

AWARD NO. 119
NMB CASE NO. 119
UNION CASE NO. 1105175
COMPANY CASE NO. 98005

PUBLIC LAW BOARD NO. 4450

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(Western Region)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

Appealing the Upgrade Level 3 Discipline assessed to Engineer N. W. Price and request of expungement of discipline assessed and pay for any and all time lost with all seniority and vacation rights restored unimpaired. Action taken as a result of formal hearing held December 18, 1997.

OPINION OF BOARD:

Engineer N. W. Price ("Claimant") was fully rested under the Federal Hours of Service Law when called on duty December 13, 1997 for train MPCHKB-10, a westbound train operating between La Grande and Hinkle, Oregon. This was CTC (Centralized Traffic Control) territory but it is not disputed that, during the night in question, the Train Dispatcher was required to move trains using verbal authority because a tree fell at Mile Post 246.8 and knocked the power out in the area of the incident. As Claimant waited at the red signal and dual control switch at CPN263, Train Dispatcher David Ryan advised him that due to the outage it had been necessary for the eastbound train to hand throw the dual control switch to line it for that train's movement. Therefore, before

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Claimant's westbound train could proceed, it would be necessary for his Conductor to hand throw the switch, realigning it and placing it in the power position for the westward movement of Claimant's train.

The following is an excerpt from the taped radio conversation between Dispatcher Ryan and the crew on the UP 9239 PCHKB West (from pages 20 and 21 of the transcript):

Dispatcher: UP Dispatcher, Omaha, to the PCHKB 9239 West, over.
Train: We're 9239
Dispatcher: Let me ask you this question, if you don't -- if I can't line you up, is it safe(...inaudible...) down there to High Bridge and hand-operate the switches on and so forth to get by there down to the Single Main?
Train: Well, I'd just have to (...inaudible...) go out there, Dispatch, but I'd have to take it really easy. You got to watch the area. It's cold weather on a short, heavy train like this. And if you've got too much to stop and you can't get it stopped in time to -- you know, to take off again (...inaudible...)
Dispatcher: Okay, well, think about it. That at this point, the High Bridge is out, both ends of Huron, Both ends of Camp and both ends of Duncan. I do have two east bounds besides the one approaching the High Bridge now. They are trying to get a tree out of the way down there around 246 8, that appears to be where my problem is as far as my CTC problem there, though they got a bunch of code lines torn up. And so if you do go west at High Bridge, we'll have to do the same thing at both ends of Huron, Camp and Duncan, plus meet those two east bounds somewhere. Over.
Train: Well, I can go ahead and try it and go on down there, if you will be to take it easy until I get down to High Bridge, so I can stop alright without -- (...inaudible...) takes a lot of air to do it, you know.
Dispatcher: Okay, sir, well, if -- yeah, that'll be fine. You might just have a talk with this east bound grain empty and 5092 East and you know, based on when he starts through the switch, I (...inaudible...) because they had the dad-gum thing off-power so you can go ahead and, you know, go through it and put it back on power, you know, before you leave there. Over.
Train: Yeah, that'd be easier if you'll do that. Then I can compare with Fred to make sure he didn't find anything wrong, either, between Fred and me here. Yeah, I can go ahead and throw it then.
Dispatcher: Okay.
Train: 6292
Dispatcher: Just leave the switch off power for the westbound PCHKB, and you might talk to em' there whenever you're starting through the switch so we can kind of sort of easing in that direction. Over.
Train: Okay, leave the power off on the switch and talk to the westbound.
Dispatcher: If you would, yes, sir. Over.

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Train: Okay, over.
Dispatcher: Thank you now.

