

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

**UNION PACIFIC RAILROAD COMPANY
(former Chicago and North Western Transportation Co.)**

Case No. 247

Award No. 22

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

The Level Three (3) discipline (five (5) day suspension) assessed Crane Operator M. A. Secco for his alleged failure to hold a proper job briefing which led to failure to stop short of red flag/board on Monday, June 8, 1998, was without just and sufficient cause, unsupported, and capricious. (Organization File 9KB-6450D; Carrier File 1158216.)

(2) Crane Operator M. A. Secco shall now have his record cleared of the incident and be compensated for all wage loss suffered.

FINDINGS:

Claimant M. A. Secco was employed by the Carrier as a crane operator at the time of this claim.

On June 10, 1998, the Carrier informed the Claimant to appear for a formal investigation into the charges that he allegedly failed to hold a proper job briefing which led to failure to stop short of red flag/board while he was assigned as a conductor pilot and operator on the American Crane at the Geneva Subdivision near the Wheaton Station at approximately 12:15 p.m. on Monday, June 8, 1998. The Carrier proposed a Level 4 discipline, which consists of thirty days off work without pay, the passing of annual operating rules exams or equivalent, and a corrective action plan.

After several postponements, the hearing took place on July 21, 1998. On July 31, 1998, the Carrier notified the Claimant that he had been found guilty of violating Rule 136.7.2 (moving roadway machines within working limits) and was being assessed a Level 3 discipline, requiring a five-day actual suspension beginning August 8, 1998, up through and including August 12, 1998. The Claimant was also required to review specific rules prior to returning to work and having a corrective action plan developed upon return to work.

The Organization filed a claim on behalf of the Claimant, a long-term employee, arguing that the Claimant held two formal job briefings on June 8, 1998, and multiple safety related conversations during the course of his assignment. The Organization argues that there were other employees at the Wheaton station, but none were interviewed or brought to the investigation by the Carrier. The Organization also argues that the Claimant was assessed a Level 3 discipline for violation of Rule 136.7.2 when he was not even charged with a possible violation of that rule. The Organization argues that the Carrier originally charged the Claimant with one charge, that being failure to hold a proper job briefing, but then convicted him of another, violation of Rule 136.7.2. The Organization contends that no red board was up when the Claimant passed the Wheaton station area and that nobody checked to see if a red board was present until one hour and forty-five minutes had elapsed since the alleged incident. The Organization argues that if the red board was up at the time of the incident, it was positioned in such a way or such an angle that the Claimant did not see it. The Organization also maintains that in the absence of a red board, the Claimant proceeded at restricted speed in accordance with the

rules. The Organization further contends that the Carrier failed to call as a witness the employee in charge of the Form B track bulletin, who apparently claimed that the red board was up when the Claimant went by. The Organization claims that the Carrier's use of a Mr. Henning to testify as to that employee's statements is second-hand testimony and also denied the Organization the opportunity of cross-examining the employee in charge. In addition, the Organization argues that the Claimant hit nothing, had no near miss, that the equipment was in the clear, no workers were present, and that the track was safe. As a result, the Organization contends that the Carrier failed to afford the Claimant a fair and impartial hearing and meet its burden of proof. In addition, the Organization argues that the Level 3 discipline does not reflect the intent of the upgrade policy to be remedial rather than punitive.

The Carrier denied the claim, contending that although the Claimant is a long-term employee, his record is not a clean one, including multiple unsafe actions. The Carrier argues that if the Claimant did indeed have a job briefing on June 8, 1998, it was not followed. The Carrier also contends that the Claimant did violate Rule 136.7.2 and that although the discipline notice did not list the rule per se, it was evident after reading the investigation of the charges. The Carrier argues that it is not obligated to cite specific rules in the notice of investigation. The Carrier contends that the Claimant acknowledged that he observed a red over yellow board, which indicates that a red board is two miles ahead, yet still passed the red board, which could have resulted in injuries or damage to Carrier property. The Carrier maintains that red boards do not go up and down mysteriously and that it was up on the date in question. The Carrier argues that the

Claimant did not see a red board because he did not look for it or looked in the wrong direction. The Carrier argues that the facts against the Claimant were clearly developed and unmistakable in that they pointed to a violation of the on-track safety procedures. In addition, the Carrier contends that the Claimant knew what the charges were against him and he had ample time to develop a defense. The Carrier maintains that it conducted a fair and impartial hearing and that the discipline assessed was fair and in compliance with the Carrier's upgrade policy. In addition, the Carrier argues that it properly questioned the employee in charge of the Form B track bulletin, who indicated that the red board was up and that it was there when the Claimant went by, but used a Mr. Henning to testify as to that employee's statements since he had interviewed that employee. The Carrier asserts that if it wanted to question the employee in charge, the Organization could have called that employee as a witness, but failed to do so.

The parties being unable to resolve the issues, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that the Carrier has failed to meet its burden of proof that the Claimant failed to hold a proper job briefing which led to his failure to stop short of a red flag on the date in question.

First of all, there was testimony by the Claimant that there was at least one and maybe two job briefings that morning. The Carrier did not present any evidence to rebut that testimony. Consequently, the record is clear that there were job briefings that morning.

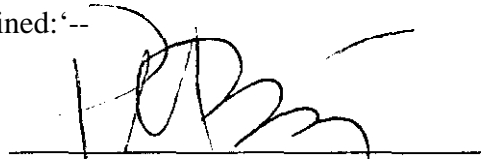
Secondly, the Claimant testified that he did not see a red board, and similar testimony was offered by Mr. Lisiecki. Nobody went to check to see if a red board was present until two hours had elapsed after the Claimant went past that point. The Carrier

did not call the B&B foreman but, instead, relied on the testimony of Mr. Henning, who interviewed the foreman. Consequently, the testimony of the Claimant and his partner was more direct than the second-hand testimony of Mr. Henning.

It is fundamental that the Carrier has the burden of proof when it assesses discipline. In this case, the Carrier has failed to prove with sufficient evidence that the Claimant failed to hold a proper job briefing and failed to stop short of a red flag/board on Monday, June 8, 1998. Consequently, this claim must be sustained.

AWARD:

The claim is sustained:--



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 4-3-01



CARRIER MEMBER

DATED: March 20 2001