

Public Law Board 6942

Docket #6
Carrier LR File: 1419437-D

Parties to the Dispute:

Union Pacific Railroad Company

and

United Transportation Union

Statement of Claim:

"Claim of Yardman R.B. Schultz 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.B. Schultz was a Switchman in the Operating Department at the North Platte Service Unit. Claimant has service dating from December 5, 1999.

A review of the record shows that Claimant was working as a pilot on train #N103 on November 1, 2004. Grievant was seen stepping from the locomotive as it was moving by K.M. Seachord, the Manager of Road Operations. Mr. Seachord approached Claimant and spoke with him. Mr. Seachord prepared a Field Debriefing Form at the scene and Claimant signed it in his presence.

Carrier advised Claimant in a certified letter dated November 2, 2004, that there was "sufficient evidence to warrant the discipline process to continue" and a Behavior Modification Form with attached Behavior Modification Waiver was included with the letter.

Carrier advised Claimant in a certified letter dated November 10, 2004, that an investigation would be held "...in connection with your responsibility, if any, for: While employed as a pilot on 11/1/04 on job #N103 at approximately 1126 hrs, you allegedly

got off moving equipment. This is a possible violation of Special Instruction effective April 1, 2004." The investigatory hearing was held on November 15, 2004. The Carrier notified Claimant in a letter dated November 24, 2004, that:

...the following charges against you have been sustained: While employed as a pilot on 11/1/04 on job #N103 at approximately 1126 hrs, you allegedly got off moving equipment. This is a possible violation of Special Instruction Effective April 1, 2004. 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 argues that the discipline must be set aside because the Carrier committed a serious procedural violation of Yard Schedule Item 17 when it failed to provide the Organization's representative with a copy of the waiver of hearing offer. The Organization further claims that the discipline was unwarranted because the Carrier was unable to meet the burden of proof. The Organization contends that the Carrier failed to prove that Claimant violated Rule 81.4.2 because he was getting off the train for an emergency and emergencies are a recognized exception to the Rule.

The Carrier maintains that the burden of proof has been met and that 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 an admission by Claimant that he got off a moving train. The Carrier continues that there were no procedural violations, and even if there was a procedural violation, the error was harmless.

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 was a procedural defect that affects the discipline. Item 17 provides, in pertinent part, the procedure for a waiver of hearing:

"The employe[e] will be apprised in writing of the charges against him and the discipline proposed, by the Superintendent or his representative, by mail or in person. A copy of the notice shall be furnished to the local chairman of the craft involved. (a) When the notice is delivered to the employe[e] by mail, the local chairman's copy will be mailed at the same time."

The record in the instant matter shows that Claimant was served his notice of waiver in a timely manner via certified mail. However, during his representation of Claimant at the investigatory hearing, the Local Chairman clearly made it a matter of record that he had not been notified pursuant to Item 17. (Tr. pp. 13-14) The Local Chairman reiterated the procedural defect in his letter to the General Superintendent appealing the discipline. Despite the General Superintendent's letter to the local chairman dated December 9, 2004, that mentions attached documentation of items that were mailed, there is no attachment in the record that shows that the Local Chairman was mailed a copy of the waiver of hearing offer.

Item 17 requires that the Local Chairman be furnished a copy of the charges against the employee and the proposed discipline that is contained in the waiver of hearing offer. PLB 5912 Award No. 17 and PLB 5912 Award No. 59, cited by the Organization, present persuasive reasoning for the proposition that failure to comply with Item 17 leads to the conclusion that the hearing was not held in accordance with the terms of the agreement between the Carrier and the Organization. Accordingly, we find that any discipline arising out of the hearing must be set aside.


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

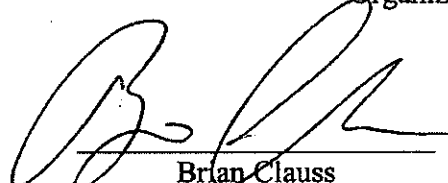
Claim sustained.

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.