

PUBLIC LAW BOARD NO. 5092

AWARD NO. 8
NMB CASE NO. 119
UNION CASE NO. PR-J.E. Van Horn
COMPANY CASE NO. 9303253

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

Request the dismissal of Engineer J. E. Van Horn be expunged from his personal record and pay for all lost time with all seniority and vacation rights restored unimpaired

OPINION OF BOARD:

Claimant J. E. Van Horn has been employed by Carrier for approximately twenty-three (23) years. Claimant's "involvement" in FISP constitutes the gravamen of this dispute. On June 3, 1993, Claimant reported a personal injury report with regard to "ear inflammation" allegedly resulting from using "Carrier provided ear protection." Shortly after Claimant submitted his report, he received a call from the crew dispatcher advising him that he was to attend a safety meeting scheduled for 1:00 p. m. that day. Claimant declined to attend as he on grounds he had "already committed to help a friend." At approximately 4:00 pm

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that same afternoon Claimant received a certified letter requesting his "participation in a formal Safety Training Session scheduled for 8:00 a. m. June 10, 1993."

Mr. Van Horn contacted Carrier with regard to the correspondence, and the Safety Session was rescheduled for June 10, 1993. With regard to that meeting, Claimant stated that he "just thought it was a Safety Conference with Mr. Harris and Mr. Hill to discuss me coming back to work after having been off awhile with an on-duty injury." According to Claimant, Carrier never explained that there was a Progressive Intervention Safety Program in effect for him, nor did Claimant receive the requisite PISP guidebook or sign off on the PISP checklist.

On August 7, 1993 Claimant was working as a through freight engineer at Pocatello, Idaho. While dismounting from the lead locomotive, Claimant allegedly struck and injured his right elbow on the snow plow of lead locomotive UP 9386. Mr. Van Horn filed the appropriate injury reports and left the property. Carrier maintained that the report of that latest accident "triggered" Phase V of PISP. When Mr. Van Horn returned to work on August 10, 1993, MTO Argyle presented him with a Notice of Investigation articulating three (3) issues upon which the hearing had been predicated:

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(1) In connection with the alleged injury as reported by you on August 7, 1993 while you were working as Engineer of train CLCOCV 02, at Pocatello, Idaho,

(2) In connection with your alleged failure to comply with instructions and/or rules presented during your Joint Safety Conference Formal Training Session Phase IV, held June 10, 1993, and other training sessions held as provided by Carrier's Progressive Intervention Safety Program, and,

(3) To review your personal injury record to date while you have been employed by Union Pacific Railroad Company regarding your alleged injury/accident proneness."

The hearing was originally scheduled for August 12, 1993, however, Claimant requested, and was granted a postponement until August 19, 1993. On August 27, 1993, Superintendent Farr notified Claimant that he had been dismissed from service having been found guilty as follows:

"These findings are in violation of General Rules B, D, and I, and Operating Rules 4(C), 804, 805 and 806, as contained in the General Code of Operating Rules, revised October 28, 1989, and Rules 4000, 4001, 4004, 4049(A), 4050 and 4057 (A) of Form 7908 Safety, Radio, and General Rules For All Employees, revised October 1989."

The Organization protested Carrier's assessed discipline, stating at the outset that Mr. Van Horn had "no knowledge of Carrier inducting him into Phase IV of PISP until around noon of June 3, 1993 when Claimant received a call from the crew dispatcher advising him to attend a safety meeting scheduled for 1:00 p. m. that day." Organization asserted that Mr. Van Horn had "no knowledge of his own involvement" in PISP, and did not

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receive any information with regard to the Program from either Mr. Hill or Mr. Harris at the June 10 meeting.

