

Award 19873

Docket 31530

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**FIRST DIVISION**

39 South La Salle Street, Chicago 3, Illinois

With Referee Carroll R. Daugherty

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF LOCOMOTIVE FIREMEN  
AND ENGINEMEN**

**READING COMPANY**

**STATEMENT OF CLAIM:** "Claim of Engineman DelSardo for time lost due to attending investigation of derailment of five cars, JPX 502/524, at Manville, N. J., June 15, 1952, and have record cleared of reprimand given to Engineman DelSardo due to this accident."

**FINDINGS:** The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

In this case petitioner attacks carrier's disciplinary decision on two main grounds: (1) The investigation given claimant was not conducted in a fair and impartial manner. (2) The evidence presented at the investigation did not establish claimant's responsibility for the derailment of June 15, 1952.

The first contention contains two elements: (a) Carrier's hearing officers acted as witnesses as well as judges. (b) Carrier failed to call two witnesses (RK) towerman Apdar and XG towerman Carvak) whose testimony was necessary for a proper development of the facts.

Because it is difficult if not impossible to consider these two alleged procedural defects without considering the merits of the case, both No. 1 and No. 2 of petitioner's contentions will be handled together.

A careful study of the record of carrier's investigation compels the conclusion that, after all the testimony was in, there remained one important area of factual doubt, namely where was claimant's engine when the WX tower home signal went red and the XG signal (WX approach) automatically went yellow? This question divides into two: (1) Where was claimant's en-

gine when RK towerman Apdar reported the hot journal on the 92nd car of claimant's train? (2) How long was it from the time of said report to the time when WX towerman Zaludek changed his above-mentioned signals? According to the facts of record, if at the time of said change claimant's engine was well east of the XG signal and it had changed to yellow, he could have seen same and stopped his train in time without using his emergency brakes. Or, if claimant's engine was west of XG signal before it went yellow and if WX signal turned red soon after claimant passed XG tower, he could have seen the red WX signal between a point about 3300 feet west of XG and a point roughly 5000 feet west of same, before WX signal became obscured by the highway bridge; and he again could probably have stopped his train safely.

It is apparent that those of carrier's management who finally assessed the evidence and decided upon the degree of discipline for claimant were also disturbed by the paucity of definite testimony on the above-stated questions—and this in spite of claimant's rather weak explanation of what he was doing on the stretch west of XG tower where WX signal might have been seen, if it had actually turned red by then. They found claimant "not blameless" but judged the extent of his blame to amount to a reprimand on his record for violating Operating Rule 106. They did not conclude that he had run one or more signals but that, in terms of said Rule, he had failed to take "every precaution for protection under conditions not provided for by the rules."

Given all these circumstances, the Division finds that carrier should have called towermen Apdar and Carvak as critical witnesses, whether or not requested to do so by the employes. Carrier has an affirmative obligation to develop all material facts possible.

As to petitioner's contention that carrier's hearing officer acted as witness as well as judge, the Division finds from a study of the transcript (e. g., page 7 of employes' exhibit A) that a more proper conclusion is this: His remarks reveal rather unmistakably that, by the time he got around to question claimant, said hearing officer's mind was pretty well made up. This is improper; management's minds should be held open until the evidence is in and the transcript is studied.

The transcript of the instant hearing is quite unsatisfactory in a number of ways. It is often hard to know who was asking questions and who answering or testifying. Thus, in carrier's exhibit 1 Mr. Van Luvanee seemed to be the hearing officer, yet on page 5 of same, somebody else put on Van Luvanee's hat, for Van Luvanee was asked a factual question and answered it.

Because of the proedural and substantive defects above noted, the Division is persuaded that carrier's discipline should be vacated and claimant should be paid for time lost in attending the investigation.

**AWARD:** Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of FIRST DIVISION

ATTEST: J. M. MacLeod  
Executive Secretary

Dated at Chicago, Illinois, this 16th day of March 1961.