

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 28328
Docket No. 47890
16-1-NRAB-00001-130068**

The First Division consisted of the regular members and in addition Referee Gail R. Moran when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of _____ for removal of Discipline, claiming full back pay (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer xxxxxxxxxxxx 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.

The Claimant, _____, had been employed by the Carrier for six years at the time of the incident. He had a clean disciplinary record. On June 21, 2011, he was assigned as Engineer on work train WDUMP-21. Working alongside him that day were Conductor John R. Williams and Brakeman Jeffrey

Mollohan. Conductor Williams and Brakeman Mollohan had, respectively, two and three years of service with the Carrier at the time.

On the day in question, near Bloomington, Illinois, the WDUMP-21 received its assignment to proceed north on the track from Mile Post 125 and then shove the train south into the clear on a side track. The train was working that day in support of a large maintenance project in the area. The track was out of service starting at the signal at Mile Post 121 (control point CPX 121). In preparation for the shove, the train proceeded through a Stop signal at Mile Post 121 (CPX 121) into the territory of the out of service track. Engineer _____ was at the controls. That the train proceeded through the Stop signal at milepost 121 is undisputed. That fact was acknowledged in testimony during the Hearing and in written form on the Form 705s the Claimant and crew completed just after the incident. After they passed through the Stop signal at Mile Post 121, the Conductor notified the Dispatcher that they were north of Mile Post 121 and were prepared to initiate the shove. They were ordered to cease all movement of the locomotive and Manager Rutledge was summoned to the scene.

As a result of the incident, on June 29, the Claimant was withheld from service pending Hearing and issued the following Notice of Investigation:

“While you were employed as Engineer on the WDUMP-21, at/near Bloomington, Illinois, near Milepost 121, Joliet Subdivision, at approximately 1430 hours, on June 21, 2011, you allegedly failed to stop before any part of your train passed signal requiring your train to stop. In addition, you allegedly failed to get authority to pass an absolute signal displaying a stop indication.”

The Conductor and Brakeman were issued identical Notices of Investigation. A Hearing was scheduled for July 6, 2011 and took place on August 26, 2011. As a result of that Investigation, on September 2, 2011, _____ was assessed discipline for violations of Rule 9.5 (Where Stop Must be Made), Rule 9.2.15 (Block and Interlocking Signals), Rule 9.12.1 (CTC Territory), and Rule 15.4 (Protection when Tracks Removed from Service).

Operating Rule 9.5 required that a stop be made before any part of a train (or engine) passed a block signal requiring the train to stop. Rule 9.2.15 visually depicted the types of signals that required a stop. Rule 9.12.1 required explicit verbal authorization to move beyond a Stop signal at restricted speed. Finally, Operating Rule 15.4 required that a control operator grant authorization to pass an absolute Stop signal at control points at either end of an out of service track.

The Claimant received a 60-day suspension for a Level 4C violation under the Upgrade Progressive Discipline table. His time out of service of 30 days was deducted from the 60-day suspension, and his qualification as Locomotive Engineer was revoked for a period of one month. The Conductor and Brakeman were assessed similar suspensions.

On the merits of the claim, the Organization contended that the Claimant was acting under the assumption that he had received specific authorization from the Dispatcher to proceed beyond the Stop signal. Numerous procedural arguments were raised by the Organization, some related to the manner in which the Investigation was conducted. In particular, the Organization raised objections to the failure of the Carrier to call the Dispatcher as a witness, the manner in which the Hearing Officer examined witnesses and the alleged last-minute introduction of Track Image Recorder (TIR) video and failure to provide it with the transcript of proceedings.

The Carrier asserted that the Claimant failed to stop before any part of the train passed an absolute stop signal and that he proceeded past the Stop signal without explicit authorization as required. Thus, the Carrier contended that it had met its burden of proving the violations by substantial evidence; that the discipline was reasonable and consistent with the Carrier's policy; and that there were no procedural errors in the Carrier's handling of the matter that warranted overturning the discipline. Regarding the TIR video, the Carrier asserted that it was a proprietary business record, required special software to view, and the Organization was able to view it at the investigation and cross examine witnesses. Further, that it was available for review after the hearing though not included in the transcript for reasons related to the software.

The Board has carefully reviewed the record in this proceeding, including the transcript of formal Investigation and the documentary evidence.

The record contained an admission by the Engineer (and crew) that he moved the train through the stop signal. However his admission was qualified by his testimony that he relied on information from the Conductor and Brakeman that authorization to proceed through the signal had been secured from the Dispatcher. The Conductor conceded, in his testimony, that he (albeit erroneously) informed the Claimant they could proceed through the Stop signal. Radio transmission tapes of conversations the Conductor had with the Dispatcher about train movements, and transcriptions of those tapes, were introduced during the Investigation. There were some inconsistencies between the two, but a careful review revealed no explicit authorization from the Dispatcher to proceed through or beyond the Stop signal at Mile Post 121. The Organization objected to the fact that the Dispatcher was not called to testify to the accuracy and authenticity of the radio transmission and its transcriptions.

