

PUBLIC LAW BOARD NO.6942

UNITED TRANSPORTATION UNION

and

NMB No. 16

AWARD No. 16

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM

Fireman-in-Training C.P. Mincey ("Claimant") seeks removal of Level 3 discipline (Collaboration Level 5 day suspension) plus pay for all lost time and benefits. He raises procedural and substantive issues.

FINDINGS

After review of the entire record, the Board finds the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; and, this Board has jurisdiction over this dispute. However, for reasons explained below, the parties were not given due and proper notice of the hearing.

Claimant operated a locomotive at the Moffit Tunnel Subdivision on March 12, 2005. An emergency brake application was made to avoid a large rock or bolder between the rails near subpost 87. Thereafter, no inspection of the breaks occurred before Claimant restarted train movement. The train immediately went into emergency. Brakes were applied. An ensuing break inspection revealed a twenty car gap.

The Carrier concluded car separation was too far for the air hose to reach. Claimant was charged with violation of Rule 6.32, Items 4, 5 and 6 for failing to ensure the train was properly inspected before initiating movement after an undesired emergency brake application. Two other employees were similarly charged.

The Carrier held a formal investigation on April 12, 2005. All participants previously received copies of the notices of investigation and various postponements except Claimant's local representative, B.A. Walden, UTU Local Chairman. Walden objected to the omission and the investigation hearing proceeded.

At the threshold is the Organization's procedural defense. For the following reasons, it is dispositive. Therefore, it is unnecessary to assess the substantive merits.

Rule 94 in the 1954 Locomotive Firemen and Enginemen Agreement provides that an employee will be advised of disciplinary charges at a reasonable time prior to the disciplinary hearing. It contains no specific pre-hearing notice requirement to the Organization or other employee representative prior to the hearing. However, on August 12, 1971, the Carrier and Organization entered an agreement amending Rule 94. It provides in relevant part:

1. The employee will be appraised 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 the local chairman of the craft involved.
 - (a) When the notice is delivered to the employee by mail, the local chairman's copy will be mailed at the same time.
 - (b) When the notice is delivered to the employee in person, the local chairman will be notified of the proposed discipline prior to or at the time of delivery to the employee.

At least 4 Public Law Boards have found essentially identical language mandatory and overturned discipline when its terms were unmet. PLB 4897, Award 86; PLB 5912, Awards 17, 59 and 217.

Sometimes, due process concerns arise from unanticipated circumstances. Here, they are rooted in express language adopted by both parties. The Organization timely objected. The Carrier offers no explanation or excuse for absence of a routine notice.

Given the 1971 agreement's unmistakable words and the logic, and apparent unanimity, of numerous PLB awards, the hearing was fatally flawed because Claimant did not receive contractually compelled due process. Absent contrary language or the most extraordinary circumstances, an employee need not specifically prove actual harm resulted from denial of express, unambiguous written procedural guarantees. By including specific mandatory rights in a written agreement the parties indicate the protections are material and enforceable. Accordingly, the parties must be held to their bargain and the claim granted.

AWARD

Claim sustained. Carrier is instructed to comply with this Award within 30 days of its date.


Michael D. Gordon, Neutral Chairman
Robert A. Henderson, Carrier Member
Richard M. Draskovich, Organization Member

AWARD DATE: 6-6-06