

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION
IBT RAIL CONFERENCE**

and

UNION PACIFIC RAILROAD COMPANY

Case No. 282

Award No. 256

STATEMENT OF CLAIM:

It is the claim of the Brotherhood that the charges against Claimant M. T. Kellner were level 1, 2, and 3 violations and that he was entitled to use the Behavior Modification policies provisions, at the Collaboration level. In that scenario, Claimant Kellner would have remained working and would have met with the appropriate manager to discuss the incident. The manager and Claimant Kellner would then develop a remedial action plan and Claimant Kellner would have been required to pass a one or two day extensive rules examination. This process would be under a basic day's pay per day and the union representative should be in attendance for the conference and may attend the test as an observer. If Claimant Kellner would have worked the balance of the original twenty-four months or twelve months from this incident, whichever is longer, his record would be cleared. Claimant Kellner should have been handled in this manner and thus is entitled to the provisions of the Behavior Modification Policy. Claimant Kellner would not have lost any work or compensation and must be made whole for the loss he incurred while out of service from November 1, 2006 until November 15, 2006, when he resigned. Claimant Kellner cannot be found guilty of other rule violations since he was not charged with violating other rules.

FINDINGS:

By letter dated November 3, 2006, the Claimant was directed to appear for a formal investigation and hearing on charges that the Claimant allegedly had failed to conduct a job briefing and failed to restore the main line switch to the west end of the Elevator track at Hardy, Iowa, to its proper position, resulting in Duty Train LTZ51-31 running into the Elevator track and striking a brush cutting machine. The investigation

was conducted on November 9, 2006. By letter dated November 16, 2006, the Claimant was informed that as a result of the investigation, he had been found guilty as charged and was being dismissed from service. The day before this letter was issued, however, the Claimant signed a resignation-from-service letter. The Organization thereafter filed an appeal on the Claimant's behalf for the period that the Claimant was held out of service until he resigned, November 1 through November 15, 2006, asserting that the Claimant should have been charged under the Carrier's former Behavior Modification Policy. The Carrier denied the claim.

The Carrier initially contends that it has met its burden of proving through substantial evidence that the Claimant was in violation of the Rules. The record establishes that the Claimant did, in fact, fail to conduct a job briefing and failed to restore the main switch to its proper position. As a result of the Claimant's failures, a train entered the elevator track and collided with the brush cutter, causing serious damage to the train's engine and the brush cutter, injury to the train crew, and soil contamination from ruptured fuel tanks. The Carrier asserts that there is no reason to overturn appropriate disciplinary action, in light of the Claimant's actions.

The Carrier argues that, contrary to the Organization's assertion, the Notice of Discipline sufficiently allowed the Claimant to ascertain the charges against him. The Carrier maintains that the Board should find that there were no procedural errors in the handling of the instant claim, and the Claimant's dismissal should not be disturbed for any alleged procedural violation.

The Carrier then emphasizes that it is well established that once an arbitral panel

has substantiated the presence of substantial evidence to support a finding of guilt, the panel lacks the authority to overturn the level of discipline assessed. The Carrier asserts that even if the discipline seems harsh, it cannot be overturned unless the panel can find that the discipline was arbitrary, capricious, or an abuse of carrier discretion.

The Carrier argues that under its UPGRADE Policy, violations of Rule 1.6 are accorded Level 5 discipline, which is dismissal. The Carrier maintains that the other cited rule violations serve to emphasize the seriousness of the situation. The Carrier points out that the Claimant should consider himself lucky that there was no death or added damage to the track structure. The Carrier insists that this was a very serious occurrence requiring serious discipline.

The Carrier contends that because of the seriousness of the incident, there was substantial evidence to conclude that there was a violation of Rule 1.6 and the other cited rules, and that the Claimant was culpable. The Claimant's proven violation of Rule 1.6 alone supports the assessment of Level 5 discipline, and Boards routinely have upheld Level 5 discipline where claimants have violated Rule 1.6 and endangered the safety of themselves and others.

