25091

In view of the above, the Carrier must respectfully dissent, as the line of awards sustaining the Organization's appeal do not represent historical application of procedural principles at the various divisions of the NRAB. The Claimants in these cases were given procedural windfalls.



Charles Wise
Carrier Board Member