

Public Law Board 6942

Docket #5
Carrier LR File: 1419432-D

Parties to the Dispute:

Union Pacific Railroad Company

and

United Transportation Union

Statement of Claim:

"Claim of Conductor R. Swarthout for removal of a 5-day suspension and Level 2 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."

Findings:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934. Public Law Board 6942 has jurisdiction over the parties and the dispute involved herein.

At the time of the incident that led to the suspension in this matter, Claimant R. Swarthout was a Foreman in the Operating Department at the North Platte Service Unit and was working the West Hump. Claimant has service dating from May 16, 1977.

A review of the record shows that Claimant was working the West Hump on September 20, 2004, with a three person crew that included a student. An incident occurred that required the entire crew to be taken to the Yard Office for a urinalysis test. Claimant returned to the West Hump office later that day. The two other crewmembers had returned earlier and had been dismissed by Mr. D.J. Essman, a Yard Master. Claimant did not contact Mr. Essman upon his return to the West Hump office. Claimant went home after learning that the rest of his crew had been dismissed.

Carrier advised Claimant in a certified letter dated October 6 2004, that an investigation would be held "...in connection with your responsibility, if any, for: While working as a Foreman on the P27R-20 job at approximately 2100 you allegedly left the property without warning." The investigatory hearing was held on November 10, 2004. The Carrier notified Claimant in a letter dated November 18, 2004, that:

...the following charges against you have been sustained: While working as Foreman on the P27R-20 job at approximately 2048, you allegedly failed to report to SMTD Dirk Hardy at the BCC after completion of the urinalysis test. Therefore, you are in violation of General Code of Operating Rules 1.13 effective April 2, 2000. This incident is a Violation 2. Based on the progressive discipline system you are now assessed a Violation 2 discipline which is five days off work without pay...

The Organization claims that the discipline was unwarranted because the Carrier was unable to meet the burden of proof. The Organization argues that the Carrier failed to prove that Claimant knowingly violated Rule 1.13 when he left the property. According to the Organization, the evidence shows that the doors to the office were locked and that Claimant's knocks could not have been heard. Confronted with a situation where he returned from the urinalysis to find that his crew had been sent home, nobody was in the office, there was ample time to question him while waiting to take the urinalysis and it was common practice to dismiss entire crews with notification to one member, Claimant went home.

The Organization also claims that, in addition to being unable to meet the burden of proof, the Carrier engaged in two procedural violations that are fatal to the Carrier's case. First, the Superintendent failed to respond to the appeal of the Local Chairman within the 30 day requirement of Rule 84(b)(1), and therefore the discipline is void. Second, the Organization continues that the date of the offense was not included in the notice of investigation or the notice of discipline.

The Carrier maintains that the burden of proof has been met here. The Claimant was afforded a fair and impartial investigation in accordance with the requirements of the Agreement between the Carrier and the Organization. The Carrier considers that Claimant is guilty as charged and points to, among other things shown in a review of the transcript, an admission by Claimant that he left the property without permission. The Carrier continues that there were no procedural violations, and even if there was a procedural violation, prior awards support the proposition that the error was harmless. Even if the Superintendent responded beyond 30 days, this cannot void the discipline because the Agreement between the Carrier and the Organization lacks a result if the timeframe for the Superintendent's response expires.

Rule 1.13 provides: Reporting and Complying With Instructions

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by the managers of various departments when the instructions apply to their duties.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

After a review of the evidence, the Board finds that there were no procedural defects which void the discipline. Initially, the Board notes that the Carrier's letter to Claimant dated October 1, 2004, and mailed via certified mail, contains the following opening language: "This refers to an incident that occurred on September 20, 2004. It has been determined from the initial review that there is sufficient evidence to warrant the disciplinary process to continue." (Exh. 3) A Behavior Modification Form was attached to the letter. In the Behavior Modification Form the date, time, location, milepost, train and allegation were specifically stated. Claimant was put on notice of the charges against him with sufficient specificity that he could answer the charges and form a defense.

It is undisputed that the Superintendent's reply to the General Chairman's appeal was not within the thirty day requirement of Rule 84(b)(1) and the record shows that it exceeded the time limit by approximately seventeen days. However, the rule of NRAB Third Division, Award No. 33955 cited by the Carrier, is instructive in analyzing this procedural issue with the following statement: "The better rule seems to be where the Rule specifically provides for the consequences of a late decision, that Rule must be enforced according to its terms. Where the Rule does not provide for specific consequences, all of the equities should be considered." Unlike the "drop dead" provision found in Rule 84(b)(2) for an appeal to the General Manager that is not answered within thirty days, there is not a similar provision in Rule 84(b)(1) and the equities must therefore be examined. The Superintendent denied the General Chairman's appeal approximately seventeen days beyond the thirty day date. A review of the record shows that Claimant was not prejudiced by this delay and the delay is therefore harmless.

After a review of the evidence, this Board cannot find that there was substantial evidence in the record to sustain the Carrier's position. Claimant returned to the West Hump to find that the rest of his crew had been dismissed. He testified, and the Yard Master agreed, that it was common practice for one member of a crew to check with the Yard Master. (Tr. 47, 53-54) The single crew member would advise the other crew members and they would then leave *en masse* – without each consulting with the Yard Master. (Tr. 53-54) Here, the Yard Master consulted with the Manager of Yard Operations and the first two crew members were dismissed. Further, if part of a crew was dismissed, there would generally be no work for the remaining member or members of the crew. There is no evidence in the record that Claimant was told to report to anyone after his urinalysis. (Tr. 45) Rather, when Claimant was brought back to the West Hump office after his urinalysis and learned that his crew had been earlier dismissed, he was reasonable in assuming that he too was released.

Based upon the record, the Board concludes that it was improper for the Carrier to issue the 5-day suspension to Claimant. Claimant is exonerated, his record shall be expunged of the Suspension, and he shall be made whole. Claim sustained.

Award

Claim sustained.

Order

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made.



Robert A. Henderson
Carrier Member



Richard M. Draskovich
Organization Member



Brian Clauss
Neutral Member

Dated this 31 day of May 2006.