

PUBLIC LAW BOARD NO. 6040

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
(Eastern District)

STATEMENT OF CLAIM: Claim of Engineer R. M. Torres of North Platte, Nebraska, for all pay for all time lost and all entries of this discipline (UPGRADE Level 4) to be removed from his personal record.

OPINION OF BOARD: On November 3, 1997 Engineer R. M. Torres ("Claimant") was working as Engineer on the CCDSA-03, an eastbound train in Through Freight Service between South Morrill, Nebraska and North Platte, Nebraska (home terminal). At approximately 1630 hours, at MP 159 in the South Morrill Yard, the Claimant fell from the engine platform to the ground while returning to the lead unit (UP6876) after performing cab test and inspection on the second unit (UP6827). Conductor D. D. Easton reported that when he returned to the locomotive units after releasing brakes, he found Claimant supine on the ground with an injury to his right knee.

Claimant was taken to a local hospital emergency room where he was treated and given a sedative for reported severe pain in his right knee. [The record indicates that he eventually underwent surgery in December 1997 and January 1998 for this injury.] In the meantime, MTO D. I. Burlinson

made arrangements for R. J. Rairigh to accompany Claimant at the hospital while remained at the Yard to interview the Conductor and take several photographs of the injury scene. Therafter, MTO Burlinson went to the hospital where he interviewed Claimant in the presence of MTO Rairigh and obtained his signature on a Personal Injury Report, which was witnessed and signed by both MTO Burlinson and MTO Rairigh.

Three days later MTO Burlinson charged that Claimant "allegedly failed to maintain a secure hand hold when on the engine platform, resulting in his allegedly falling from the engine platform to the ground, causing injury to himself". Following several agreed-upon postponements, a hearing was held on January 7, 1998 at North Platte, Nebraska in which MTO R. J. Rairigh was the Carrier-designated Hearing Officer. Claimant's representative, BLE Local Chairman Lamberty, made timely and repeated objections to Mr. Rairigh serving as Hearing Officer in this case and requested that he recuse himself, due to his prior personal involvement in the interviews with Claimant at the hospital. After observing that he had not been the "principal investigator" and discounting his investigatory role as "peripheral", Mr. Rairigh declined to recuse himself and continued to serve as the Hearing Officer.

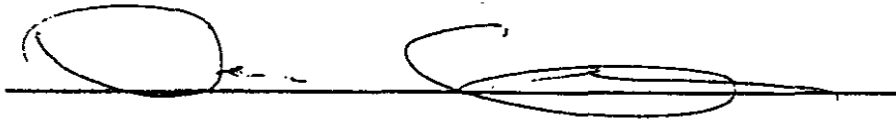
Based upon the transcribed record developed by Hearing Officer Rairigh, Superintendent Transportation Services M. R. Sanders found Claimant guilty of violating Rules 81.6 - Maintain a Secure Hand Hold; 1.1.2 - Alert and Attentive and 70.1 - Safety Responsibilities. Because Claimant was already at Level 3, the UPGRADE Level 1 discipline assessed was upgraded to a Level 4 (30 day suspension without pay), which Claimant served commencing on January 14, 1998.

It is a fundamental principle that, in addition to a valid substantive basis, disciplinary actions under UPGRADE must conform to fundamental standards of procedural fairness. In any case where "cause" is contractually required for discipline, the Arbitrator's inquiry is not limited to whether the Grievant committed the offense of which he is accused. In arbitral review of disciplinary action under the UPGRADE policy and the System Discipline Rule, the case must also be considered in the context of whether the Company acted justly and fairly in compiling the evidentiary record which leads to its conclusion that the employee is culpable of misconduct.

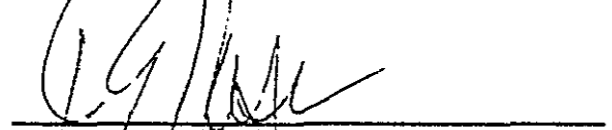
In our considered judgement, allowing an individual who participated in the initial investigation which led to charges of alleged misconduct to serve as the Hearing Officer in the formal investigation into that alleged misconduct, despite timely objections and requests for recusal by the representative of the accused employee, is a fatal flaw which taints the investigative record and requires voiding of the disciplinary action based on that record.

AWARD

- 1) Claim sustained.
- 2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.

A handwritten signature in dark ink, appearing to read 'Dana Eischen', written over a horizontal line.

Dana Edward Eischen, Chairman
Dated at Spencer, New York on January 30, 2000

A handwritten signature in dark ink, appearing to read 'D. J. Peterson', written over a horizontal line.
Union MemberA handwritten signature in dark ink, appearing to read 'J. G. [unclear]', written over a horizontal line.
Company Member