

Board Type	Public Law Board
Board Number	6942
Award/Case Number	9
Carrier	Union Pacific Railroad Company
Union	United Transportation Union
Date	30 May 2006

Statement of Claim:

Claim of Conductor J.T. Guest for removal of a 5-day suspension and a 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.

Carrier's Position:

The Carrier maintains that the Claimant, Conductor J. T. Guest, was assessed a Level 2 discipline for violation Rule 8.15 of the General Code of Operating Rules (GCOP). The rule reads as follows:

"8.15: Switches Run Through

"Do not run through switches, other than spring switches or variable switches. If a rigid type switch is run through, it is unsafe and must be protected by spiking the switch, unless a trackman or other competent employee takes charge.

"An engine or car that partially runs through a switch must continue movement over the switch. The engine or car must not change direction over a damaged switch until it has been spiked or repaired."

The Carrier maintains that the Claimant was disciplined based on the facts developed through a formal investigation and was afforded a fair and impartial hearing in accordance with the applicable agreement. The Carrier asserts that the Organization did not raise any procedural objections during the hearing or the on property handling of the claim.

The Carrier further maintains that it used the Claimant's own admission of guilt to support the discipline assessed.

Organization's Position:

The Organization maintains that the Claimant did not receive a fair and impartial investigation, that the Carrier failed to prove its allegations against the claimant, and that the resulting discipline was therefore arbitrary and unwarranted.

The Organization asserts that the Carrier prevented the Claimant from receiving a fair and impartial investigation when it failed to call the Claimant's engineer and fireman-in-training (FIT) to testify. The Organization asserted "Road Schedule Rule 84" and previous Public Law Board awards as exhibits in support of its position that the hearing was not fair and impartial. As a result, the Organization asked that the instant case be set aside.

Beyond this threshold claim, the Organization maintains that the Carrier failed to establish violated "Rule 8.2." *(The Board must assume that this is a typographical error since the Claimant's suspension was for the violation of Rule 8.15. Rule 8.2 appears to be the applicable rule for "Locomotive Department Employees" rather than "Conductors.")* The Organization asserts **in essence** that there were unusual or extenuating circumstances that were not considered in the mitigation of culpability of the Claimant.

1. The Claimant was riding the point and gave a stop signal with what he believed was sufficient time to stop.
2. The Claimant testified that the switch was covered with shadows.
3. The inexperience of both the Claimant and the FIT contributed to the incident and should have been considered in the decision to assess discipline.

The Organization asserts that the Carrier did not meet its burden of proof and that the discipline be reversed.

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.

On the threshold issue, the Organization asked that the case be set aside because the Carrier failed to call the engineer and FIT to testify. There is no indication from the transcript of the hearing that the Organization requested any additional witnesses and there is no testimony in the transcript that the Organization was denied the opportunity to call any witnesses that it wanted

to testify. The transcript shows that the Hearing Officer, Mr. R.W Kirby, advised the Organization and Claimant of their right to examine and cross-examine any witnesses who may testify. The Hearing Officer further asked the Organization if there were any objections that the Organization wished to present at that time. Near the end of the hearing, the Hearing Officer asked if either the Claimant or the Organization had any other evidence to present in the hearing. From the transcript, it is clear that the Hearing Officer gave the Organization sufficient opportunity to either call additional witnesses, request that the Carrier provide additional witnesses that the Organization wanted to call, and/or object if additional needed witnesses were not available.

The Claimant and the Organization have some affirmative responsibility to call (or ask for) witnesses if they believe that the witnesses are necessary for a fair and impartial hearing. Numerous Public Law Boards address the issue of failure to call witnesses. There are findings on both sides of the issue as it relates to the Carrier's duty to call all possible witnesses. Referee William M. Edgett in Public Law Board 987 Award 8 of February 23, 1973 stated, *"In the middle lies an area in which Carrier's obligation to call witnesses requested by the accused or his representatives, who have relevant information bearing on the dispute, is recognized."* This Board also recognizes that finding. While there is definite affirmative responsibility on the part of the Carrier to call relevant witnesses who have knowledge of the incident, the Claimant and Organization have some responsibility to let the Carrier know whom they wish to have as witnesses and call to testify. They may certainly object and establish a record of the Carrier's refusal to provide witnesses in the hearing while there is opportunity for the Hearing Officer to address the issue of witnesses. The Board then has a basis for determining whether the Claimant was denied due process.