The Organization further argued that pursuant to the August 7 incident, Mr. Van Horn "promptly" complied with Rules 806 and 4004, both of which pertain to Carrier employee's obligation to report personal injuries. Carrier also asserted that Claimant was in violation of Rules 804 and 805, both of which require inspection of equipment by a "competent employee of the mechanical department." Organization asserts that Claimant "is not qualified to do such inspections, nor is it part of his job description, and once Mr. Van Horn reported the injury, he was relieved of any responsibility with respect to those Rules. Finally, Organization submitted that Carrier was "using PISP as a progressive discipline program rather than a progressive intervention program."

Carrier denied the claim arguing that it had relied on "substantial" evidence adduced at the investigation and that Claimant "conducted himself in an unsafe manner." Carrier further asserts that: "Claimant's frequency factor and severity factor is greater than other employees performing the same job." Finally, Carrier pointed out that it "is responsible for Mr. Van Horn's protection as well as his fellow employees' well being". Carrier maintains that numerous attempts to retrain Claimant "have been to no avail."

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In November, 1989 Carrier formalized and implemented the "Progressive Intervention and Safety Program" (PISP). Carrier's declared intent for the system-wide program was to "offer a consistent method of dealing with those individuals who repeatedly suffer on-duty personal injuries." Additionally, and hopefully intervene in the injury process before individuals are disabled by personal injury or disciplinary action becomes necessary." PISP consists of five (5) phases in which affected employees are supposed to be "fully involved" at each juncture. In aid of that goal, program participants are provided a copy of the "Progressive Intervention Safety Program," a guidebook which provides a comprehensive overview of PISP. Carrier maintains it tries "to follow the guidebook as closely as we can."

Following is a brief overview of the phase progression: Phase I commences when an employee is involved in a personal injury/unsafe act. The individual is required to attend a "Manager's Conference" with his/her immediate supervisor to discuss the incident. If that employee is involved in a second personal injury/unsafe act, and has had five (5) injuries within the prior seven (7) years; or more injuries than years of service; or two (2) or more injuries in a calendar year, Phase II is initiated. Like Phase I of the program, Phase II consists of a safety conference, however, in addition to the employee's immediate supervisor, Carrier Safety Manager is also present. If the affected employee meets "appropriate criterion" as a result

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of the Phase II meeting, Phase III is implemented, in which a "Voluntary Safety Training Program" is designed for the individual. Should an additional incident occur, Phase IV commences and the employee is placed in a "Mandatory Safety Training Program". Should another personal injury/unsafe act occur thereafter, Phase V, "Formal Investigation Account of PISP", can be utilized. Detailed checklists and appropriate documentation are requisite at each phase of the program, and when checklist items have been "thoroughly discussed", any participant involved in a particular phase is required to sign the forms. It is important to note that Carrier insists that "all Phases should be utilized before PISP disciplinary action is initiated." (Emphasis added).

We have examined the record evidence and conclude that Carrier committed no fatal procedural error in connection with issuance of the the termination letter. There was, however, a serious departure from Carrier's commitment to scrupulous adherence to the phase progression of PISP which requires this Board to reverse the termination. The Organization has persuasively demonstrated that Carrier skipped over Phase III and precipitously invoked the Phase V disciplinary procedures before fully utilizing Phase IV. As a consequence, the Carrier officers involved deprived Claimant of the full benefits which PISP has to offer within the guidelines set forth in the program. Therefore, even though Carrier has shown that this Claimant has a

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"dismal" safety and discipline record, we have no alternative but to direct his reinstatement to service at Phase IV of the PISP. Claimant should not take undue satisfaction in this result, however, because he is subject to the "Mandatory Safety Training Program" and remains only one step away from Phase V. Moreover, fairness requires that Carrier be permitted to take his absence history into account in calculating back wages under this award.

AWARD

- 1) Claim sustained to the extent indicated in the Opinion.
- 2) Carrier shall implement this Award within thirty (30) days' of its execution by a majority of the Board.



Dana Edward Eischen, Chairman

Dated at Ithaca, New York on July 30, 1994



Union Member

Dated at Springfield, Mo
on 8-11-94



Company Member

Dated at Amherst, Me
on 8-22-94