Claimant's Conductor aligned the switch as instructed and when he reboarded Train MPCHKB-10 Claimant then proceeded past the signal, entered CTC limits and occupied the main line. Claimant and his Conductor later testified that, based upon the foregoing conversation with the Dispatcher, they "assumed" that they had been authorized to proceed west past CPN 263, after they had lined the switch for their movement west and put it back in power. After leaving High Bridge, however, the crew had the following conversation with the Dispatcher (from page 79 of the Transcript):

Dispatcher: (...inaudible...) approaching West Kamela, okay. Hello - PCHKB, where you all at - 9239 West?
Train: (...inaudible...) west of High Bridge signal there - we're moving about 10-15 miles an hour, heading down to (...inaudible...)
Train: (...inaudible...) La Granda, can you (...inaudible...) for me, please?
Dispatcher: (...inaudible...) so, you're stopping there at high Bridge, so I can talk you by there, over?
Train: (...inaudible...) talk us by (...inaudible...)
Dispatcher: Yes, sir.
Train: It was my understanding when we left there.
Dispatcher: Not technically, I didn't, over.
Train: (...inaudible...) restarted the power, (...inaudible...), over.

The Claimant operated the train west bound to Camp, where the crew tied the train down. They were interviewed by MOP Middleton and temporary MTO Ritter, then were removed from service for allegedly proceeding past the red signal and occupying CTC territory and the main line without proper authorization from the Train Dispatcher. On December 14, 1997, claimant was provided with a copy of Union Pacific Railroad Company, "Notice of Waiver/Hearing Offer", which set the hearing for 9:00 a.m. at the UP Depot on Thursday, December 18, 1997. Included with the

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NOI was the required Form 2 notice of waiver/hearing offer, indicating a proposed assessment of a Level 3 (5 day suspension and development of a corrective action plan) against Claimant's personal file under Carrier's UPGRADE Discipline Policy.

Claimant rejected that offer to waive the hearing and accept the proposed discipline and the hearing went forward as scheduled on December 18, 1997. After four (4) hours, however, the Hearing Officer recessed the proceedings until January 5, 1998, due to the alleged "unavailability" of Train Dispatcher Ryan for testimony until that latter date. On January 15, 1998, Superintendent K. H. Hunt, issued a letter of discipline indicating carrier had found Claimant culpable of failing to receive proper instructions from the control operator to pass signal at CPN 263, High Bridge, on December 13, 1997, in violation of Rule 9.12.1 of Union Pacific Rules, effective April 10, 1994. That Notice of Discipline dated January 15, 1998 imposed an Upgrade Level 3 disciplinary status to Engineer Price, which Superintendent Hunt calculated as already served while Claimant was being held out of service between December 14 to 18, 1997.

For reasons elucidated below, this Board finds that the disciplinary action imposed in this case must be reversed, due to fatal procedural lapses by Carrier in the handling of this matter in violation of the System Agreement Discipline Rule. It is clear beyond cavil that the testimony of Train Dispatcher Ryan was an essential ingredient in this case and Claimant's BLE representative made a timely written request of Carrier on December 15, 1997 for this critical witness to be physically present for examination and cross-examination at the hearing on December 18, 1997. By written response dated December 16, 1997, Carrier asserted: *"We will make every effort to make him available by phone. Precedent has been set that testimony has been given and accepted by*

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phone". The Organization immediately protested by letter of December 16, 1997 that telephone testimony of this witness in this particular case would be inappropriate since it would deprive Claimant of the opportunity to confront and effectively cross-examine his accuser. To this Carrier responded by a letter dated December 17, 1997, but hand-delivered to the BLE Representative by the Hearing Officer 30 minutes prior to commencement of the December 18, 1997 hearing: *"Train dispatcher will be provided to give testimony by telephone. Any objection can be made to the hearing officer"*. Contrary to these representations and despite strenuous objections by the Organization Representative, mid-way through the December 18, 1997 hearing, the Hearing Officer unilaterally declared a recess for some eighteen (18) days, due to alleged unavailability of the Train Dispatcher. During the interregnum, Carrier issued the following explanation for the disputed unilateral recess and rescheduling:

Investigation began on December 18, 1997, and was recessed that day with date to reconvene established as January 5, 1998. Although a tape of conversation was available on December 18, 1997, the Company was unable to provide the Dispatcher for testimony by phone account work assignments...