The evidence in this case does not support the contention that the hearing was not fair and impartial. The testimony of the Claimant himself and the Manager of Yard Operations (MYO) forms substantial evidence of the events.

Moving past the threshold issue, the Organization asserts that the Carrier failed to establish that the Claimant violated Rule 8.15.

From the evidence, it is clear that the two leading wheels of the locomotive ran through the switch. There is no dispute that the Claimant was "riding the point" and that the night was clear so the FIT could clearly see the Claimant's signals.

The Claimant had exactly four months of service at the time of incident. In the Cheyenne Yard, the Claimant testified that he had two weeks of experience as a "conductor in training" and after that, he had made approximately four setouts or pickups in the Cheyenne yard. Clearly, the Claimant did not have a lot of railroad experience, especially as the conductor

of a train. The locomotive was under the control of a fireman-in-training at the time the switch was run. The Organization asserts that his lack of experience may have been a contributing factor, too.

The Manager of Yard Operations (MYO), Mr. P. D. Urrichio, testified that after he was notified that an engine had run through a switch in the yard, he drove to the site, climbed up into the locomotive cab and talked to the crew. The testimony indicates that there was snow on the ground between the rails. However, the MYO testified that there was snow on the ground, but the weather was clear (visibility was good). He stated that there was snow between the rails, but there was no problem lining the switch.

The Claimant testified that the locomotive speed was not a problem or, he would have signaled the FIT to reduce his speed.

There is no testimony in this record that would indicate that the experience, or lack thereof, of the FIT was actually a contributing factor. It is impossible to tell from the submissions if the FIT was truly inexperienced or was experienced as a trainman who was because of circumstances being retrained as an engineer. There simply is no evidence in the record to support the contention that the FIT's lack of experience in any way contributed to the switch being run.

Decision:

The Board finds that the Carrier met its evidentiary burden of proving, by substantial evidence that the Claimant failed to line switch which was run, and as such, violated GCOR Rule 8.15.

The assessment of a five-day suspension may seem relatively harsh to a comparatively new conductor, however, the discipline is consistent with the Union Pacific's applicable "Behavior Modification Policy" and was not proven patently arbitrary or capricious given the circumstances of record.

As the Chairman of this Board, I was particularly impressed by the attitude and the desire of the Claimant to "do the right thing." After the locomotive ran the switch, he handled everything professionally and was forthcoming in his statements. From the statements of the Claimant in response to the questions of the Hearing Officer (as well as the Claimant's closing statement), it is apparent that the Claimant had learned from this incident and from his additional experience in railroading. Part of the purposes of discipline is educational and to help ensure that the unacceptable behavior will not be repeated. It is highly likely that the Claimant, who had very little actual experience as a conductor at the time of the incident, has learned a great deal from this experience. At the date of this Board, it has been approximately eighteen (18) months since the incident. If the Claimant is still

with the company and has not been disciplined for any other infraction, I suggest that the record of the discipline be expunged and not considered in any subsequent progressive discipline.

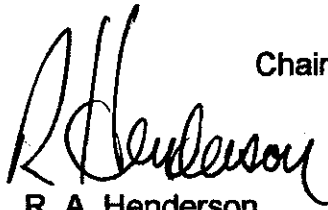
Award:

The appeal of the Claimant, Conductor J. T. Guest, is hereby denied. The suspension stands and there will be no award of back pay or benefits.

However, if the Claimant has not had any subsequent violations that resulted in documented disciplinary action on or before the date of this award, the record of this incident will be expunged from the Claimant's disciplinary record without award of back pay or benefits. If the Claimant has been subsequently disciplined as of the date of this award; the suspension for running the switch on November 30, 2004 and the disciplinary record thereof will stand as originally taken by the Carrier and may be considered in any subsequent disciplinary action.



Brady Gadberry
Chairman and Neutral Member



R. A. Henderson
Carrier Member



Richard M. Draskovich
Employee Member