

**PUBLIC LAW BOARD NO. 7633**

Case No.: 13/Award No. 13  
System File No.: UP312WF12/1571898  
Claimant: Stephone S. Wells, Sr.

UNION PACIFIC RAILWAY COMPANY )  
 )  
 -and- )  
 )  
 BROTHERHOOD OF MAINTENANCE )  
 OF WAY EMPLOYEES DIVISION )

**Organization's Statement of Claim:**

1. The discipline (Level 3 – field training) imposed on Mr. S. Wells, Sr. by letter dated August 1, 2012 for alleged violation of Rules 70.3 (Job Briefing), 1.1.2 (Alert and Attentive) and 1.19 (Care of Property) in connection with allegations that he failed to have a job briefing with the assistant foreman and foreman before making a reverse move with his machine striking the door of a backhoe parked near the tracks was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP312WF12/1571989).
2. As a consequence of the violation referred to in Part 1 above, the Carrier must expunge these charges from the Claimant's record and compensate him for all wage and benefit loss suffered as a result of the Carrier's improper discipline.

### Facts:

By letter dated July 6, 2012, the Carrier directed the Claimant to appear on July 12, 2012 for an “investigation and hearing on charges to develop the facts and place responsibility, if any, that while employed as Machine Operator on Gang 9199, at Englewood Yard, Terminal Subdivision, on May 30, 2012, you allegedly failed to have a job briefing with the Assistant Foreman and Foreman, before making a reverse move with your machine, the TRIP 0306, causing it to strike the door of a backhoe parked near the tracks.”

The Notice also indicated that if substantiated, the allegations would result in violations of Rule 70.3 Job Briefing, Rule 1.1.2 Alert and Attentive and Rule 1.19 Care of Property.

**Carrier Position:**

The Board must not substitute its judgment for that of the Carrier, but simply determine if the charges against the Claimant have been proven by substantial evidence. Substantial evidence shows that the claimant failed to have a job briefing with the backhoe operator. Consequently, the boom of the TKO machine operated by the Claimant hit the backhoe door. The earlier job briefing with the Assistant Foreman did not suffice because it did not involve a final assessment of the surroundings when the Claimant was to make his reverse move.

The investigation was fair and impartial and the Claimant's due process rights were observed. There is no merit to the Organization's contention that holding a formal investigation violated the Agreement. Although the Organization objected to statements from two witnesses whom the Carrier did not call, the Organization could have called these individuals as their witnesses. The Level 3 UPGRADE discipline was not arbitrary and capricious and did not violate the Agreement.

**Organization Position:**

The investigation was not fair and impartial because written statements from the Assistant Foreman and the backhoe operator deprived the Organization of the opportunity to cross-examine these witnesses when the Carrier refused to call them and because the Charging Officer had no direct knowledge of the accident. It was the Carrier's responsibility to develop the facts—a position supported by NRAB and P.L.B. decisions.

The Carrier did not meet its burden of proof and has, instead, based its case on assumptions. The Claimant complied with the job briefing rule when he had a job briefing with the Assistant Foreman. The Claimant had walked around his machine and saw no open backhoe door, as it had been closed by the operator. The Claimant's testimony remains unrebutted in the absence of additional witnesses.

Rules 1.1.2 and 1.19 were not placed in evidence during the investigation and there was no evidence showing a violation of these "catch-all" rules. While the discipline was arbitrary and capricious, if the Board finds a violation, mitigating circumstances, including the Claimant's 21 plus years of service, should be considered.

**Findings:**

The Board essentially has no choice but to find that the investigation violated the Rule 22(a) fair and impartial requirement. The Carrier must bear the burden of proving the charge against the Claimant by substantial evidence. Substantial evidence requires more than the testimony of a Charging Officer with no first-hand knowledge of the accident and hearsay written statements from the two witnesses with possible first-hand knowledge. While written statements may be acceptable in some circumstances, they are no substitute for testimony and the right to cross examine in this case.

The Board notes that this is not the first time that the Carrier has fallen short of the Rule 22(a) requirement. Referee William Miller, writing for the Board in P.L.B. No. 6402, Award No. 171 said:

The Carrier had a responsibility to call all witnesses that had relevant information. If Woodward and Cocrell had been called as witnesses both could have clarified the events...Absent the testimony of Mechanic Cocrell who helped secure the machine for towing we have the un-rebutted testimony of the Claimant that the machine was properly prepared for towing. Carrier's failure to call both of the aforementioned employees as material witnesses, especially Cocrell, not only denied the Claimant his right to a "fair and impartial" Hearing (sic) it substantiated the fact that the Carrier did not meet its burden of proof (See Fourth Division Award No. 4700).

With the substitution of the names of the Assistant Foreman and the backhoe operator for those of Woodward and Cocrell in the quote above, the quote could have been written by this Board about this case.

Because the investigation was not fair and impartial and because the Claimant's due process rights were violated, the Board finds no further need for comment and analysis.

**Award:**

Claim sustained.

**Order:**

The Board, after consideration of the dispute identified above, hereby orders that the Carrier should remove the charge letter from all records and should compensate the Claimant for any loss of time, vacation rights, seniority and any other contractual rights due. The Carrier is to make the award effective on or before thirty (30) days after the award is adopted.



Kevin D. Evanski, Organization Member



Katherine N. Novak, Carrier Member

A handwritten signature in black ink, appearing to read 'I. B. Helburn', followed by a long horizontal line extending to the right.

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I. B. Helburn, Neutral Referee

Austin, Texas  
March 10, 2014