

PUBLIC LAW BOARD NO. 6942

Case No. 29

**United Transportation Union
and
Union Pacific Railroad Company**

Appearances:

Mr. Richard M. Draskovich, Sr. Vice General Chairperson UTU, 5990 SW 28th Street, Suite F, Topeka, Kansas 66614-4181, appearing for the Organization.

Mr. Robert A. Henderson, Assistant Director-Labor Relations, Union Pacific Railroad Company, 1400 Douglas Street, STOP 0710, Omaha, Nebraska 68179, appearing for the Carrier.

ARBITRATION AWARD

The undersigned was appointed as the third or Neutral Member of Public Law Board No. 6942 on May 3, 2006. The undersigned was assigned this case on May 4, 2006. Based upon the entire record and arguments of the parties, we issue the following Award.

DISCUSSION

By letter dated May 25, 2005, the Carrier notified Jason Cannon ("Claimant") to report for an investigation and hearing in connection with the following charge:

While working as pilot in North Platte, Nebraska on job N204-23 at West trim May 23, 2005. You Allegedly failed to line the 5-switch, and giving permission for (UP3638, PO36-23 job) to make westward movement. Resulting in the PO36 - 23 to couple into the UP3114).

Following the investigation, the Carrier sustained the charges and found the Claimant in violation of General Code of Operating Rules 7.1, 8.2, 70.3, 1.1.1, and 1.1.2 effective April 2, 2000. The Carrier assessed the Claimant a **Level 2 Discipline** (five day suspension without pay) and placed him at the **Conference Level** in the Behavior Modification Matrix with a 24-month recovery period.

The Organization raises two procedural objections to the Claimant's discipline and asserts that the Carrier failed to meet its burden of proof in the instant case. The Organization asks that the discipline assessed the Claimant be reversed.

The Carrier argues that the Organization's procedural objections fail and that it sustained its burden of providing substantial evidence of Claimant's guilt. The Carrier requests that the grievance be denied.

The Organization initially argues that the Carrier violated that portion of the controlling discipline agreement (Employees' Exhibit A) which states: "The notice will state the date, time and place of the investigation, employees charged, *witnesses expected to be called* . . ." (Emphasis in the Original). As pointed out by the Organization, the notice of investigation (Tr. Exhibit A-1) failed to identify Manager of Signal Maintenance Moritz as a witness and Local Chairman Ebmeier timely objected to the Carrier's error at the investigation. (Tr. p. 31).

The Carrier argues that there is no agreement rule that creates an obligation for it to name witnesses in a Claimant's investigation notice. However, the agreement at Article III – Notice of Investigation, Section A clearly provides that the notice *will state* "witnesses expected to be called." (Emphasis added). The agreement was in effect, and is applicable to the instant dispute. (Employees' Exhibit A, pp. 6 and 8 of 8).

The Carrier could reasonably expect to call Moritz as a witness because he played a central role in the investigation of the incident involving the Claimant by pulling together all the information pertinent to the investigation and presenting it to the Carrier's lead investigator. (Tr. pp. 9, 11, 34). Consequently, we sustain this procedural objection of the Organization. This procedural error can provide a basis for reducing what would otherwise be appropriate discipline. Christine D. VerPloeg, "Investigatory Due Process and Arbitration: Is There a Common Trend in the Arbitral Community?", Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, Ed. Gladys W. Gruenberg (Washington, D.C.: BNA Books, 1992).

The Organization also argues that the Carrier erred when the notice of investigation improperly identified one of the crews involved in the alleged incident. Assuming arguendo this is true, the Organization's procedural objection must fail because there is no evidence that the Claimant's position was prejudiced by this error.

We turn our attention to the merits of the dispute.

The record indicates that the Claimant, while working as pilot in North Platte, Nebraska on job N204-23 at the West trim on May 23, 2005, failed to line the 5-switch, and gave permission for (UP3638, PO36-23 job) to move westward which resulted in the PO36-2 coupling into the UP 3114. (Tr. pp. 11, 14, 29, 34-37). The Claimant was solely responsible for ensuring that the switches were properly lined unless he expressly delegated the responsibility to another person. (Tr. p. 16). A computer log of switches, admitted into evidence during the investigation, showed that the Claimant never lined the 5-switch and that he personally permitted the UP3638 to move westward without being properly lined for that movement. (Tr. pp. 14, 23 and 37; Carrier's Exhibit F). As a result of these actions, the Carrier has proven by substantial evidence that the Claimant violated the aforesaid Carrier rules by creating a potentially dangerous situation whereby the UP3638 was on a collision course with UP3114.

The Organization points out that the Claimant testified (Tr. p. 66) that he felt he lined the switch properly, and that a mechanical error had occurred. However, although the Claimant knows the procedure for reporting mechanical error, (Tr. p. 58), there is no evidence that he reported mechanical error for the above coupling or that such error occurred.

The Organization also argues that it was "established that the 5-switch was not on the intended route, and that the 5-switch could not be thrown because the UP3114 was already occupying it." However, the 5-switch was indicated in the caption only because it was the last switch that could have prevented the collision. (Tr. p. 41). There is no doubt the collision occurred as a result of the Claimant's actions.

The Carrier has proven that the Claimant is guilty of the alleged misconduct. However, the Organization has established that the Carrier failed to name a witness in its Notice of Hearing in violation of the aforesaid agreement. A grievant must be given a meaningful opportunity to tell his side of the story before discipline is imposed. Christine D. VerPloeg, supra, 18. This would include, pursuant to the parties' rules, informing the Claimant who the Company expects to call as a witness at the hearing so he can prepare his case. This information is necessary, as pointed out by the Carrier, so that the Claimant has all the necessary "information to prepare his defense to pending charges." The Carrier's failure to provide this information mitigates otherwise proper discipline. We will, therefore, reduce the penalty from a five (5) day suspension to a three (3) day suspension, and order the Carrier to reimburse the Grievant for two (2) days pay lost as a result of the Carrier's action.

Based on the foregoing, it is our

AWARD

1. The grievance is sustained in part and denied in part. The five (5) day suspension without pay is modified to a three (3) day suspension without pay.
2. The Carrier is ordered to make the Claimant whole for two (2) days of suspension without pay the Claimant served in July, 2005.

Dated at Madison, Wisconsin this 23rd day of May, 2006

Dennis P. McGilligan
By Dennis P. McGilligan, Chairman & Neutral Member

I concur _____ Date _____ I dissent _____ Date _____

R. Henderson
Robert A. Henderson, for the Carrier

I concur _____ Date 6/6/06 I dissent _____ Date _____

Richard M. Draskovich
Richard M. Draskovich, for the Organization