

PUBLIC LAW BOARD NO. 6942

**Case No. 40
Award No. 40**

PARTIES TO DISPUTE: United Transportation Union

And

Union Pacific Railroad Company

STATEMENT OF CLAIM: Claim of Conductor W. J. Crow for removal of a 5-day suspension and 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.

FINDINGS: Upon the whole record and all of the evidence, the Board finds as follows: That the Carrier and Employees involved in this dispute are, respectively, Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the parties and subject matter involved.

This claim arose from discipline assessed against Claimant following a formal disciplinary investigation which was held on September 8, 2005, "...to develop the facts and determine your responsibility, if any, with the report that, while working as an(sic) crewmember on the GSSHST-22 on August 24th, 2005 at approximately 0555 hours in the vicinity of MP 511.25 on the Laramie subdivision, you allegedly failed to have a copy of subdivision General Order number 22 in your possession to present upon request of Manager during FTX Testing. You have been deemed 'habitual in violation of rules' as of March 2005, therefore you are being charged at a Conference Level."

Based upon evidence developed and testimony given at the investigation, Claimant was notified that he had been found to have violated Rule 1.3.2 of Carrier's General Code of Operating Rules and System Special Instructions to the same effect. For these violations, Claimant was assessed Level 2 (Conference) of Carrier's Behavior Modification Discipline Policy and a five day actual suspension by Carrier's General Superintendent, Joseph Whalen.

Claimant was given timely notice of the investigation. The notice advised Claimant of the subject matter of the investigation and of his right to have representation, to question witnesses and to present his own witnesses. Claimant chose to be

represented by Mr. P. G. Wade, Local Chairman, UTU. Mr. Wade questioned Claimant and the single Carrier witness, Manager, Operating Practices, Mr. M. R. Tucker at great length. Claimant was offered the opportunity to question Mr. Tucker but chose not to do so. Claimant was permitted to enter into the record such testimony as he desired. Following the investigation, the Notice of Discipline was issued in a timely manner and subsequent handling of the claim arising from the assessment of discipline was also timely.

The Organization took no exception to the manner in which the notice of the investigation was given, to the manner in which the investigation was conducted, to the manner in which the notice of discipline was given or to the propriety of the handling of this grievance on the Property. Accordingly, this Board finds that there are no issues of procedural propriety before this Board.

The only issues to be decided by the Board are as follows: 1) Was substantial evidence of a violation by Claimant of Rule 1.3.2 developed during the investigation? ; and, (2) If substantial evidence of a violation of Rule 1.3.2 was developed was the discipline assessed against Claimant excessive or discriminatory?

Carrier's Witness Tucker read Rule 1.3.2 into the record of the investigation. That Rule is, in pertinent part, as follows:

"Before beginning each day's work or trip, crewmembers, and any others whose duties require, must review general orders that apply to the territory they will work on. They must have a current copy of subdivision general orders they can refer to while on duty."

The System Special Instructions apparently mirror that same language.

Mr. Tucker testified that on August 24, 2005, at 5:55 am, he boarded train GSSHST-22, of which Claimant was Conductor, and, among other tests, asked to see the Engineer's and Claimant's copies of the subdivision General Orders. Claimant was unable to find his copy though he was able to produce other necessary papers such as track warrants.

Somewhat later, according to Mr. Tucker's testimony, Claimant called Mr. Tucker to say that he had found his copy of the subdivision General Orders. Mr. Tucker instructed Claimant to take his copy and the Engineer's copy and, upon his (Claimant's) arrival at Rawlins, Wyoming, show them to another Company official named Keating.

Claimant's testimony confirmed that of Mr. Tucker. Claimant testified that after he found the subdivision General Order in his grip, he showed it to his Engineer, and then called Mr. Tucker. Claimant said that he called Mr. Tucker about 45 minutes after Mr. Tucker had completed his field testing of Claimant and the Engineer. (Mr. Tucker testified that he was called by Claimant about an hour and a half after

he had completed his testing.) Claimant also testified that, upon their train's arrival at Rawlins, he and the Engineer, once they were relieved by the outbound crew, immediately showed their copies of the General Order to Mr. Keating.

Claimant testified that he was familiar with Rule 1.3.2 and acknowledged that he had been asked prior to this instance, by another Manager, if he had his copy of the subdivision General Orders. He also acknowledged that he did realize the importance of being able to access paperwork in a timely manner.

