Public Law Board 6942

Docket #7
Carrier LR File: 1419591-D

Parties to the Dispute:

Union Pacific Railroad Company

and

United Transportation Union

Statement of Claim:

"Claim of Yardman C.E. Anema for removal of a 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."

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 Denver Service Unit. Claimant has service dating from January 10, 1964.

A review of the record shows that Claimant was working as a Switchman on YDE51-22 on October 22, 2004. At approximately 1530 hours, Craig Romer, the Manager of Terminal Operations, pulled up to the Mile High Industrial Park in order to have a discussion with the crew about track warrants and securing the locomotive. YDE51-22 was parked and the entire crew was inside a building at that location. YDE51-22 consisted of two locomotives and two tank cars. The two locomotives were tied down but none of the handbrakes on the two tank cars were applied. Mr. Romer had a Field Training Exercise about the application of the brakes with the crew on scene.

Carrier advised Claimant in a certified letter dated October 27, 2004, that there was "sufficient evidence to warrant the discipline process to continue" and a Behavior Modification Form with attached Waiver Notice was included with the letter. Claimant denied receiving the letter. Carrier advised Claimant in a certified letter dated November 3, 2004, that an investigation would be held "...in connection with the report that while working as a crewmember, on the YDE51-22 on October 22, 2004, at approximately

1530 hours in the vicinity of MP 634 on the Limon Subdivision, you failed to apply a sufficient number of handbrakes to your cars left unattended." Claimant also denied receiving this letter.

Pursuant to the Local Chairman's request for postponement, a hearing was held on November 19, 2004. Claimant also denied receiving the letter notifying him of the postponement. The Carrier notified Claimant in a letter dated November 23, 2004, that he was being assessed with a 5-day suspension.

The Organization argues that the discipline must be set aside because the Carrier committed a serious procedural violation of Yard Schedule Item 17 and Yard Schedule Rule 20 when it failed to provide the Claimant with the notice of investigation, the waiver offer or the notice of postponement. The Organization further claims that the discipline was unwarranted because the Carrier was unable to meet the burden of proof and did not call the Foreman as a witness. The Organization contends that the Carrier failed to prove that Claimant violated Operating Rule 7.6 because the two units held the cut and did not roll.

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 the fact that no hand brakes were applied.

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 no procedural defect. The record contains the Certified Mail Receipts for each of the above documents. Those postmarked receipts clearly show that the notice of investigation, the waiver offer and the notice of postponement were mailed to the Claimant in a timely manner with proper postage affixed. There is nothing in the record that shows that the letters were returned to the Carrier as undeliverable.

Rule 7.6 provides: 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 handbrakes to prevent movement. If the 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.

Mr. Romer's testimony forms the basis for the instant dispute. He stated at the hearing: "When I arrived, I discovered that the locomotives, there were two locomotives, they were both tied down and none of the cars that they pulled from industry were tied down. They were attached to the train and the air was cut into the train." (Tr. 13-14) Whether the locomotives were tied down was immaterial to Mr.Romer because the brakes must be tied down on the cars in order to comply with the Rule. (Tr. 14, 15, 17) A sufficient number of hand brakes is "more than zero" and does not include locomotives. (Tr. 14, 17)

PLB 5912 Award No. 31, cited by the Organization, addressed an issue that is similar to the issue here where the hand brakes on two units were set but the handbrakes on the cars were not set. In PLB 5912 Award No. 31, the Board did not find a violation of Rule 7.6 where the Claimant was satisfied that tying the handbrakes on the locomotives would prevent movement and there was no evidence that the number of handbrakes was insufficient. Similarly, the record here indicates that the two locomotives were tied down, the two tank cars were not, and claimant was satisfied that he had applied "a sufficient number of handbrakes to prevent movement" by tying down the handbrakes on the two locomotives. (Tr. 20) Claimant then tested to see if the train would roll. (Tr. 20) There is no evidence in the instant record to show that the number of handbrakes was insufficient to prevent movement. Therefore, this Board is unable to find that Rule 7.6 was violated. Accordingly, the Board need not decide the Organization's contention that the Foreman was a necessary witness at the hearing.

After a review of the evidence, this Board cannot find that there was substantial evidence in the record to sustain the Carrier's position. Based upon the record, the Board concludes that it was improper for the Carrier to issue the Level 3 discipline 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.