

PUBLIC LAW BOARD NO. 2766

Parties  
to the  
Dispute

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS

and

UNION PACIFIC  
RAILROAD COMPANY

Case No. 141

STATEMENT OF CLAIM

- (1) That the Union Pacific Company erred and violated the contractual rights of Electrician John Savior when he was unjustly assessed a discipline level (1) on September 14, 1995, again on September 18, 1995 assessed a Level (2) discipline without benefit of a hearing.
- (2) That accordingly, the Union Pacific Railroad Company expunge any mention of discipline from Electrician Savior's personal record.

BACKGROUND OF THE CASE

The parties have agreed that the decision in the instant dispute, one of many identical disputes progressed on the property, will be applied to all such cases now pending. The issue raised is whether employees may voluntarily waive their Contract right to an investigation and accept the discipline offered by a

Carrier official. The Rule at the center of this dispute reads in pertinent part as follows:

Rule 32. Discipline Investigations. (a) An employee covered by this agreement who has been in service more than thirty (30) days, or whose application has been formally approved, shall not be disciplined or dismissed without first being given a fair and impartial investigation by an officer of the railroad....

On July 1, 1994, Carrier put into effect a comprehensive discipline program entitled "Union Pacific General Rules for Administering Discipline Effectively." The acronym "UPGRADE" is used to identify the new policy. The following paragraph from the Chairman's letter to employees contained in the forward of the policy booklet is of interest and is duplicated here.

The goal of UPGRADE is to establish a Discipline Policy that is fair, consistent and effective, with an emphasis on corrective action and training rather than on punitive discipline. That goal was achieved during the pilot project. Specifically, the UPGRADE pilot was very successful in that discipline in these areas was reduced and understanding of, and compliance with, the rules has increased. Such results complement our efforts in the areas of safety, employee satisfaction and cost control.

The Upgrade Policy contains a discipline assessment table that lists the Rules and the discipline to be assessed for their violations. It also contains a progressive discipline table that demonstrates what level of discipline will be assessed based on

the Rule infraction and the past discipline record of offenders. The discipline that can be applied at each level is specified in the policy. For example, Level 1 = Letter of Reprimand; Level 2 = up to one day alternative assignment with pay to develop a corrective action plan; Level 3 = five days off, review rules violated, and corrective action plan developed upon return to work; Level 4 = thirty days off, review rules violated and corrective action plan; Level 4.5 = sixty days off, must pass operating rules test before return to work, corrective action plan; Level 5 = permanent dismissal.

The policy booklet contains a number of forms that were designed for use by Management personnel when dealing with disciplinary matters. The form most pertinent to this arbitration is Form 2 (Waiver/Hearing Offer):

[see exact form on page 4.]

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WAIVER/HEARING OFFER  
FORM 2

TODAY'S DATE

FILE NUMBER

Last Name		First Name / MI		Soc. Sec. No.
Job Title	Hire Date	Dept./Service Unit		Work Location Gang

Section One

Based on the facts brought forth in our discussion on \_\_\_\_\_  
you are allegedly in violation of Rule(s) \_\_\_\_\_  
found in the following Union Pacific Railroad publication(s):  
Check the appropriate box:  
☐ Union Pacific Rules  
☐ Timetable  
☐ Other: (specify) \_\_\_\_\_  
In connection with: (describe incident) \_\_\_\_\_

Section Two

Under the UPGRADE Discipline Table, the violation listed in Section One requires a minimum discipline of LEVEL \_\_\_\_\_

Section Three

Disciplinary action within the past 36 months or since policy effective date, when applicable.. (Rule and description)

RULE	DESCRIPTION OF VIOLATION	LEVEL	DATE

This equates to a current discipline status of; LEVEL \_\_\_\_\_

Section Four

Under the UPGRADE Progressive Discipline Table, the current violation plus the current discipline status require the assessment of: LEVEL \_\_\_\_\_

The violation \_\_\_\_\_ Did \_\_\_\_\_ Did Not result in an incident which requires assessment of the next higher level of discipline. Therefore, the required discipline for this violation is: LEVEL \_\_\_\_\_

Section Five

- ☐ OPTION A: I, the undersigned Employee, have discussed the alleged violation(s) with the responsible manager and have been afforded a right to union representation in making my decision to accept the discipline listed above and to waive any rights to a formal investigation.

