PUBLIC LAW BOARD NO. 6942

Case No. 38
Award No.

38

PARTIES TO DISPUTE: United Transportation Union

And

Union Pacific Railroad Company

STATEMENT OF CLAIM: Claim of Yardman C. V. Brasher for removal of a 5-day suspension and 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.

FINDINGS: Upon the whole record and all of the evidence, the Board finds as follows:
That the Carrier and Employees involved in this dispute are, respectively, Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the parties and subject matter involved.

This claim arises from discipline assessed against Claimant following a disciplinary investigation which was held on August 30, 2005. The caption of the charge against Claimant was as follows: "...to develop the facts and place responsibility, if any, in connection with the report that at approximately 0200 hours on August 13, 2005, while employed as Switchman on Train YCB72/12, you allegedly failed to comply with instructions by leaving your assignment without proper authority in the Council Bluffs Yards. Your actions indicate possible violation of Rules 1.13 and 1.15, among others of the General Code of Operating Rules as adopted and modified by Union Pacific."

Based upon evidence developed through testimony given at the investigation, Claimant was notified that he had been found to have violated General Operating Rules 1.13 and 1.15. For these violations, Claimant was assessed discipline Level 2 of the Carrier's Behavioral Modification Discipline Policy and a five day actual suspension by Carrier's Superintendent, John Rourke.

During the investigation and in the handling of the appeals to this claim on the property, the Organization made certain procedural objections: First, Claimant's Representative at the investigation, Local Union Chairman Mr. W. R. Price, Jr., objected to the notice of investigation which Claimant was given, taking the position that it was not timely. Second, Mr. Price objected to the contents of the caption of the investigation on the grounds that the caption misidentified the job on which Claimant was working at the time of the incident in question. In support of its position in regard to errors in the caption of an investigation calling for removal of discipline assessed, the Organization cites a previous instance in which discipline was removed from an Employee's record because of an error in the caption of the investigation. Last, Mr. Price objected because another crew member was not called as a witness at Claimant's investigation. The Organization cites two PLB Awards in support of its position that failure to call certain witnesses can result in discipline being overturned. The Board is required to determine whether any of these procedural objections have merit and are fatal to the investigation and require removal of discipline assessed against Claimant.

The Organization's first procedural objection was that the notice of investigation, which was sent by certified mail, was not timely because it was not received within ten days of the incident but, rather, was received on August 24, 2005, the 11th day following the incident which occurred on August 13, 2005. In support of this position, Mr. Price referred to the Memorandum of Agreement concerning assessment of discipline between the Parties to this dispute, specifically to the following language:

"ARTICLE III—NOTICE OF INVESTIGATION

A. Within 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 of the specific charges against him or her...."

Mr. Price correctly calculated that the date of receipt of the notice was the 11th day following the incident; however, the appropriate officer is charged with seeing that the notice is "given" within ten days of the alleged offense, not with insuring that it was received within ten days. The Parties to this dispute could have specified that receipt within ten days was mandatory or could have provided for the attachment of a penalty in the event that receipt did not occur within the specified time. They chose not to do either. The Memorandum Agreement, in another Article, Article VIII—Miscellaneous, specifies, inter alia, that, "If a dispute arises concerning the timeliness of a notice or decision, the postmark on the envelope containing such document...shall be deemed to be the date of such notice or decision." The postmarked envelope would have been in the custody of Claimant since it was signed-for at his place of residence. Since it was not introduced into evidence by Claimant at the investigation, the only evidence of when the notice of investigation was sent (given) to Claimant is the date on the notice itself, i.e., August 22, 2005.

That date would not seem to be incongruent with Claimant's receiving of the mailed notice on August 24, 2005.

The Board, in consideration of the language adopted by the Parties in ARTICLE III, A, above and the admittedly limited evidence available, concludes that the notice of investigation was given to Claimant in a timely manner and that no procedural violation occurred.