When asked by his Representative, "Do you always ascertain whether the locomotive engineer has a copy of that general order?" Claimant replied, "Yes." And went on to say that the reason that he did so was, "Well, just in case—again, you know, paper—paperwork can get away and we want to make sure both—both of us have it in case there's a problem, you know."

The Board finds that the meaning of Rule 1.3.2 is that each of the crewmembers must have his own copy of "subdivision general orders they can refer to while on duty." The reason for the Board's finding is that the word "They" which begins, and is the subject of, the sentence, "They must have a current copy of subdivision general orders they can refer to while on duty." refers to the word "crewmembers" in the preceding sentence. In that preceding sentence, it is clear that the meaning of "crewmembers" is "each and every one of the members of the crew" since no one is exempted from the requirement to participate in the review of applicable general orders. If the word "crew" had been used in place of the word "They", then one copy in the possession of any member of the crew might constitute compliance with the rule, but use of the word "They" means that what follows in the rule applies to each and every crew member as did the preceding sentence. Next, the words "a current copy" do not indicate that the intent of the rule has changed but simply reflect the fact that each member of the crew need only have one copy, not multiple copies, of the subdivision general orders.

Claimant testified that he did have a current copy of the subdivision general orders with him but was unable to locate it during the time that Mr. Tucker was conducting his field test aboard Claimant's train. He further testified that he subsequently located the general orders, informed Mr. Tucker that he had found them and, as directed by Mr. Tucker, showed his copy to Mr. Keating in Rawlins.

Mr. Tucker's testimony indicated that he did not actually see Claimant's copy of his general orders; however, Mr. Tucker testified that, "Upon discussion with other managers, the rule says he has to be able to present them upon request." This testimony indicates that Mr. Tucker believed that Claimant did actually locate his copy of the general orders because, if Mr. Tucker did not believe that, then his belief would have been that Claimant had not had a copy of the general order in his possession on the evening in question and that would, without question, have been a violation of Rule 1.3.2. In that regard, the Hearing Officer could have asked Mr. Tucker if he had confirmed with Mr. Keating that Claimant had presented his copy

of the general orders (and the Engineer's copy if the Engineer had not presented them himself).

Mr. Tucker's "discussion with other managers" also indicates that he himself was uncertain of the meaning of Rule 1.3.2 and that becomes more clear in Mr. Tucker's subsequent testimony:

Q. "...Then after talking to other managers, you stated that they have to present the current general order upon your request, according to that rule. Can you show me in Rule 1.3.2 where it states that?"

A. (of Mr. Tucker) "Well, it—it is somewhat vague in a sense, but..."

A. (later, also of Mr. Tucker) "...You need to be able to have that at hand when you need it. Therefore, he must be able to present it when he—when requested, because of the fact that that's when—he needs it"

While the latter testimony provided valid reasoning in support of the principle that the appropriate general orders should be immediately accessible to all crewmembers of all trains (and others) at all times, it was not responsive to Claimant's representative's request that Mr. Tucker "show me in the Rule 1.3.2 where it states that" the rule requires that the general orders be immediately accessible at all times. Had Mr. Tucker testified to other specific instances in which Rule 1.3.2 was applied to require that copies of the general orders be produced immediately upon request of a manager or in which failure to have immediate access caused or contributed to a mishap or to the existence of a specific practice of interpreting the rule in this manner, then the reviewing officer could reasonably have concluded that substantial evidence of Claimant's guilt of a violation of Rule 1.3.2 had been developed during the investigation.

The testimony by Mr. Tucker concerning the scope of Rule 1.3.2 is opinion as were the conclusions of the "other managers" with whom he discussed Claimant's situation. In this case, where the general orders were apparently in Claimant's grip and he simply overlooked them when asked to present them, the Board finds that something more than opinion concerning why the cited rule should be interpreted as Carrier believed that it should be interpreted and something more than the conclusions of Mr. Tucker and "other managers" (unnamed and not present at the hearing) was necessary to warrant a decision that assessment of discipline against Claimant was justified.

Accordingly, the Board finds that the decision to discipline Claimant in this situation was not supported by substantial, credible evidence that Rule 1.3.2 was violated. Since the Board finds that the discipline assessed, which included a five day actual suspension from service, was not warranted, Claimant's record shall be cleared of this matter and he shall be compensated for wages and benefits lost in

PLB NO.

⑤

And NO. 40

accordance with past practice between the parties in other cases in which discipline was found by a prior tribunal not to have been warranted.

AWARD: In accordance with the above Findings, the claim is Sustained.

David J. Rutkowski, Neutral Member

Robert A. Henderson, Carrier Member

Richard M Draskovich, Employee Member