Check the appropriate box:

Employee SIGNATURE

DATE

- ☐ OPTION B: I, the undersigned Employee, have discussed the alleged violation(s) with the responsible manager and do not agree with the facts or the recommended discipline. I understand that a formal investigation will be held to review all the facts of these allegations.

Employee SIGNATURE

DATE

MANAGERS SIGNATURE

DATE

This form is used by Managers to record the incident that was involved, the Rule violation, and the penalty to be imposed based on the schedule of penalties in the Upgrade Policy. Most significant for the purposes of this arbitration is Section 5 of the form. That section contains an offer to affected employees to waive their right to a hearing and accept discipline. Thus, they agree not to go to formal hearings, as authorized by the Agreement. The Union in this instance, as well as in the other pending cases, takes the position that Carrier has no right to have an employee waive his or her right to an investigation without the concurrence of the General Chairman.

Carrier maintains that individual employees can agree to accept discipline and they need not have anyone's permission to do so. The arguments supporting each party's position are as follows.

#### Carrier

(1) Employees are not restricted from voluntarily waiving their rights to a disciplinary investigation and accepting the discipline imposed by a Manager. If an employee accepts discipline without resorting to an investigation, it has not bypassed the role of the General Chairman. Carrier recognizes that the General Chairman has the role of representing employees in collective bargaining and does not intend to usurp that authority. An employee agreeing to accept a certain level of discipline

without an investigation in no way undermines the General Chairman's authority to enter into collective bargaining with Carrier.

(2) In the past, the Union often has allowed Rule G violators to accept the discipline imposed by Carrier in an effort to see these violators retain their jobs. If the Organization can turn its head with Rule G violators who waive hearings because they are going to keep their jobs, there is no sound reason for not doing so in cases where lesser discipline is imposed under the Upgrade Program.

(3) To allow an employee to waive his or her right to a hearing and accept the discipline offered is not to enter into an individual contract with that employee. It is not a violation of Carrier's obligation to bargain with an authorized Union representative.

(4) The modern and enlightened view of this issue supports the concept that procedural safeguards, such as an investigation, may be waived by individuals. To force Carrier to convene a hearing when the employee admits guilt is absurd. Employees are made aware that they may have a Union representative involved if they so choose. It is their choice not to have one present, not Carrier's.

(5) Carrier has no concern for the Union's desire to obtain a release of responsibility for it at the same time the employee

waives his or her right to a hearing. That is the Union's problem, not Carrier's.

(6) Carrier's position in this case is that the Union has no justification for its position. It allows some employees to waive hearing rights, while objecting to others doing so. Rule 32 does not require a hearing if an employee admits guilt.

#### The Union

(1) The Union points out that Rule 32(a) clearly states that an employee shall not be disciplined or dismissed without first being given a fair and impartial investigation. The Union interprets this to mean that an employee may not waive the application of Rule 32(a), just as Carrier cannot avoid it. Only the General Chairman can agree to waive the terms of Rule 32(a).

(2) Carrier's Upgrade Policy is a scheme to circumvent applicable Agreements and the law. The Supreme Court has held that employers cannot make individual agreements with employees that supersede or modify the Collective Bargaining Agreement. To allow an employee to waive his or her rights under Rule 32(a) is just such a prohibited act.

(3) Forcing employees to complete the Upgrade Discipline Procedure Forms is a form of intimidation that should not be allowed.

(4) When employees were called in to discuss discipline with Carrier officials in the past, they were accompanied by Union

tion would take place, a finding would be made by a Carrier-appointed Hearing Officer, and discipline would be imposed. If the employe was not satisfied with the results, the case would be appealed to the NRAB, a PLB, or a SBA for review. The disciplinary system was under the control of Carrier with an appeal process available to the Union. The bases for appeals were narrow. If Carrier performed its responsibility throughout the process correctly, its decisions were seldom overturned or modified.