When the hearing resumed on January 5, 1998, Carrier did provide testimony of the Train Dispatcher by telephone, over the continuing objection of the BLE Representative that Claimant was thereby deprived of his right of confrontation and effective cross-examination. In addition, at the outset and at the conclusion of the resumed hearing on January 5, 1998, the Organization Representative entered objections and assertions, none of which have been refuted on this record, that the responsible Carrier managers knew prior to the commencement of the December 18, 1997 hearing that they were not going to honor their commitment to the Organization to provide even telephone testimony from the Train Dispatcher on that day.

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In these facts and circumstances, this Board concludes that the disciplinary action taken against Claimant on the basis of the tainted hearing must be voided. Leaving aside the troubling but unanswered questions surrounding managerial representations that the Train Dispatcher would be made available for testimony on December 18, 1997, Carrier itself rendered this Carrier employee "unavailable" by scheduling him to work when it had already made a commitment to the Organization to make him available as a witness. In the considered judgement of this Board, such boot-strapping does not constitute the kind of "just cause" for which the System Agreement-Discipline Rule contemplates that reasonable postponements of disciplinary hearings should be allowed.

Finally, we recognize that in some cases telephone testimony has been found acceptable while in others it has been ruled inadequate and unfair. *See* PLB 5719-40 (Lynch) and PLB 4828-17 (Lieberman); *Cf.* PLB 4975-17 (Harris). Each such case turns on its own unique assessment of whether such testimony is sufficient to meet requisite burdens of proof and/or whether an accused employee is thereby afforded a full, fair and impartial investigation. In the facts and circumstances of this particular case, the transcript of the January 5, 1998 hearing bears out the Organization's previously expressed concerns that long-distance telephone presentation of the most critically important testimony in Carrier's case would be inadequate and the right of cross-examination unduly compromised if the witness was not physically present at the hearing. In addition to the problems surrounding the lack of his availability on December 18, 1997 and the unilateral recess until January 5, 1998, the telephone testimony of Train Dispatcher Ryan simply does not pass the litmus test of a fair, full and impartial hearing. To the contrary, the following observations from Arbitrator Harris

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in Award 17 of PLB 4975 apply with equal validity in the present matter:

In this case, presence of the dispatcher, who could explain certain of the essential facts in this case, was vital. The failure of the carrier to have him physically present at the hearing over the objection of claimant, effectively denied claimant the right to see the witness while cross examining him. Such a denial deprived claimant of the safeguards which are essential and which were incorporated into the agreement between the parties. Claimant was, therefore, deprived of a fair hearing and any discipline assessed against him must be set aside.

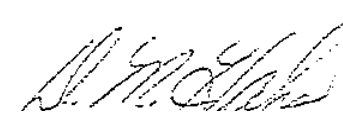
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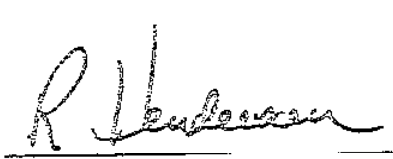
1) Claim sustained.

2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.


Dana Edward Eischen, Chairman

Dated at Spencer, New York on March 18, 2001


Union Member


Company Member

Discont attached

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CARRIERS DISSENT

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The Board in this case has criticized the Carrier's use of telephone testimony saying, *"...the telephone testimony of Train Dispatcher Ryan simply does not pass the litmus test of a fair, full and impartial hearing."*

This case turns not on the testimony of Train Dispatcher Ryan but rather on the tape recording of the conversation between the crew of the UP 9259, PCHKB west and Train Dispatcher Ryan. Nothing said in that recording gave permission to Claimant to operate west of signal at CPN 263 and into CTC territory. The testimony provided by Train Dispatcher Ryan clarified what had happened; however his not being physically present did not change the facts of what actually occurred. That is Claimant and his conductor assumed they had permission or authority to proceed. Train Dispatcher Ryan was steadfast in his telephone testimony that he had not given Claimant permission or authority to proceed past CPN 263. Had Train Dispatcher Ryan been present at the Hearing his testimony would not have changed.

The Carrier respectfully disagrees with the Majority opinion in Award 119

A handwritten signature in dark ink, appearing to read "R. Henderson". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

R.A. Henderson