

Board Type	Public Law Board
Board Number	6942
Award/Case Number	12
Carrier	Union Pacific Railroad Company
Union	United Transportation Union
Date	30 May 2006

Statement of Claim:

Claim of Conductor C.S. Page 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, Conductor C.S. Page, violated General Code of Operating Rules (GCOR) 32.2 – Releasing Hand Brakes. Specifically, the Claimant was assessed Level 2 discipline [a five (5) day suspension] for his failure to release the hand brake on a tank car resulted in tread build-up and the derailment of the car. The Carrier avows that the investigation and hearing were conducted in a manner providing the Claimant substantial procedural due process and that despite the claim of the Organization, there were no fatal procedural defects.

Organization's Position:

The organization maintains that the Carrier prevented the Claimant from receiving a fair and impartial investigation in that the Hearing Officer and the Sr. Manager of Terminal Operations "collaborated prior to the investigation." Getting past this threshold issue, the Organization further contends that there was not substantial evidence produced for the Carrier to meet its burden of proof and that the discipline must be reversed.

Findings and Opinion:

The Board, 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.

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. In this specific instance, the hearing officer is the Manager of Terminal Operations and the chief witness is the Senior Manager of Terminal Operations. It stretches credibility to believe that there was not some discussion of the incident before the case came to the formal investigation and hearing. 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 real 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, Hearing Officer R. W. Kirby appears to meet the standard prescribed by that Public Law Board. The Organization asserts that the Hearing Officer and the Sr. Manager of Terminal Operations "collaborated prior to the investigation." Based on the record and the information available to this Board, the actual conduct of the hearing does not show any predisposition by the Hearing Officer egregious enough to set aside his decision.

Moving past this threshold issue, the Organization maintains that the Carrier did not produce substantial evidence to meet its burden of proof on the charge and that the discipline must be reversed.

The testimony from both parties agrees that train (MRVNP-8) on January 11, 2005, on which the Claimant was the conductor, had an "undesirable emergency" at approximately MP530. With the train stopped at approximately MP 530, the Claimant set the hand brakes on the first 18 cars of the 85-car train. In preparing the train to resume, the Claimant had to release the hand brakes on the cars. At issue is whether or not the Claimant

released the hand brake on the tenth car (NCTX23001) thereby violating General Code of Operating Rules (GCOR) 32.2 – Releasing Hand Brakes.

The testimony of the Claimant is clear that he released the hand brake. He stated, "I climbed up on each car and used the hand release levers on most of them, except for the tank car that didn't have a hand release lever on it. And I spun it in the reverse direction to get it to release." He further indicated that he kicked the chain to make sure it loosened.

When the train stopped at Tower A on the Laramie Subdivision waiting for a light to proceed, it was discovered that the abovementioned car was derailed. The testimony of Mr. Rick Helfrich (SMT), Mr. Bob Lockman (Mechanical Manager), and Mr. Jerry Schlotthauer (Derrick Car Forman) all state that they personally saw that the hand brake of the car was set when the car was inspected at point that the derailment was discovered. The testimony of Mr. Helfrich states that Mr. Burt Wilson (MYO) got on the car and "applied and re-applied" the hand brake and that everything worked properly.

The organization states that the car passed over two hot box detectors at approximately MP 527 and MP 517 after the train had stopped at MP 530 and neither detector picked-up any high reading. The Carrier stated that the detectors were designed to pick-up hot axles instead of hot wheels. (The point of the derailment was 511.17.) While Mr. Helfrich stated under examination that he had seen trains stopped for hand brakes by that type of scanner, the Board is not convinced that the scanner would always or automatically pick-up hot wheels just because there had been instances where hot wheels had been picked-up even though the scanners were not designed to do that.

The testimony of the Carrier's witnesses made the case that because the hand brake had not been released; the wheel slid down the track. Since the car was empty it was able to slide more easily than if had been loaded. However, tread build-up caused by the wheel not turning eventually caused the car to derail.

At the time of the hearing the car had not been repaired, and it was still sitting on the rip track as a bad order car. It is the contention of the Organization that since the car had not been repaired and tested, that it was not possible to determine if the slack adjuster might cause the hand brake to tighten when moved. As such, the Organization made the point in its closing argument in the hearing that the Carrier is assuming that the brake was tight because the Claimant failed to release it. The implication was that there could be an alternative explanation for the cause of the derailment—that the hand brake might tighten because of a problem with the slack adjuster.

Assessing credibility is difficult even when there is personal testimony given in the presence of a hearing officer or those given the responsibility of weighing evidence. When the Board assesses the record and weighs evidence, it is considerably more difficult to establish credibility. In this case the Board relied heavily on the testimony of Mr. Helfrich and Mr. Schlotthauer. Mr. Helfrich stated that Mr. Burt Wilson got on the car and "applied and re-applied" the hand brake and that everything worked properly. Mr. Schlotthauer's testimony about the inspection of the car was convincing. Mr. Wilson and Mr. Schlotthauer did not have had a vested interest in the inspections.

From the whole record and the evidence presented, the Board finds more credibility in the arguments of the Carrier and substantial evidence that the Claimant failed to release the hand brake on car NCTX23001 which subsequently led to its derailment.

Decision:

The Board finds that the Carrier met its evidentiary burden of proving, by substantial evidence that the Claimant, Conductor C.S. Page, violated General Code of Operating Rules (GCOR) 32.2 – Releasing Hand Brakes.

Award:

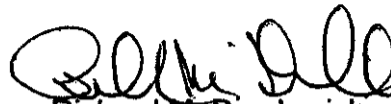
The appeal is denied.



Brady Gadberry
Chairman and Neutral Member



R. A. Henderson
Carrier Member



Richard M. Draskovich
Employee Member