

PUBLIC LAW BOARD NO. 6942

UNITED TRANSPORTATION UNION

and

NMB No. 3
AWARD No. 3

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM

Cheyenne Conductor R.L. Haynes and Brakeman B.T. Domman ("Claimants") seek removal of a 5 day suspension and Level 2 discipline under the Behavior Modification Policy from their personal records plus pay for all lost time and benefits. They raise procedural and substantive issues.

FINDINGS

After review of the entire record, the Board finds the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over this dispute; and, the parties were given due and proper notice of the hearing.

About 12:30 a.m. on August 10, 2004, Claimants worked train WCYLMB-9 at the Laramie, Wyoming Yard when its Locomotive UP 9625 derailed at the #2 switch causing property damage. On August 11, the Carrier wrote Claimants that the discipline process would continue concerning "the incident that occurred August 10, 2004" and requested a waiver or election of hearing. An enclosed waiver form described the incident and its time but did not specify its date. Claimants were alleged to have failed to properly line switch #2 and subsequently to have run through the switch, then reversing through the switch causing derailment and damage.

On August 17, the Carrier scheduled a formal investigation for 10:00 a.m. on August 20 at the MTO Conference Room, 105 W. 15, Cheyenne, Wyoming. The letter described the allegations in identical words as the August 11 proposed waiver except it called Haynes a Brakeman.

On August 18, the Organization's Local Chairmen representing Claimants requested a hearing postponement to some date after September 6 to have more time to develop facts. As a result, on August 24, the Carrier rescheduled the hearing for September 7 at the same time and place. Meanwhile, on August 23, the Local Chairmen wrote the Carrier a letter the Carrier received August 26. It described their understanding of the facts, stated inexperience and lack of training in the Cheyenne area led to the mishap and suggested the matter be resolved with a mutual consent conference and development of a peer training program.

On September 3, the Organization sought another hearing extension after September 21 to benefit from the anticipated response to its August 23 letter. Also on September 3, the Carrier wrote a reply the Organization received September 7. It said a similar peer training program currently was being evaluated and denied a mutual consent conference. On September 9, the hearing was reset for September 21 at the original time and location.

At 10:00 a.m. on September 21, Claimants and their Organization representatives appeared at the MTO Conference Room at 105 W. 15. About 10 minutes later, they were directed to another location, 1800 Westland Road, a few blocks away, where the Carrier was ready for the hearing.

The hearing began at 10:30 a.m. The Organization objected to the location change without prior notice, citing Rule 84's fourth paragraph. The Organization also objected that the September 21 date was before October 5, the first date requested in its September 3 correspondence. The Hearing Officer offered to recess until after October 4; but, the Organization declined. The Organization further objected to (1) the absence of a date for the incident in the proposed waiver enclosed in the Carrier's August 11 charging letter; and (2) reference to Haynes in certain correspondence as a Brakeman rather than a Conductor. Objections were noted and the investigation proceeded. On September 30, the Carrier found Claimants guilty of the charges against them and assessed the discipline now before this Board.

No written agreement speaks directly to the Organization's procedural objections. Rule 84 deals with non-appearance by the Claimant and/or Organization. The lack of express language is not necessarily fatal. But, in the absence of specific language or convincing evidence indicating the parties intended a contrary result, there must be a material lack of fundamental due process that unfairly limits an employee's right to a fair hearing and/or full consideration of relevant circumstances before a procedural misstep nullifies an otherwise adequate procedure. A technical mistake controls only when the parties say it does or when, under the particular facts, it might materially impact the outcome.

On this particular record, Claimants' procedural arguments raise no serious concerns. The minor, essentially trivial, blips did not change the relevant factual landscape, modify the core charges, disadvantage Claimants' ability to participate or otherwise diminish the fairness of their hearing.

Regarding the merits, neither party disputed there had been a run through the #2 switch prior to hearing. The issue was whether substantial evidence showed Claimants responsible. To the extent questions arose at the hearing about the existence of the run through, the Carrier's evidence was more than adequate. It

reflects strong probability of Claimants' fault. Indeed, the Organization's August 23 letter says it had been briefed on the facts and told by a sympathetic, long-experienced Engineer involved immediately before and after the incident that "the only defense" was "inexperience and lack of training." In other words, it conceded Claimants caused the accident but urged they be excused because they had no reason to know better.

Although in an unfamiliar yard, nothing indicates conditions were so unique or unusual that Claimants could not have accomplished routine duties with deliberate and careful application of skills and procedures exercised at other locations. The notion they were improperly trained also is inconsistent with their ultimate contention that they followed all proper procedures.

AWARD

Claim denied.



Michael D. Gordon, Neutral Chairman

Robert A. Henderson, Carrier Member

Richard M. Draskovich, Organization Member

AWARD DATE: 6-6-06