

PUBLIC LAW BOARD NO. 5912

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION)	
(EASTERN DISTRICT))	
VS)	NMB CASE NO. 13
)	AWARD NO. 13
UNION PACIFIC RAILROAD CO.)	

STATEMENT OF CLAIM:

Claim of Conductor D. R. Lutjemeier for reinstatement to service with all rights unimpaired and with pay for all time lost, including payment for all wage equivalents to which entitled, with all insurance benefits and any monetary loss for such coverage while improperly disciplined.

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 an allegation that claimant passed a signal displaying stop indication at approximately 1340 on April 7, 1996.

In presenting the dispute to this Board, the Organization has argued there was a procedural error in that it contends the officer who conducted the investigation had predetermined claimant's guilt when he allegedly phrased certain questions so as to secure answers he desired rather than merely asking questions to establish the facts surrounding the incident.

The Board has thoroughly reviewed the transcript of hearing, and while it is true the Hearing Officer did ask certain leading questions during presentation of technical evidence, we do not believe he exceeded the bounds of his authority, consequently, we must overrule the argument presented by the Organization that claimant did not receive a fair and impartial hearing.

When we look at the evidence produced at the investigation, there is doubt raised as to whether or not sufficient evidence was produced to find claimant guilty of the charges brought against him.

Claimant here was charged with passing a signal displaying stop indication. During the course of the investigation claimant testified that he actually climbed up on the unit to secure the best view possible of this particular signal and he states that such signal was "a high flashing red." The engineer testified that he saw claimant going up the ladder and crossing over to view the signal on the opposite side before claimant gave him the back-up signal. The engineer likewise testified that after he stopped the movement and then proceeded back through the signal, after receiving instructions from the STO to do so, he physically went over and looked out the Fireman's side to observe the signal and saw that it was flashing red.

During the course of the investigation Carrier did not produce any substantial evidence to disprove the statement of claimant that the signal was flashing red (stop and proceed) at the time this incident occurred. There was an interpretation of the CAD printout by a Signal Supervisor, however, this witness testified that it was not possible for the two movements involved to be accepted at the same time, yet the CAD printout indicates that claimant passed Signal No. 4 at least 13 seconds before another unit was permitted by signal No. 14 to enter the area. If, as the Signal Supervisor testified, the signal system would not permit the two movements to be accepted at the same time, then Signal No. 14 should have shown a stop aspect when claimant's unit passed Signal No. 4. Based upon this information from the Signal Supervisor, there is merit to the argument presented by the Organization that there is a question about the reliability of the signal system in this instance.

Despite the technical aspect of the CAD printout and in light of the testimony above referred to, the record is barren of any physical evidence to disprove the statement of claimant that he acted correctly when he stopped his movement and then proceeded through a flashing red signal. His testimony is supported in the record by the testimony of the engineer.

Carrier has argued before this Board that it is the duty of the trier of facts to weigh and resolve conflicting testimony, and this Board does not disagree with this concept. Here, however, there is no conflict in testimony--both claimant and his engineer testified it was a flashing red signal and Carrier has not produced anyone who viewed the signal to testify to the contrary. Considering the seriousness of this alleged offense, the Board is left to wonder why Carrier did not send someone to the location to look at the signals to determine if there was a malfunction.

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Claimant in this case is an employee with over 25 years of service, and basically he has an excellent record. As a long term employee, the Board believes his testimony should have been given more credence than that allowed by the Hearing Officer. His record shows that the only discipline administered during his career was the assessment of 30 demerits in 1977 for not being available for call, and then a 30 day suspension (Level 4 under UPGRADE) for passing a red light on November 3, 1994.

It was actually the Level 4 discipline in November 1994 which, when coupled with the Level 4 discipline assessed in the instant case, which resulted in raising the discipline to Level 5; that is, permanent dismissal from service. While the UPGRADE Discipline Policy looks at the discipline assessed during the preceding 36 month period, it does not look at or take into consideration a long and basically trouble free career such as that produced by claimant.

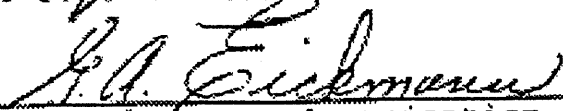
After a complete and thorough review of the entire record before us, it is our opinion that Carrier did not prove with substantial evidence that claimant was guilty of passing a signal displaying a stop indication on the date in question. Under the circumstances his dismissal from service cannot be upheld.

AWARD

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


F. T. Lynch, Neutral Chairman


D. J. Gonzales, Carrier Member


G. A. Eichmann, Organization Member

Award date November 13, 1996