

PUBLIC LAW BOARD NO. 364

PARTIES TO DISPUTE:

United Transportation Union - T

Eric Lackawanna Railway Company

STATEMENT OF CLAIM:

"Claim of Susquehanna 1st Subdivision Road Trainman A. C. Lisi for time lost November 1 through 15, 1966, as identified on Form 3004-A dated October 31, 1966, and that the notation of discipline be expunged from his personal record."

FINDINGS:

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

The discipline assessed and imposed in this case and the investigative hearing on the property were the result of a report received by the Assistant Trainmaster (Mr. E. G. Clancy) that the claimant flagman's train was working against the current of traffic in the vicinity of M.P. 222 without proper flag protection. Mr. Clancy was a Company witness at the investigation and so testified. Under cross-examination he admitted, however, that he "**** did not witness the train run against the current of traffic without flag protection****" and that the person who made the report to him was not present at the investigation.

The representative of the claimant (W. F. Murphy), who was examining Mr. Clancy, promptly entered an objection based upon the grounds that it was the Carrier's obligation to have present "any and all witnesses who are known to have any information whatsoever concerning an incident", and that, in the absence of the person who made the report, there could not be a fair and impartial investigation. The Carrier's presiding officer noted the objection but continued with the investigation.

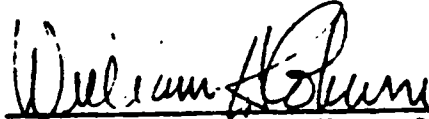
In Award No. 27 (involving a similar discipline case) the Board had this to say:

"A carrier is not obligated to call as witnesses at an investigation each and every employee whose presence is requested by the Organization. Such witnesses may be unavailable for one reason or another, or their testimony may not be relevant or material to the subject matter of the investigation. Where, as here, however, the witness was a participant in the incident giving rise to the investigation and was, therefore, in a position to testify on matters material to the subject matter thereof, it was a denial of due process to refuse or fail to produce him as requested. (See First Division Awards 19910, 20094, 20466, 20906, among many others.)"

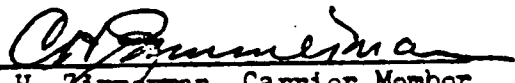
In the instant case, the unidentified person who made the report to Mr. Clancy was clearly a material witness whose testimony would have had a direct bearing upon the crucial factual question of whether or not the claimant had complied with the operating rules by providing proper flag protection. It was, therefore, prejudicial error on the part of the Carrier not to have called him as a witness as requested by the Organization.

AWARD: Claim sustained.

ORDER: Carrier is hereby ordered to make effective Award No. 156 rendered by Public Law Board No. 364 on or before February 28, 1974.


William H. Coburn, Neutral


R. M. Crago, Employees Member


C. H. Zimmerman, Carrier Member

Cleveland, Ohio
January 31, 1974.