The Organization's second procedural objection was that the caption and subsequent notice of discipline misidentified the job which Claimant was working on on the date in question in this dispute, i.e., August 13, 2005 as CB72-12 rather than CB31-12 to which Claimant had initially been assigned. Claimant's representative made reference to two documents which were attached as Exhibits to the transcript of Claimant's investigation. These documents, called "JBLs" show the employees assigned to specifically identified jobs on the night in question in this dispute. Examination of one JBL indeed shows that Claimant and another crew member, Mr. S. N. Hansen, were assigned to job CB31-12 which went to work at 11:30 pm on the night of August 12, 2005, and was to complete its work day at 8:00 am on August 13th. The JBL identifies the engineer for this job as being named Behrens. Claimant acknowledged that he felt that Mr. Hansen was not sufficiently qualified to perform the duties assigned to job CB-31 and expressed his concern to yard managers. As a result, the officers on duty allowed Claimant and Mr. Hansen to switch their assignment so that they would be working with Engineer K. W. Kinney. Mr. Kinney, the second JBL shows, was assigned to work job CB72-12 and, according to the unrebutted testimony of Carrier's witness H. E. Lyons, it was the work of job CB72-12 that Claimant was performing on the night in question.

The Organization contends in its submission hereto that reference to Claimant's job as CB72 vis-à-vis CB31 shows a "disregard for factual accuracy and for the Claimant's guilt or innocence in this matter." The Board disagrees because Claimant acknowledged that the duties assigned to job CB31 were not, at his request, the duties which he and Mr. Hansen were performing that night. Carrier witness Lyons testified that,

"Engineers remained on their assigned jobs. We instructed Mr. Brasher, MR. Hansen to do YCB72's work."

YCB72 was, in fact, the job to which Engineer Kinney had been initially assigned.

The notice of investigation caption states that when the incident in question occurred, Claimant was "employed as Switchman on Train YCB72/12." Claimant was "employed on" that job because he had requested a change of job duties from those assigned to YCB31-12 and it was the duties of that job, YCB72-12, which Claimant was ultimately, at his request, assigned to perform on August12 and 13. The notice of discipline uses the same language as that used in the notice of investigation.

The Board finds that there was no misidentification in either the notice of investigation or the notice of investigation. The description of Claimant's duties and in what capacity he was employed on the night of August12/13 was accurate. Claimant's testimony disclosed that he was well aware of the events that resulted in the investigation and evidenced no confusion. No procedural violation occurred.

The Organization's third procedural objection was that Carrier violated the controlling agreement by not calling Helper S. N. Hansen as a witness in the investigation.

Carrier Witness Lyons testified that Helper Hansen received permission to go off duty and went home about 2:00 am on the morning of August 13 and that Claimant left his job and went home "approximately 4:00 am" that morning. Claimant testified that Mr. Hansen left about 3:45 am and confirmed that he went home about 4:00 am that morning.
Accordingly, Mr. Hansen had already gone home at the time when Claimant made his decision to leave the job. It appears to the Board that Mr. Hansen could not have had any knowledge of the factors which caused Claimant to leave his job later in the morning and that Carrier's officials could reasonably conclude that Mr. Hansen's appearance as a witness would add nothing relevant to the investigation. If, nevertheless, Claimant's Representative felt that Mr. Hansen should have been called as a witness, the Controlling Agreement provided him with the means to see to it that Mr. Hansen was called, specifically ARTICLE VIII, C of the MEMORANDUM OF AGREEMENT of March 25, 2005 between the parties hereto. The relevant provision is, in pertinent part, as follows:

"The employee being investigated or the representative may request the Carrier to direct a witness to attend an investigation, provided sufficient advance notice is given as well as a description of the testimony the witness would be expected to provide."

