

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

Award No. 26074  
Docket No. 45489  
04-1-01-1-U-2620

The First Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

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

**STATEMENT OF CLAIM:**

“Claim of Engineer K. B. Lee for removal of discipline, claiming all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer Lee’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.

According to the record, on August 24, 2000 the Claimant attended a formal Investigation to determine his responsibility, if any, in connection with his alleged failure to properly sound the train whistle in accordance with the Union Pacific Railroad’s Operating Rule 5.82. [11] and Item 10 A of the System Special Instructions. By certified letter dated August 31, 2000, the Claimant was notified by General Superintendent R. M. Scoggins that:

"After review of the transcript and careful consideration of the facts developed at the formal investigation held on August 24, 2000, you have been assessed a Level 1 for violation of *Rule 5.8.2 [11] Sounding Whistle* of the Union Pacific Railroad Operating Rules effective April 2, 2000, and Item 10A of System Special Instructions dated April 2, 2000."

General Superintendent Scoggins further explained that because the Claimant's disciplinary status under the UPGRADE Progressive Discipline Table stood at "Level 0" at the time of the offense, the discipline assessed as a result of the instant proven infraction would be a Level 1 Letter of Reprimand.

In its subsequent appeal of the discipline, the Organization raised a number of procedural and substantive objections. First and foremost, as the on-property record indicates, was the procedural objection that the discipline should be removed from the Claimant's record, and that the Claimant thus should be paid for attending the Investigation. The Organization's rationale in that regard was based on recent Board holdings involving similar cases in which this Carrier was found to have committed a fatal procedural mistake by distributing undated copies of Investigation transcripts (as regards the transcriber's transcript completion date) to this Organization.

Specifically, in support of its procedural argument, the Organization proffered several recent First Division Awards rendered by Referee Ann S. Kenis, in which this Organization prevailed in its above procedural position against this same Carrier. Thus, the Organization's renewed procedural argument concerning the undated transcript in the instant case is a threshold issue which, if resolved in the Organization's favor based on its factual consistency with the cases adjudicated by Referee Kenis, would indeed be dispositive of the claim. The cases of precedential value, refereed by Neutral Kenis, consist of First Division Awards 25987, 25988, 25989, 25991, 25993 and 25994, issued on March 10, 2004.

Upon its careful review of the above-cited Awards, we find that consistent with the prior on-property arbitral precedent established by First Division Awards 24874 (Wesman); 24935 (LaRocco); 25043 (Dennis); Public Law Board No. 787, Award 4 (Moore); and others, Referee Kenis essentially held that the Carrier's disciplinary rule requires that the assessment of discipline against Agreement-

represented employees should be based on the evidence contained in the formal Investigation record, or transcript. Relying on the Awards cited above in this paragraph as on-property guiding precedent, Neutral Kenis specifically stated, "The rendering of a decision without the advantage of the transcript constitutes prejudgment and failure to provide a fair and impartial Investigation."

As was the situation in each of the cases (again, involving these same parties as in this dispute) heard by the Board refereed by Neutral Kenis, here the decision to assess the Level 1 Letter of Reprimand against the Claimant was rendered by the General Superintendent, who appeared to have not attended the Investigation and thus would not have heard the witnesses' testimony or observed their demeanor. As in the above-cited cases, the General Superintendent's determination would have solely stemmed from his review of the transcript record, we emphasize.

Although the Carrier reiterated the same argument it apparently had advanced in each of the cases leading to the above Awards 25987, 25988, 25989, 25991, 25993 and 25994 – that the System Agreement - Discipline Rule does not specifically require that the transcript be dated, the Board's response in Award 25987, et al., must be followed by this Board given this case's similarity to those and their precedential value. As Referee Kenis succinctly stated in lead Award 25987:

"The date of the transcript would have provided a straightforward means of ascertaining whether the Superintendent had the transcript before rendering his decision. Despite that fact that the matter was put squarely at issue on the property, the Carrier did not supply that particular piece of evidence...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."

In light of the factual circumstances underlying this case with respect to the threshold issue of the undated transcript, this Board affirms the Board's earlier findings in Award 25987, quoted above. Thus, for the same reasons as articulated above, this Board similarly rules in the instant case that the Carrier's transmittal of a transcript that did not bear a completion date, i.e., transcriber's certification date,

constitutes a fatal procedural flaw warranting removal of the discipline. Furthermore, the Carrier's failure to provide evidence, while this case was still in on-property handling, that the transcript was completed before the General Superintendent's assessment of discipline further underscores the Carrier's procedural error thereby warranting an Award favorable to the Organization. The claim, therefore, is sustained. The Carrier is directed to remove the Letter of Reprimand from the Claimant's record, and pay him for "time lost" for attending the Investigation.

**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 13th day of December 2004.

## Carrier Member's Dissenting Opinion to Award 26074

While the Board does not specifically have to provide all its rationale for reaching a decision, it is disappointing when not one word is written to assist the Carrier in understanding why there was no comment or apparent weight given to the following awards holding that failure to date a transcript is not a fatal error:

Referee Eischen in Public Law Board 6040, Award 82, set this identical issue aside as follows:

*"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."*

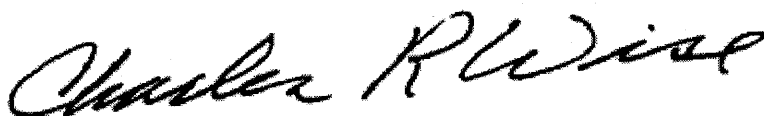
First Division Award 25216, Referee Richter:

*"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."*

Carrier Member respectfully dissents.



Charles Wise  
Carrier Board Member  
CarrierDissent Docket 45489