Board Type	Public Law Board
Board Number	6942
Case Number	2
Carrier	Union Pacific Railroad Company
Union	United Transportation Union
Date	30 May 2006

Note from the Board:

The Carrier's original submission mistakenly mixed two different cases with charges against the Claimant into the information provided to the Board. The Board notified both the Carrier and the Organization of the problem of the Carrier's mistaken submission in the case. After the Board sought clarification from the Carrier, additional evidentiary filings were sent to the Board to replace those which were mistakenly combined into the original submission. However, the Carrier did not replace the original three-page submission itself. Those three pages contained the "Carrier's Statement of Facts" and the "Carrier's Position." While the Carrier's applicable rule (GCOR 7.6), which it claims was violated, is consistent with the amended transcript and other evidence, some of the other information in the submission is inconsistent with the second set of evidence and transcript making it somewhat difficult to understand exactly which commentary went with which charge.

Without question, rules of evidence and the procedures used in Public Law Boards are not intended to be formal to the point that they precludes rectifying obvious mistakes—even mistakes such as the one the Carrier made in this case. The issues of overriding importance are that the Claimant is not prejudiced undeservedly, receives due process, and that the sorted out facts justify the determination that the Board ultimately makes.

The Board has tried to maintain a fair and impartial decision making process in the piecing together the information from the two submissions of evidence and match it to the applicable rule. It is evident after considerable study what the Carrier was trying to charge and which evidence went with which case. The Board endeavored to be completely fair to all of those involved.

Statement of Claim:

Claim of Denver Yardman Z.A. DeLange for removal of Level 3 discipline from his personal record with pay for all time lost, including time spent attending the investigation, vacation benefits, and payment for all wage equivalents to which entitled, with all insurance benefits and any monetary loss for such coverage while improperly disciplined, without regard to any outside income that may have been earned by Claimant during such period of time.

Carrier's Position:

The Carrier maintains that the Claimant, Yardman Z.A. DeLange, was assessed a Level 3 discipline for violation Rule 7.6 of the General Code of Operating Rules (GCOP). The rule reads as follows:

"7.6 Securing Cars or Engines

"Do not depend on air brakes to hold a train, engine, or cars in place when left unattended. Apply a sufficient number of hand brakes to prevent movement. If hand brakes are not adequate, block the wheels.

"When the engine is coupled to a train or cars standing on a grade, do not release the hand brakes until the air brake system is fully charged.

"When cars are moved from any track, apply enough hand brakes to prevent any remaining cars from moving."

The Carrier maintains that the Claimant received a fair and impartial hearing and that there were no procedural errors egregious enough to warrant voiding the discipline assessed.

Organization's Position:

The Organization maintains that the Carrier violated the controlling agreement and that the investigation did not produce substantial evidence that the Claimant was guilty. The Organization further maintained that the Carrier owned culpability due to its failure to train new employees properly. As a result, the assessment of any discipline in this matter must be considered arbitrary and excessive and should be set aside.

Findings and Opinion:

Public Law Board No. 6942, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute; and that the parties were given due notice of the hearing thereon.

First, the Organization claims that the Carrier violated the controlling agreement by not providing the Claimant's Local Chairman with a copy of the transcript as he had requested at the close of the investigation. The Organization's submission states, "The controlling agreement, Yard Schedule

Rule 20 (Exhibit A), states, 'Copy of the evidence...shall be accessible to employee affected or his representative upon request.' " The Carrier shows that it provided Claimant DeLange and UTU representative Marlin Milligan copies of the transcript on the 10th day following the hearing. Additionally, a copy of the transcript was sent to UTU Local Chairman Brent Walden as soon as he asked for one on September 28, 2004. (Clearly, the carrier sent the transcript to the wrong UTU representative although two representatives were at the hearing. Mr. Milligan was representing a different crewmember in the same investigation.) However, the Carrier did send one to Claimant DeLange on the 10th day. Rule 20 says, "...employee affected or his representative..." The key word is "or." The rule does not say "and his representative." The Carrier complied with the technical language of the rule; and although it also sent one to Mr. Milligan, it corrected the error by sending one to Mr. Walden when requested again. Even though not technically a requirement of Rule 20, it appears to be customary to send copies to both the Claimant and his representative. Certainly, there was no harm or delay in the Board process caused by the Carrier's actions.

The transcript of the case covers the investigation of all three crewmembers on job YDV34R-06 on August 6, 2004. The investigation was for allegedly failing to apply a sufficient number of hand brakes to prevent a roll out of cars of Yard 30, Track 8 resulting in a derailment and the sideswipe of power on train MGJNY-05 and resulting in the delay of yard operations.

The only crewmember covered by this Board is Yardman Z.A. DeLange who is the Claimant. The Claimant was a relatively new employee who hired-in during June 2004 and had been out of RCL class approximately 4 weeks at the time of the aforementioned accident. At the time of this accident, the Claimant was serving as a student to Foreman J.E. Meyer on this crew. The evidence is clear that the crew moved a sufficiently large number of cars onto Track 8 that it required the release of hand brakes on cars already set on the track so that the additional cars could be spotted there. Switchman J. R. Stephens testified that he made the original cut of cars and released the brakes on those cars. After Switchman Stephens moved the final set of cars onto Track 8, he passed the box for the RCL to the Claimant and left to meet them at the yard tower as directed by the crew's foreman. Mr. Meyer and the Claimant each set the brakes on two of the cars in question as directed by Mr. Meyer.