The notice of investigation showed the name of the only witnesses to be called: Mr. Hosea Lyons, as Charging Officer, and Mr. Kevin Kinney as "Company Witness". Mr Hansen was not named as a potential witness. Neither Claimant nor his Representative took any of the steps set forth in ARTICLE VIII, C, quoted above, to have Carrier call Mr. Hansen as a witness; nor did Claimant or his Representative choose to call Mr. Hansen as an Employee's witness, a path that was also open to them under ARTICLE VII, C.

The Board finds that Carrier officials could reasonably conclude that Mr. Hansen would have no relevant testimony to offer at the investigation, therefore, need not be called as a witness; that Claimant and his Representative could have taken steps to have Mr. Hansen called as a witness by Carrier or could, themselves, have called Mr. Hansen as a witness but chose to do neither; that Claimant and his Representative could and did examine and question the individuals who were called

as witnesses; and that the Awards cited by the Organization in support of its position in this matter are distinguishable from the case at hand because there is no evidence that an Agreement provision such as ARTICLE VIII, C was available to the parties to those disputes and no evidence that the individuals not called as witnesses in those cases were similarly situated to Mr. Hansen, that is, off the job and home or on the way to his home at the time that the incident in question occurred. Accordingly, this Board finds that Carrier's failure to call Mr. Hansen as a witness did not constitute a procedural violation of the Governing Agreement.

Having found no procedural violations, the Board now must turn to the question of whether Claimant was proven by substantial evidence to have violated any of Carrier's Operating or Safety rules.

Claimant was notified that his conduct during the morning of August 13 was possibly in violation of Carrier's General Code of Operating Rules 1.13 and 1.15. These rules were entered into the transcript in their entirety as Exhibits Nos. 5 and 6. Rule 1.13 is as follows:

"Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties"

Rule 1.15 is as follows (in pertinent part):

"Employees must not leave their assignment...without proper authority"

Claimant testified that he was assigned to the duties of job CB72-12 after he had asked to have duties other than those of the job to which he had initially been assigned, job CB31-12. Claimant also testified that, shortly after another crew member, Helper Hansen, was given permission to leave the job, he (Claimant) also left the job but had not sought or been given permission by any supervisor to absent himself.

Claimant offered a number of reasons for his leaving his job without permission but, essentially, these reasons involved assumptions that a replacement would not be called for his Helper on his current job and that the authorized departure of his helper because of illness constituted his authority to leave the job.

Claimant testified that he was acquainted with Rules 1.13 and 1.15 and he also testified as follows:

"Q. Did a Manager tell you that you could leave and go home?

A. No.

Q. Do you understand that the rule states that you cannot leave unless given permission?

A. I understand-

Q. Okay

A.-the rule, yes "

In this case the Board finds that an official reviewing the transcript and the rules cited therein could reasonably conclude that Rule 1.13 established that Claimant's duties, that is, ultimately, the duties of job CB72-12, were assigned to him by Carrier's yard officials and it was to these officials to whom he was responsible for completion of the duties assigned. Rule 1.15, the Board finds, could reasonably be found to absolutely prohibit Claimant's leaving his job and failing to perform the duties which he was assigned without the permission of one of those same yard officials.

Claimant's testimony provided all of the evidence which a reviewing officer would need to find that Claimant, in leaving his job without permission of Company yard officials, violated Rules 1.13 and 1.15.

The Organization has taken the position that Claimant was not proven to be guilty of the charged violations of Rules 1.13 and 1.15, therefore, should not have received any discipline. The Organization has not taken the position that, if Claimant was properly found to have violated Rules 1.13 and 1.15, the discipline assessed was, nevertheless, inappropriate under or inconsistent with Carrier's discipline policy or in some way discriminatory. Accordingly, the Board is compelled to conclude that the discipline assessed was not, on its face, excessive. Hence the discipline assessed will be allowed to stand.

AWARD: The claim is denied.

David J. Rutkowski, Neutral Member

Robert A. Henderson, Carrier Member

Richard M. Draskovich, Employee Member