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| Board Type | Public Law Board |
| Board Number | 6942 |
| Award/Case Number | 11 |
| Carrier | Union Pacific Railroad Company |
| Union | United Transportation Union |
| Date | 30 May 2006 |

Statement of Claim:

Claim of Yardman T. D. Gragg for removal of a 5-day suspension and a 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.

Carrier's Position:

The Carrier maintains that the Claimant, Yardman T. D. Gragg, was assessed a Level 2 discipline for violation Rule 7.1 of the General Code of Operating Rules (GCOP). The rule reads as follows:

"7.1: Switching Safely and Efficiently

"While switching, employees must work safely and efficiently and avoid damage to content of cars, equipment, structures, or other property.

"Do not leave cars or engines standing where they will foul equipment on adjacent tracks or cause injury to employees riding on the side of a car or engine."

The Carrier maintains that the Claimant was disciplined "based upon information brought forth during the investigation;" and, "Viewing the record as a whole, Claimant was accorded substantial due process." The carrier further maintains, "Carrier sustained its burden of providing substantial evidence of Claimant's guilt."

Organization's Position:

In its submission the Organization maintains, "...the Carrier prevented the Claimant from receiving a fair and impartial investigation when prior to the

proceeding, the hearing officer had conversations concerning this matter with both Company witnesses and even gave MTO Centore advice on how to handle the investigation." Therefore, the Organization asks that the discipline assessed the Claimant be set aside.

The Organization further claims, "Notwithstanding the forgoing, the Carrier failed to establish that the Claimant violated Rule 7.1. The Claimant testified that this was his first time working the west hump, and to his knowledge, he did not hump in trim. Contributing to this incident was the claimant's inexperience, which certainly should have been taken into account when the decision to assess discipline was made."

The Organization claims that the Carrier did not produce substantial evidence of the violation of Rule 7.1 to support its discipline of the Claimant and that any discipline assessed must be considered arbitrary and excessive and that it must be set aside.

Findings and Opinion:

Public Law Board No. 6942, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing thereon.

The record is clear that there was substantial damage to three cars totaling approximately \$25,000 that the Claimant humped around 3:35 to 3:40 a.m. on January 24, 2005. The testimony and reports presented by Mr. R.J. Mortiz, Manager of Signal Maintenance was extensive, clear, and convincing that the cars were damaged because they were humped while the operating system was in "trim mode." Without dispute, the Claimant was the Hump Foreman and as such was the only person who had the ability to put the system into trim mode. The computer system cannot automatically go into trim mode and no other person's computer would allow him to put the system into trim mode.

There is substantial evidence to support that the Claimant violated GCOR Rule 7.1. However, that in and of itself does not establish that the discipline was appropriate in this case. There is still the question of mitigation because the Claimant lacked experience. According to the testimony, it was the first time he had humped at the west hump, and he had been qualified as a foreman for less than three (3) weeks. The Board is convinced that the Claimant's lack of experience was a contributing factor in the circumstances that led to the violation of GCOR Rule 7.1. Nonetheless, the Claimant's relative lack of actual experience does not sufficiently mitigate against the

damage caused by his failure to work safely and efficiently and avoid damage to content of cars, equipment, structures, or other property.

Additionally, the fairness of the hearing process remains in question. Ironically, the Carrier's Charging Officer, MYO Terri Centore, had been with the Company only a few months, and it is her lack of experience which is a central factor in whether the hearing was fair and impartial. The testimony of Ms. Centore is clear that she conferred with SMTD Dirk Hardy (her team leader) to find out how to conduct her investigation and what procedures to follow. This would not necessarily be a problem except that Mr. Hardy also served as the Hearing Officer for the Claimant's case.

Investigations and hearings on site where the Carrier's administrative employees serve as hearing officer are by nature very close to the line when it comes to fair and impartial hearings. Often the hearing officer has prior knowledge of some of the events because of his immediate proximity to the events which result in investigations and hearings. It is impossible to avoid. It is for such reasons that board and courts have held that hearings do not have to follow the same standards as courts of law in the conduct of hearings and the handling of evidence and witnesses. The test is one of fundamental due process and fairness to the accused.

From 1991 in PLB 4689, Award 28, Case No. 35, Raymond R. Hawkins, Chairman and Neutral Member wrote, *"This Board recognizes that it is a difficult task for an officer of the Carrier to be totally impartial. However, the role of the hearing officer should be neither interested in proving the charge nor disproving it. He should have as his objective the development of the truth and to follow the procedures set forth in the collective bargaining agreement."* In that particular case the Board decided *"...the hearing officer's actions exceeded the boundaries of fairness as required by the agreement, much to the prejudice of Claimant."* Nonetheless, the Board established a good standard to follow in judging the fairness and impartiality of the hearing officer.

From the transcript in the instant case, the hearing officer appears to try to be fair and impartial. However, after reading the submission several times, it simply does not *"pass the smell test"* that the hearing was completely fair and impartial. It is clear from Ms. Centore's testimony that Mr. Hardy guided her in the development of her case against the Claimant. Mr. Hardy tried to be fair in the hearing but even led Ms. Centore in his questions to try to elicit from her what he already knew to be the evidence. It is impossible to tell the extent the previous assistance subconsciously weighed on Mr. Hardy in his role of Hearing Officer. This is akin to a teacher/coach tutoring a student. The teacher/coach is not going to tutor the student to fail—but rather to win. Did the hearing officer help build a winning case? The question remains, did he have an interest in proving the charge? The Board does not wish to

impugn the integrity of Mr. Hardy. He may have bent over backwards to be fair to the Claimant; however, the circumstances put Mr. Hardy in an unacceptably awkward position. The benefit of the doubt about the fairness and impartiality of the hearing must always go to the Claimant. Just as the inexperience of the Claimant does not sufficiently mitigate against the mistakes he made, the inexperience of the Company's Charging Officer does not sufficiently mitigate against the mistakes that the Carrier made in the investigation and hearing process. The Carrier could have used a different management official at the hearing and removed the question of impartiality.

Regardless of who served as the hearing officer, the Board is convinced that the testimony and information supplied by Mr. Mortiz would have been used in the hearing, and the Board would have found substantial evidence that the Claimant violated Rule 7.1.

Decision:

The Board finds that the Carrier met its evidentiary burden of proving, by substantial evidence that the Claimant violated Rule 7.1 of the General Code of Operating Rules (GCOP).

The Board additionally finds that the Carrier had a substantial procedural problem in the investigation and hearing process.

Award:

The appeal of the Claimant, Yardman T. D. Gragg is hereby **partially sustained**.

For Yardman T. D. Gragg:

The Carrier will remove the 5-day suspension and a Level 2 discipline from his personal record with the exception explained below. It will 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.

For the Carrier:

To ensure safe and efficient operation, the Carrier may (at its will) retain the record of the discipline in the Claimant's personnel record for a period of up to two (2) years from the date of the incident if there are no subsequent rule violations. Such record may be used in any subsequent disciplinary

procedures against the Claimant for rules violations during the two (2) year period [and thereafter if additional violations occur during the two (2) years] and may be considered in the appropriate level of discipline to exercise if subsequent violations occur. At the end of the two (2) year period, the record will be expunged in no subsequent rule violations occur.



Brady Gadberry
Chairman and Neutral Member



R. A. Henderson
Carrier Member

Richard M. Draskovich
Employee Member