The testimony of both Mr. Meyer and the Claimant was that they waited to see that the cars were not going to move. The cars were not moving when they began to move the RCL to continue their job. It is unclear from the testimony exactly how long it was before the cars began to roll and eventually collide causing the derailment and damage to the power on the adjacent train. Estimates in the testimony based on other things that the crew was doing sets the time at somewhere between about five and ten minutes.

The Organization tries to make the point that the Claimant and other crewmembers waited and the cars were not rolling so they satisfied their responsibility to set and adequate number of hand brakes. Further, the Organization questions why the Carrier did not download the RCL to show exactly how long the crew waited before the cars began to roll. The Organization uses this to establish that the Carrier did not prove its case against the claimant. However, the Carrier makes their point by a question Hearing Officer W.G. Brunskill asked the Claimant, "Any time limits specified in Rule 7.6?" The answer was no. The point is compelling. There is no time limit set; the purpose of the rule is to set enough hand brakes that the cars would not roll regardless of how long it took them to start to roll. In this case the track was on a partial grade, and it took some time for cars to pull back after the push-in removed the slack in the string of cars. Those circumstances would make the need for the download of the RCL a moot issue.

The other key issue is one of adequate training. The Organization maintains that the Claimant was a student and did not receive adequate training from the Carrier. Therefore, as a student, he cannot be held responsible for **not** doing something to prevent the accident—specifically, not setting an adequate number of hand brakes. Their position is in two parts: first, he did not know to question his foreman's directive; and second, he could not know that the cars would roll.

The Carrier's submission states, "...all crew members are jointly responsible for the safety of the train... Claimant cannot escape culpability merely because he is relatively new to the job." It further states, "He was qualified on the book of rules and had knowledge of operating procedures. Merely **claiming another employee** (emphasis added) told him to set a fixed number of brakes does not relieve Claimant of exercising 'good judgment.' "

The Board agrees with the position of the Carrier that being a student in this type of job is not the same as being a student in the traditional sense. The Claimant was not without some relevant experience with approximately one month of on-the-job training as well as his knowledge of the book of rules. He was entrusted with the operation of the RCL and with exercising sound judgment. Nonetheless, the Carrier cannot claim the foreman of a crew, especially when he is supervising a student, to be just "another employee." The Claimant must take his lead from the direction of the foreman. The foreman told the Claimant to sets the brakes on two cars and that he would set the brakes on two other cars. This is exactly what the Claimant did. Should the Claimant have questioned the foreman about the adequacy of setting the breaks on just four cars? Yes, even as a student he should have questioned the foreman about whether or not he was sure that was sufficient,

especially if he thought there was any way the cars could roll. The Claimant's judgment is a legitimate issue.

This Board finds the Claimant violated Rule 7.6. Not withstanding that finding, this Board believes the foreman holds the greatest degree of culpability in this incident. However, even the implication of sanctions for the foreman is not appropriate because his case is not before this Board and could possibly be adjudicated by a different Board. Regardless, this Board will not authorize the Carrier to take any action against the Claimant greater than the sanction levied against the foreman.

There is one additional matter in the Organization's submission that the Board will address. The Organization objected to what it described as, "Superintendent Whalen denigrating the Claimant's decision to not participate in the Carrier's Behavior Modification Policy..." The Carrier has developed an alternative to its discipline policy which has not been endorsed by the Organization. This Board will not weigh in on the issue standing between the Carrier and the Organization. However, the Carrier must recognize that even with its alternative "Behavior Modification Policy" that the violation stays on the employee's personal record for either 12 or 24 months before it can be removed (depending on whether or not there are additional violations). An employee may elect to go through the hearing process for the opportunity to clear his personal record. That is not a reflection of the value placed on additional training or an inference that additional training is unnecessary. It is an exercise of the employees' right to a hearing to have the charges adjudicated. The Carrier always has the right to provide additional training regardless of the options taken by the employee in the investigation and hearing process if it determines that additional training of the employee might benefit the Carrier or the employee.

Decision:

The Board finds that the Carrier met its evidentiary burden of proving, by substantial evidence that the Claimant violated Rule 7.6 of the General Code of Operating Rules. The discipline is consistent with the Carrier's discipline policy and is not unduly harsh, arbitrary, or unwarranted.

Award:

The appeal of the Claimant, Yardman Z.A. DeLange is hereby denied with the following conditions:

1. The disciplinary sanctions taken against the Claimant will stand without modification if they do not exceed those of the foreman, unless the foreman elected to take the "Behavior Modification Policy" option. In

that situation, the discipline taken against the Claimant will stand since it is not possible to weigh both sanctions on the same scale.

2. If the discipline of the foreman is being heard by a different Board and the decision is not final, the discipline of the Claimant will be adjusted if necessary so that is not greater than that of the foreman when there is a final determination.

3. If the investigation did not result in discipline for the foreman, or the foreman received lighter sanctions; the discipline of the Claimant will be adjusted to be no greater than that taken against the foreman.

Brady Gadberry
Chairman and Neutral Member

R. A. Henderson
Carrier Member

Richard M. Draskovich
Employee Member