

And NO. 32
Case 32

BEFORE PUBLIC LAW BOARD NO. 6942

UNITED TRANSPORTATION UNION

vs.

UNION PACIFIC RAILROAD

PETITIONER'S STATEMENT OF THE CLAIM

Claim of Trainman K.D. Smith, for removal of 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 lost 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. [The discipline was as the result of the formal investigation held on July 20, 2005, at Pocatello, Idaho, resulting in a Level 2 discipline administered (one day off with pay to develop an action plan) for failure to properly line switch at approximately 5:00 a.m. on June 15, 2005 at American Falls, Idaho, resulting in a derailment and damage to track, lading, and equipment in violation of Rule 8.2 (Position of Switch).

ISSUES

1. Failure to provide 10 days notice
2. Failure to provide adequate notice
3. Failure to call relevant witnesses
4. Failure to show substantial evidence.

POSITIONS

ORGANIZATION

The Carrier failed to give Claimant 10 days notice of the hearing. The Carrier has failed to demonstrate that the notice of hearing was received by the Claimant in 10 days. It also failed to provide adequate notice of the hearing when it miss-identified

the location of the alleged incident in the notice of hearing. Even if the error were typographical, the Carrier's refusal to correct the error when it was brought to its attention establishes its intentional disregard for factual accuracy. It is thereby a disregard for Claimant's guilt or innocence. The Carrier prevented Claimant from receiving a full and fair hearing when it failed to call pertinent witnesses to testify.

The Claimant failed to establish substantial evidence for the alleged violation. The Claimant conclusively testified that he had: "... examined the points, because the target was not visible." Thus, he knew the switch was lined for this movement. He stated they moved through this switch twice and, therefore, it could not have been misaligned. The accident could have occurred from other factors. The Carrier has failed to show otherwise.

Since the Carrier has failed to meet its burden of proof, the discipline assessed is unreasonable and arbitrary. It must be set aside and the Claimant made whole.

CARRIER

The Organization's procedural objections are without merit. Article VII, only requires that the notice be postmarked within ten days. The incident occurred June 15 and the notice was mailed June 23 as evidenced by the UPS tracking. The Organization's argued that the notice miss-identified the location. However, the transcript shows that there was no confusion about the location. There was no effect on Claimant's ability to defend himself. The Organization did not call witnesses. The Carrier produced sufficient witnesses to prove its case. There is no failure to call witnesses which failure violated Claimant's procedural rights. The organization has failed to explain how the witnesses it alleged were necessary could add anything relevant to the issues at hand. The Carrier produced circumstantial evidence sufficient to show what happened. The evidence establishes overwhelmingly that Claimant did not comply with rule 8.2. The discipline assessed against Claimant is justified due to the seriousness of the violation.

DISCUSSION

Claimant K.D. Smith was the Trainman on LIF39-14 while it was at General Mills, in American Falls, Idaho, on June 15, 2005, at about 5:00 a.m. when three grain cars derailed and near on a switch at that location. Senior Manager of Operations Steven M. Wilson learned of the incident and went to investigate. He saw the three cars derailed and on their side. The lading and switch were damaged. He removed Claimant from service pending investigation. He examined the switch and damage which occurred and concluded that the accident occurred because Claimant failed to properly align the switch. He assessed Level 2 discipline to Claimant for allegedly violating rule 8.2 (Position of Switch). Thereafter, a notice of investigation was delivered to UPS on June 23, 2005, but Claimant received it about 12 days after the incident. The notice improperly identified the incident as occurring at Milepost 238.5 on Track 02-753. The

S.M.O. Wilson was the sole Carrier witness called to testify at the investigation. Other facts are noted below.

1. Procedural Objections

a. Ten Day Notice

Article III provides that "[w]ithin ten (10) days of the time the appropriate officer knew or should have known of the alleged offense, the employee will be given written notice . . . " Article VIII, Section A states: "If a dispute arises concerning the timeliness of a notice or decision, the postmark on the envelope containing such document . . . to the employee shall be deemed to be the date of such notice"

The Organization raised this issue at the hearing, but did not address it in its submission. Accordingly, it has abandoned this issue.

In any event, the incident occurred on June 15, 2005, at 500 hours. The notice is dated June 24, 2005. The notice was sent on June 23, 2005, to Claimant by UPS Next Day Air. It was received by UPS on June 23, 2005, and was delivered on June 27 to the employee. The notice was also faxed on June 23, 2005, to the Organization. Pursuant to Article VIII, the date of receipt by UPS governs. That date was well within the 10 days and, accordingly, there is no violation of the agreement on this basis.

b. Identification of the Location

Article III provides that the ". . . the employee will be given written notice of the specific charges against him or her." The notice in this case incorrectly identified the track where the incident occurred. The error occurred largely because there had been a change in track numbers associated with various locations. A review of the record demonstrates that neither the Organization, nor the Claimant were misled by the error. Claimant was present when the derailment occurred and always knew about the location of the incident. The Organization accordingly had access to the knowledge where the incident occurred. They, therefore, had adequate notice and an opportunity to prepare for the hearing. There is no violation.

c. Missing Witnesses

The carrier called witnesses sufficient to establish its case. It did so by producing evidence of the factual circumstances which led to its conclusion. This was done through S.M.O. Wilson. It, therefore, did not need first-hand witnesses. It had no further obligation to call witnesses. No witnesses were called for whom the Organization did not receive notice. Thus, the Carrier did not violate Article 3 by identifying unnecessary witnesses. See, p 24

The Organization identified that there were others in the area. It failed to make any statement as to what testimony those witnesses might offer. It is not likely they

could have added significantly to the investigation because it is unlikely they had first-hand knowledge of the disputed facts with respect to throwing the switch or any other conceivable cause of the derailment.

The Organization was offered the opportunity to ask that witnesses be called and it did not make a request to so. Accordingly, there is no procedural due process violation with respect to the failure to call witnesses or provide notice of the names of witnesses.

2. Merits

As to the merits of the case, the Carrier has established that it had substantial evidence to support the level 2 discipline. Claimant's contentions are; 1 that he examined the points, and 2 that he had reversed through the switch twice previously without incident. These contentions are contradicted by the physical facts of scrape marks evidencing the facts that; 1) the switch had been run through; 2) scrape marks show it was Claimant's train that ran through the switch. If believed by the decider, this testimony irrefutably contradicts Claimant's testimony. The credibility judgment was for the decider to make and is supported by substantial evidence.

The penalty chosen by the Carrier is at a level authorized by the agreed-upon disciplinary policy. It is well supported by the serious nature of the circumstances. These include the fact that there had been a discussion with Claimant the night before about proper switch procedures and the amount of damage.

AWARD

The Claim filed by K.D. Smith is denied in its entirety.

This award will become final unless either party objects within fifteen (15) days of the date of this award in writing, with a copy to opposing party. The claims of both Claimants are denied in their entirety.

Dated this 19th day of June, 2006,


Stanley H. Michelstetter II,

Referee

I concur:

I dissent:

Richard Henderson
Carrier Member

Richard Henderson
Carrier Member

Robert Draskovich
Organization Member

Robert Draskovich
Organization Member