The Carrier insists that under these circumstances, the discipline assessed was not arbitrary, capricious, or an abuse of Carrier discretion. The Carrier points out that it is obligated to ensure the safety of its workers and the public at large. The Carrier therefore cannot allow employees, such as the Claimant, to remain in service if they have demonstrated an inability to follow the rules.

The Carrier ultimately contends that the instant claim should be denied in its

entirety.

The Organization initially contends that because the incident at issue occurred on October 31, 2006, the Claimant cannot be prosecuted under the Carrier Policy and Procedure for Ensuring Rules Compliance, which took effect November 1, 2006. Because this Policy was not in effect at the time of the incident, it does not apply to this case. The Organization asserts that the Claimant was entitled to be disciplined under the Carrier's Behavior Modification Policy.

The Organization argues that under the Behavior Modification Policy, the Claimant would be entitled to be at the Collaboration or Decision Level for the Level 1, 2, and 3 violations. The Organization points out that the highest discipline level associated with the charge is Level 4, which is associated with violations of Rule 136.4.3. The Organization objects to the Carrier's allegation that the Claimant violated Rule 136.4.3. in that this rule refers to making track inaccessible to establish working limits on non-controlled track. The Organization maintains that the Claimant was not establishing working limits in this instance.

The Organization then asserts that one requirement of due process is a specific charge that sets forth the alleged misconduct. The Organization maintains that this is essential to a fair and impartial hearing so that the employee may prepare his or her defense to a particular charge. The Organization points out that the specific charges against the Claimant were failing to conduct a job briefing and failing to restore the main line switch to the proper position; the Organization insists that the Claimant cannot be found guilty of any other rule violations, and the Carrier cannot use any other rules

against the Claimant during the investigation. Moreover, the Carrier cannot change the charges against an employee during an investigation, as the Carrier improperly has done in this case.

The Organization then argues that the proper discipline level in connection with the alleged rule violations at issue is up to a Level 3, but the Carrier applied Level ~~5~~^{DA4}, permanent dismissal. The Organization contends that in an attempt to bolster its position, the Carrier suggested that the Claimant was guilty of committing offenses other than those alleged in the charge or for which he was disciplined. The Organization characterizes such practices as unfair and an attempt to seek an improper advantage. The Claimant obviously had no real opportunity to defend against such an insinuation.

The Organization emphasizes that the charges against the Claimant were Level 1, 2, and 3 violations, and the Claimant was entitled to use the Behavior Modification Policy provisions, at the Collaboration level. The Organization does not deny that the Claimant failed to conduct a proper job briefing or restore the main line switch to the proper position. The Organization insists, however, that the Claimant should have been allowed to utilize the provisions of the Behavior Modification Policy in effect at the time of the incident. Under this Policy, the Claimant would not have lost the opportunity for work and compensation.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization and we find them to be without merit.

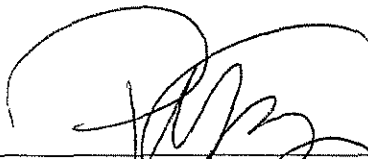
This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating Carrier rules when he failed to conduct a job briefing and failed to restore the main line switch to the proper position at the west end of elevator track at Hardy, Iowa, which resulted in an accident with a brush cutter on October 31, 2006. We find that the Claimant's rule violations constituted extremely serious conduct which caused injury to the crew, and two of the crew members were still off work at the time of the investigation hearing.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case was dismissed by the Carrier for his rule violations in this case. It is apparent from the serious misconduct in which the Claimant engaged that under the Behavior Modification Plan~~s~~, or any other disciplinary system, the Carrier would have had a sufficient basis to terminate the Claimant's employment. The record reveals that the Claimant resigned one day before the decision was issued in this case. This Board cannot find that the action taken by the Carrier was unreasonable, arbitrary, or capricious. Therefore, this claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: Oct. 3, 2008



CARRIER MEMBER

DATED: Oct 3, 2008