

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

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

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY)**

Case No. 286

Award No. 260

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

1. The Level 2 discipline (1 day alternative assignment with pay to develop a Corrective Action Plan to modify behavior) imposed upon Truck Foreman Michael J. Kuk for violation of GCOR Rules 1.13 (Reporting and Complying with Instructions) in connection with his failure to comply with instructions to inspect a vehicle before leaving a repair shop is unjust, unwarranted, based on unproven charges and in violation of the Agreement (System File UPWJ-7501D/1469115 CNW).
2. As a consequence of Part 1 above, Foreman Kuk's record must be cleared of the alleged violation and Foreman Kuk must be made whole for any expense incurred as a result of the hearing and discipline assessed, including any lost wages resulting from the improper discipline assessed."

FINDINGS:

By notice dated October 11, 2006, the Claimant was notified to report for a formal hearing and investigation to develop the facts and place responsibility, if any, in connection with allegations that the Claimant allegedly had violated Rule 1.13 by failing to comply with instructions to inspect a vehicle upon leaving a repair shop. The investigation was conducted, as scheduled, on October 19, 2006. By letter dated November 8, 2006, the Claimant was notified that as a result of the hearing, he had been

found guilty as charged, and that he was being assessed Level 2 Discipline. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to impose such discipline upon the Claimant. The Carrier denied the claim.

The Carrier initially contends that it has met its burden of proving that the Claimant was in violation General Code of Operating Rule 1.13. The Carrier asserts that based on the evidence produced at the investigation, it is clear that the Carrier has met its burden of proof and has produced substantial evidence to demonstrate that the Claimant did violate the rule with which he was charged. The Carrier argues that there is no reason to overturn what constitutes appropriate discipline, considering the Claimant's actions.

The Carrier maintains that the Claimant admittedly was given adequate notice of the investigation, as well as the opportunity to prepare his defense. The Carrier points out that the Claimant was allowed to have a representative during the investigation, to cross-examine witnesses, to view all evidence, and to present his own witnesses. The Carrier contends that because nothing was improper in its handling of the claim, and because the Claimant was afforded a fair and impartial hearing, the instant claim should be denied.

The Carrier argues that it is well established that the role of an arbitral panel is to verify whether substantial evidence supports a finding of guilt. Once the arbitral panel has determined that the Carrier has presented substantial evidence, the panel lacks authority to overturn the discipline assessed. The Carrier asserts that even if the discipline seems harsh, it cannot be overturned unless it is found to be arbitrary, capricious, or an abuse of Carrier discretion.

The Carrier asserts that the discipline in this case was not arbitrary or capricious. The Carrier points out that foremen and assistant foremen are responsible for ensuring that work is performed to standard, and they cannot shirk these responsibilities for their own convenience. The Carrier emphasizes that the Claimant was given a lenient measure of discipline when compared to the seriousness of the damage to the Carrier's vehicle. The Carrier argues that the discipline also was lenient in light of the fact that just hours earlier, management covered the necessity of checking vehicles before taking them from the shops. The Carrier emphasizes that the Claimant did not take the necessary leadership role to ensure that this happened. The Carrier insists that the Claimant is deserving of the discipline, which was not arbitrary, capricious, or an abuse of Carrier discretion.

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

The Organization initially contends that the Carrier has failed to meet its burden of proof in this matter. The Organization asserts that the Carrier has not presented a single procedure or policy that allegedly was violated in this case.

The Organization argues that the three supervisors directing the Claimant speculated that the truck was not properly inspected before leaving the repair facility, and they blamed the Claimant for the subsequent overheating of the vehicle. None of these supervisors, however, could point to a definite rule or established policy in connection with this matter. They asserted that the truck foreman must make sure the ordered repairs are performed (which the Claimant verified at the service desk), that a proper inspection

of the vehicle is performed (which the Claimant did by directing an assistant foreman to conduct such an inspection), or that he must inspect the vehicle before it leaves the repair facility. The Organization insists that the record never established with any certainty exactly what instruction the Claimant failed to comply with.

The Organization points to the Carrier's assumption that the truck left the repair facility without any fluid in the radiator or with the radiator cap not properly in place, but the Carrier never proved its assumptions. Citing a number of prior Awards, the Organization maintains that the Carrier may not rely on mere speculation, assumption, or conjecture as a basis upon which to impose discipline.

The Organization emphasizes that because radiator caps are designed to become loose, acting as a pressure release valve should a cooling system overheat, it cannot be determined if the cap was left loose. The Organization insists that the proper way to check the fluid level of a cooling system is to check the fluid level in the holding/overflow reservoir. The Organization points to Assistant Foreman Tom's testimony that he checked the fluid level in the holding/overflow reservoir, and the levels were within the specified range.

The Organization argues that there is nothing in the record that indicates that the Claimant violated Rule 1.13. The Claimant complied with supervisory instructions when he assigned Assistant Foreman Tom to inspect the vehicle while he insured that the ordered repairs had been completed. The Organization submits that the Carrier has failed to prove a rule violation or that the Claimant is deserving of any discipline in this matter.

The Organization ultimately contends that the instant claim should be denied 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 record and testimony in this case, and we find that the Carrier has failed to meet its burden of proof that the Claimant was guilty of violating Carrier rules and that he failed to comply with instructions with respect to inspecting a vehicle before it left the repair shop. Therefore, the claim must be sustained.

The record is clear that the truck did run hot after the Claimant was charged with inspecting the vehicle. However, the record reveals that the Assistant Foreman testified that he had checked the fluid level, and those levels were within the specified range. The Claimant testified that he had complied with the supervisory instructions on the date in question. In sum, although something went wrong, there is insufficient evidence in this record that the Claimant was responsible for the problem.

It is fundamental that in order for a Carrier to impose discipline, it must prove with substantial evidence that the Claimant was guilty of either violating some rule or of performing some task improperly. In this case, although the Carrier “assumes” that the Claimant was responsible for what had occurred, there is simply insufficient proof to support the issuance of discipline to this Claimant. Therefore, the claim must be sustained.

AWARD:

The claim is sustained.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER
CARRIER MEMBER

DATED: Sept 9, 2009

DATED: Sept 9, 2009