The record also revealed that during the Hearing, over the objection of Claimant's Organization representative, the Hearing Officer examined the Claimant, Conductor and Brakeman seriatim, without permitting examination by the Organizations' representatives until the conclusion of all three individuals' testimony. After all three had been examined by the Hearing Officer, the Representatives were then permitted to question their respective witnesses.

On the issue of whether a stop had been made prior to reaching the Stop signal as required by the Operating Rule 9.5, the record testimony of the Claimant and crew was less clear. They either didn't specifically recall whether the train stopped before it proceeded through the Stop signal (as Claimant testified), or that they were preoccupied doing other tasks and didn't notice (as the crew testified). Manager Rutledge testified that they had each told him they did not stop prior to proceeding through the signal when he spoke with them at the time of the incident. However, at the end of the Hearing after examination of all witnesses, the TIR video of the lead locomotive's movements was introduced by the Carrier. This video removed any question about whether the train came to a stop before it proceeded through the Stop signal. It did not.

After consideration of the entire record, the Board finds that there is sufficient evidence to support the Carrier's contention that the Claimant did not stop before he proceeded through a Stop signal, at a control point of an out of service track, without authorization as required under Operating Rules 9.5, 9.2.15, 9.12.1 and 15.4. That the Claimant, the more senior and experienced member of the crew, relied upon his less experienced crew members on such a critical point does not compel a different result. The Conductor and Engineer are equally responsible for the safe operation of the train. Running through a Stop signal on less than first hand explicit direction is a serious violation of safety Rules with potentially grave consequences. The penalty assessed for these Rule violations is consistent with the Carrier's Upgrade Policy for a Level 4C violation and is not arbitrary.

The fact that the Hearing Officer did not call the Dispatcher to clear up purported inconsistencies in the radio recordings and transcriptions is not fatal to the Carrier's case. Whatever inconsistencies were present in these forms of evidence, the inconsistencies do not overcome the record testimony and admissions by the Claimant and witnesses that they proceeded through the signal. Under either "version" of the radio transmission, the record is lacking any explicit or implied authorization from the Dispatcher to proceed through the Stop signal. Moreover, the Conductor was permitted to freely give his testimony regarding the conversation(s) with the Dispatcher, and it lacked clarity that he or any other crew member received explicit authorization to proceed. Instead, the record revealed a basic misunderstanding by an inexperienced Conductor of the Operating Rules that applied to Stop signals and out of service tracks. This does not excuse the conduct of the Engineer. Calling the Dispatcher as a witness may have provided the investigating Hearing Officer with the "best evidence," and would have been a best practice where there was a dispute about the evidence, but failure to call him or her was not prejudicial under the facts presented in this case.

Turning to the manner in which the Hearing Officer conducted his examination of the Claimant and crew, it was highly irregular and is not condoned by this Board. However, it cannot be concluded that the Claimant was denied due process and a fair hearing by the Hearing Officer's manner of examination. The Claimant's representative was permitted to call and examine witnesses, present evidence and mount a vigorous defense.

Regarding the alleged late introduction of the TIR and failure to provide it to the Organization prior to the hearing or with the transcript, it is evident that the Carrier could not conclusively prove that the Claimant violated Operating Rule 9.5 without it, i.e. that the train failed to stop before any part of the train or engine passed the Stop signal at Mile Post 121. The record testimony was conflicting on this point. The Carrier knew the TIR contained irrefutable evidence of a violation of Operating Rule 9.5, and admitted on the record that it was examined by the Manager Rutledge on the day of the incident. However, it failed to make this evidence known or available to the Claimant or Organization prior to the Hearing. In the words of the Hearing Officer (transcript at page 132), “We were trying to avoid having to use this, but because none of the charged employees here could remember anything about what took place at the location, and this TIR seems to indicate what did take place.”

This Board understands that there is no formal right of discovery in these proceedings and that the TIRs are considered a proprietary business record by the Carrier that takes special software to review. There is no evidence in the record that the Organization requested the TIR until the day of the hearing when Claimant’s representative asked if it had been downloaded and had an exchange with the Hearing Officer about it. (Transcript, p. 56). Thus, the Organization cannot claim surprise and the late introduction and reliance on the TIR to sustain discipline under Rule 9.5 is not inconsistent with the Carrier’s obligations under the System Agreement - Discipline Rule, Section 7.¹ The Organization was able to view the TIR and examine Manager Rutledge about it at the investigation. In hindsight, and acknowledging again there is no right of formal discovery in these proceedings, as a practical matter it may have shortened the hearing and avoided the unorthodox examination of the witnesses by the Hearing Officer if the Carrier had informed the Organization what the TIR showed prior to the hearing or introduced it at the start of the Carrier’s presentation rather than at the conclusion of all testimony. That

¹ “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. At the Investigation, the Engineer and/or the BLE representative will be afforded the opportunity to examine or cross examine all witnesses. Such examination will extend to all matters under Investigation.”

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said, the Organization's arguments concerning the TIR do not lead this Board to conclude that the Claimant was denied due process in the Investigation.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 31st day of August 2016.