

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25299
Docket No. 44913
02-1-99-1-U-2137

The First Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of Engineer K. R. Battles for removal of Discipline, claiming all lost time (including time attending the investigation), and clearing this notation of discipline from Engineer Battles’ 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 a formal Investigation, the Claimant was issued a Level 4 discipline (30 day suspension) as the result of his passing a dark signal during an efficiency test. In addition to objecting to the discipline on the merits, the Organization has raised several procedural arguments.

In its first argument, the Organization contends the Carrier had directed the reporting service to discontinue dating the investigation transcripts. This, says the Organization, was the result of several Awards on this property overturning discipline

that had been rendered prior to receipt of the transcript. By omitting the date on the transcript, reasons the Organization, the Carrier can conceal the fact that the transcript might not have been received until after the discipline was issued.

We agree with the Carrier that the Agreement does not require dating of disciplinary investigation transcripts. The concept of a fair and impartial Investigation, however, requires that disciplinary decisions be based upon the record. As noted in First Division Award 24874, among others involving these parties, the issuance of discipline without a review of the record is cause for reversal.

We are, in this case, unable to determine that the discipline was, in fact, rendered without benefit of the transcript. The reason for this is, obviously, we do not know when the transcript was received by the Carrier. This does not necessarily create a "Catch-22" situation for the Organization. We have examined the examples of dated transcripts contained in the Organization's Submission, and find that there had been generally six or seven days from the Investigation to the completion of the transcript. Several of these examples involved transcripts longer than the one in this case (269 pages), and some were completed in as little as four days. For instance, a transcript of 293 pages was taken from an investigation on October 31 and completed on November 3. A 340 page transcript, from an October 24 investigation, was completed on October 31. It is not beyond the realm of possibility, therefore, that the transcript in this case, from an Investigation conducted on May 10, 1999, could be completed prior to the issuance of discipline on May 19, 1999. Other cases might lead to a different conclusion. Consequently, it would be in the Carrier's best interest either to return to having the transcripts dated or time stamp them when received. That would be the Carrier's best evidence that the record was received prior to the issuance of discipline.

The Organization also asserts the Carrier violated the Agreement by failing to provide it with copies of documents that would be used in the Investigation. The applicable Rule states, "Where request is made sufficiently in advance and it is practicable, the engineer and/or the BLE representative will be allowed to examine material or exhibits to be presented in evidence prior to the investigation." In Award 85, Public Law Board No. 6040, between these parties, held that denying such a request, without good reason, constitutes a fatal violation of the rule, mandating reversal of the disciplinary action.

The Carrier's only argument on this point is that it offered to allow the Claimant or his representative to examine the documents in the Carrier's office, but the Agreement does not require it to fax or mail copies. It made no argument that it was not practicable to do so. The question, therefore, is whether the Carrier's limited interpretation of the Rule is correct.

In response, the Organization offers evidence that the Carrier, on numerous occasions, has mailed documents or tapes, or has transmitted documents via fax in compliance with this requirement. The Organization explains it would be a hardship upon the Organization to have to make a separate trip to wherever the documents might be, only to examine a few pages that could have easily been sent via fax.

We do not read the Rule as strictly as the Carrier would wish. The right to examine documents is not much of a right if they are not readily accessible. Given the vastness of the territory covered by this Carrier, it would certainly be possible for documents to be located anywhere in the country. Furthermore, there may be cases where the Organization would want others to review the documents prior to the investigation. We believe the right to examine includes the right to access, and that would require the Carrier to provide copies of the documents, in some manner, to the Organization. Under this interpretation, the Carrier is still not obligated to furnish documents that will not be used in the investigation, or when it is not practicable to do so.

Inasmuch as the Organization made a proper request for documents that were ultimately used in the Investigation, and the Carrier effectively denied the request without good cause, the Board must find, in accordance with Award 85 of Public Law Board No. 6040, that the Claimant was denied the due process the Agreement entitles him to. We will, therefore, direct that the discipline be removed from his record. His entitlement to compensation for time lost, though, is contingent upon whether his certification revocation was reversed by the FRA. First Division Awards 24846 and 24935.

AWARD

Claim sustained in accordance with the Findings.

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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 25th day of February, 2002.