There is no question that many cases were appealed that never should have been and that, over the years, millions of dollars have been spent and millions of man hours expended on these cases. The system is often burdensome and any improvement in the system should be welcomed. The fact remains, however, that the Upgrade system represents such a major change in the procedures that it is inappropriate to implement it unilaterally. Sound labor relations dictate that such a major change should have the General Chairman's concurrence or that, at the very least, there be some procedure in place so that he or his designee may speak to the employe about the charges and the impact of signing a waiver. At the same time, the General Chairman can obtain from the employe a waiver that absolves the Union from any responsibility in the case.



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In this instance, Carrier has taken the position that it had no interest in the Union's desire to obtain a release from its members who decide to take the Upgrade penalties without a hearing. This Board thinks that this is an erroneous position to adopt, one that could cause more problems than the Upgrade Policy is supposed to solve.

For example, consider the case of an employee who waives a hearing at the first four levels of the policy and then finds him- or herself assessed a Level 5 penalty as a result of an insignificant Rule violation. His past record of discipline, together with the new charge, thus supports his dismissal. The case goes to a PLB and the Board issues a short denial Award. The employee goes to his or her lawyer who knows something about labor law and asks the lawyer to get his or her job back. The first thing the lawyer does is sue both the Carrier and the Union for failure to properly explain the implications of the procedure and for allowing the employee to agree to waive the investigation and accept preestablished discipline.

If the Union had a statement signed by the Claimant that he held the Union harmless, at least it would give the Union some leverage in a duty of fair representation case. The fact that a system was in place for a proper discussion between the Claimant and a Union representative would demonstrate that carrier also thinks it appropriate that everyone's rights are protected.

In the railroad industry, the discipline system is under Carrier's control. It is obligated to operate a fair and equitable system. Carrier must do everything possible to project an image of fairness. To implement a new policy that makes no allowance for the Union's political or legal needs is wrong.

Throughout Carrier's presentation, much was made of the fact that the Union does not contest the fact that a first-time Rule G violator may agree to accept discipline without a hearing, but opposes the procedure in lesser cases. This Board is not impressed with this argument. Social pressure for rehabilitation of alcoholics, certain legal rights, and the Carrier's desire not to lose a well-trained employee has resulted in practical procedures being developed in this area. The Union should not be made a culprit in this instance.

This Board concludes that employees may waive their right to a hearing under certain conditions and accept a preestablished level of discipline. It does not, however, agree that it can be done without the involvement and agreement of the General Chairman or his designee. The potential mischief and injustice that can result from employees dealing with a Manager without representation in a disciplinary matter is unlimited. While employees may think that they know what is best for them in such situations, the chances of agreeing to charges that cannot be proven or agreeing because an employee thinks it pleases the boss or agreeing to charges that might, if challenged, represent dispa-

rate treatment are just a few of the problems that might arise if the employe does not have some type of Union representation.

While it is understandable that Carrier would like to simplify the disciplinary procedure and eliminate as many hearings as possible and still have a positive influence on employe behavior, the method it has in effect undermines the authority of the Union and in some cases might be unlawful. The more reasoned decisions on this issue weigh in favor of more rights of representation for employes, not less.

It is not this Board's intent that the discipline imposed in the pending cases be overturned or affected in any manner by this decision. It is our intent, however, that the waiver portion of the Upgrade Policy not be implemented further until a procedure is established and in place that allows the General Chairman an opportunity to obtain a waiver relieving the Union of its obligations to an employe when the employe elects to waive his or her right to a hearing.

AWARD

Claim sustained per the  
Findings of the Board.

R. E. Dennis

R. E. Dennis,  
Neutral Member

D. A. Moresette,  
Carrier Member

5-20-97

Date of Approval

V. L. Janeczek  
V. L. Janeczek,  
Employe Member