

PUBLIC LAW BOARD NO. 7633

Case No.: 03/Award No. 03

System File No.: CEI000212A/1565561

Claimant: Edgar D. Mims

UNION PACIFIC RAILWAY COMPANY)

-and-

BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Statement of Claim:

1. The discipline [Level 4 ten (10) day suspension] imposed on Mr. E. Mims by letter dated February 24, 2012 for alleged violation of Rules 136.4.2 Inaccessible Track, Rule 70.3 Job Briefing and Rule 71.2.4 Roadway or Work Equipment in connection with the allegations that the Claimant failed to make track inaccessible on January 26, 2012 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File CE1000212A/1565561).
2. As a consequence of the violation referred to in Part 1 above, Mr. Mims must now be afforded a remedy prescribed by Rule 22(f).

Facts:

By letter dated February 1, 2012 the Claimant was directed to attend a February 8, 2012: “investigation and hearing on charges to develop the facts and place responsibility, if any, that while employed as Track Foreman on Gang 1101, at Chicago Heights, Illinois, near milepost 26, at approximately 1130 hours, on January 26, 2012, you alleged (sic) failed to properly make track inaccessible.”

The Notice went on to identify Rules 136.4.2 Inaccessible Track, Rule 70.3 Job Briefing and Rule 71.2.4 Roadway or Work Equipment as the rules possibly violated. Further, Claimant was advised that he could be assessed Level 4 discipline under the Carrier's UPGRADE policy if a violation was found.

The original date was unilaterally postponed until February 16, 2012 by the Carrier.

Carrier Position:

There is substantial evidence that the Claimant violated three rules: Rule 136.4.2 Inaccessible Track, Rule 70.3 Job Briefing and Rule 71.2.4 Roadway Equipment. MTM Smith testified that the Claimant's reliance on the lock and blue flag placed by the Mechanical Department was misplaced as that was insufficient protection. The Mechanical Department could have removed the blue flag. The Claimant should have placed a derail on the track and marked it with a red flag. Foreman Johnson testified that there was neither a clamp nor a spike on the switch.

MTM Smith testified that he observed the Claimant while his machine was running and his face mask was off and that he could see clearly that the Claimant was not wearing ear plugs as required within 100 feet of his operating machine.

The lack of preparedness shown by the Claimant and his fellow employees and observed by MTM Smith evidenced the Claimant's failure to properly brief.

The Claimant's violation of three rules was a serious violation of the Carrier's UPGRADE policy, which has been previously upheld, as has discipline assessed for Rule 70.3 and Rule 136 violations. The discipline, assessed in strict accordance with the UPGRADE policy, was not arbitrary or capricious and should not be set aside by the Board.

The Carrier complied with the Claimant's required due process rights and committed no defects serious enough to require the discipline to be set aside. The hearing was postponed so that the other three employees who were involved, all with first-hand knowledge, could be present and thus a fair and impartial hearing could be provided. The Carrier's decision to postpone the hearing finds support in PLB 6402, Award No. 115. It should be noted that the Carrier and the Organization agree on the dates of March 19, 2012 initial Organization appeal of discipline) and May 4, 2012 (Carrier denial) as the official start of the record of discipline.

Organization Position:

The Carrier's unilateral postponement of the formal investigation was a violation of the negotiated agreement, Rule 22(b), which allows postponements of formal investigations only by mutual agreement. This alone requires that the claim be sustained. The Carrier could have procured necessary witnesses without waiting until the morning of the investigation. Support for the Organization's position is found in PLB 1844, Award No. No. 41, PLB 5719, Award No. 54, PLB 6302, Award No. 217 and NRAB Third Division Award No. 23082.

The formal investigation itself was not fair and impartial because there was a Carrier Special Agent positioned directly behind the Claimant and his representative, Mr. Cartwright, because three employees who signed waivers of the charges were then used as witnesses against the Claimant and because these three employees were allowed to sit together in one room, along with the charging officer, MTM Smith, so that they could have talked about related matters. Furthermore, Hearing Officer Foresman asked leading questions and MTM Smith refused to answer certain questions and was thus a hostile witness.

Even if the unilateral postponement and the failure to hold a fair and impartial hearing did not violate the agreement, the Carrier has failed to meet the burden of proof that it bears in this discipline case. The Carrier has not shown how Rule 136.4.2 applies to the situation. The Mechanical Department had provided sufficient protection for the area in which work was being done. MTM Smith did not explain why he left two men working if the area was improperly protected.

The Carrier has not shown how the Claimant violated the briefing rule and did not identify failure to wear hearing protection as a charge prior to the investigation. The Organization claims that hearing protection was worn.

Finally, if any of the three alleged rule violations is not proven the discipline should be set aside or at a minimum reduced.

Findings:

There is no question that the initial February 8, 2012 formal investigation was unilaterally postponed by the Carrier so that the four employees involved in the incident under investigation could all attend. There is also no question that the Organization timely protested the unilateral postponement at the outset of the February 16, 2012 investigation and has maintained the challenge to the Level 4 UPGRADE discipline throughout the process for that reason and other reasons set forth above.

The Carrier rejoins that the postponement was so that a fair and impartial hearing could take place and that PLB 6401, Award No. 115 supports that action. The Board disagrees. That award involved two unilateral postponements: the first due to the unavailability of the Investigating Officer and the second due to the unavailability of a key witness. The Board wrote: "There is no evidence that the postponements were made for any reason other than necessity and no evidence of any further effort that Carrier could have undertaken to conduct the hearing within thirty and twenty day time frames."

The above-noted circumstances depart from those facing this Board. The Carrier sets the original date for the formal investigation. Thus the Carrier set the dates so that initially the three involved employees besides the Claimant would not have been able to attend a February 8, 2012 hearing. That was the Carrier's doing so that the unilateral postponement cannot be said to have occurred because of unforeseen circumstances. The

Carrier created the conflict, resulting in the postponement on the morning of the hearing as the Claimant and his representative were en route.

Rule 22(b) specifies that a formal investigation: “may be postponed. . .by mutual agreement between the Carrier and the employee or his representative.” The awards provided by the organization provide strong support for the proposition that Boards must honor and enforce the parties’ own negotiated, unambiguous language, which is what appears in Rule 22(b). In PLB 6302, Award No. 217, a case involving the same parties as in the current dispute, a claimant had been dismissed because of dishonesty, with the discipline contested in part because of the Carrier’s unilateral postponement of the formal investigation. The Board wrote:

The Board always prefers to settle disputes on their merits, however, in this case to protect the integrity of the Agreement and the fidelity of the parties’ agreed to language the Board is compelled to not address the merits of the claim as it is evident that the Carrier violated the time limits for the holding of the Investigation as it unilaterally postponed the Investigation beyond the required 30 day time limit period despite the fact that Rule 48(b) requires mandatory agreement for an extension.

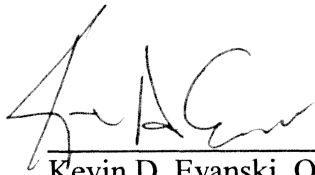
Although this case does not involve time limits, we concur with the approach taken above.

Award:


Claim sustained.

Order:

The Level 4 UPGRADE discipline is to be rescinded and the Claimant is to be afforded the remedy prescribed by Rule 22(f). The Carrier is to make the award effective on or before thirty (30) days after the award is adopted.



Kevin D. Evanski, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
February 28, 2014