

CARRIER FILE - 9402878
ORGANIZATION FILE - PR-DE HAWKINS

PUBLIC LAW BOARD NO. 5719

PARTIES TO DISPUTE:

UNION PACIFIC RAILROAD COMPANY)	
(WESTERN REGION))	
)	
VS)	NMB CASE NO. 14
)	AWARD NO. 14
)	
BROTHERHOOD OF LOCOMOTIVE ENGINEERS)		

STATEMENT OF CLAIM:

Appealing the UPGRADE Level 4 Discipline of Engineer D. E. Hawkins and request the expungement of discipline assessed, and pay for all lost time with seniority and vacation rights restored unimpaired. This action is taken as result of the investigation held on July 25, 1994.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved.

The parties to this dispute were given due notice of hearing thereon

The dispute here involves claimant's failure to stop his train before passing a Red Flag. Under date of July 18, 1994 claimant was notified to report for formal investigation as follows:

"Report to the Conference Room, Union Pacific Railroad, 300 South Harrison, Pocatello, Idaho, at 9:00 a.m., Wednesday, July 20, 1994, for formal investigation to develop facts and place responsibility, if any, in connection with the alleged report that while working as Engineer on the NPSE-14, approximately 7:34 p.m., July 15, 1994, you allegedly failed to stop before passing red flag in siding at Georgetown, Idaho, approximately M. P. 127.8, Pocatello Subdivision, resulting in running over red flag by approximately two and one-half pole lengths. This indicates a possible violation of the General Code of Operating Rules, Third Edition, effective April 10, 1994."

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Following the investigation claimant was notified that he was guilty of violating certain rules and was assessed Level 4 discipline (30 days suspension) under Carrier's newly implemented UPGRADE Discipline Policy which became effective July 1, 1994.

Once again the Organization raises the procedural question that claimant did not secure a fair and impartial hearing as provided by Rule 122 of the parties agreement, in that the officer who conducted the investigation also rendered the decision of guilt, thereby acting as prosecutor and judge. As we noted in our prior Award No. 12, the UPGRADE Policy clearly provides for the hearing officer to also act as the officer to assess discipline when the discipline is in the Level 1 to 4 category, unless the collective bargaining agreement stipulates otherwise. A careful review of Rule 122 does not reveal a provision which would prevent the hearing officer from also acting as the officer to assess discipline. The objection is therefore overruled.

A second objection raised by the Organization relates to Rule 99 of the parties agreement which reads as follows:

"Rule 99. EFFICIENCY TESTS. Efficiency tests will not be conducted under conditions that are hazardous to the employes. Red Lanterns or flags will not be used unaccompanied by torpedoes."

It was clearly developed during the investigation that the Carrier officers who conducted the efficiency test here involved, and who placed the red flag on the track, did not use any torpedoes. The Organization argues that the use of the red flag without torpedoes is contrary to the rule.

Carrier argues that torpedoes are not needed when the train is traveling at restricted speed, and the record indicates when claimant's train entered the siding here involved it was traveling at restricted speed. Carrier further points out that when traveling at restricted speed the train must be prepared to stop within the range of vision short of a stop signal. Consequently it is Carrier's position that torpedoes are not needed when a test is being performed in a restricted speed zone. Carrier also states that Rule 99 applies to trains and tests conducted on main lines where trains would be expected to operate at high speed.

Rule 99, however, does not differentiate between trains operating on main line at high speed or operating at restricted speed. The rule is mandatory in its provision that "Red Lanterns or flags will not be used unaccompanied by torpedoes" when efficiency tests are conducted.

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Inasmuch as the record is clear that the efficiency test here involved the placement of a red flag without the use of torpedoes, it is the opinion of this Board that the test was not conducted in accordance with the agreed upon rules, therefore, the results of such test cannot be used for the purpose of disciplining claimant in this case.

AWARD

Claim sustained. Carrier is instructed to comply with this award within 30 days of the date hereof.

F. T. Lynch
F. T. Lynch, Neutral Chairman

D. J. Gonzales
D. J. Gonzales, Carrier Member

R. E. Dean
R. E. Dean, Organization Member

Award date October 30, 1996