

RECEIVED DEC - 4 2001-6

AWARD NO. 120
NMB CASE NO. 120
UNION CASE 99030
COMPANY CASE 183634

PUBLIC LAW BOARD NO. 4450

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY
(Western Region)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

Appealing termination of employment of former Student Engineer D. T. Kavanagh (SSN 534-58-9908) whom Carrier alleged failed to meet the requirements to successfully complete the Student Engineer Training Program. Action taken as a result of Carrier's letter dated January 28, 1999 over signature of MOP C. M. Harrison.

OPINION OF BOARD: At the outset it is important to establish that this is not a traditional disciplinary discharge for misconduct or violations of Carrier rules but rather a case of disqualification of a Student Engineer for failure to successfully complete his training requirements. Thus, the appropriate analytical framework is not the "just cause" disciplinary standard and the Upgrade Policy, under which Carrier bears the burden of persuasion regarding culpability. Instead, we are presented here with allegations by Mr. Kavanagh and the Organization(s) that Carrier violated or improperly applied the "self-executing" termination provisions of controlling Agreements governing post-November 1, 1985 employees who are promoted to engine service but twice fail to successfully complete the Locomotive Engineer Training Program. As the moving party, Claimant

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bears the burden of proof of such alleged violations or misapplication of the contract language. *See* PLB 2105, Award 177 (Referee Criswell); PLB 5507, Award 1 (Referee Lieberman); PLB 4901, Award 58 (Referee Wallin); PLB 4975, Award No. 23 (Referee Harris) and PLB 5180, Award 136 (Referee Twomey).

The Agreement provisions which govern this case are found in contracts between the United Transportation Union and the Carrier, viz, Article V of the 1972 UTU National Agreement, Article XIII of the 1985 UTU National Agreement and the UP/UTU Memorandum of Agreement dated December 17, 1996 (2112019629), entitled "Engineer Selection Process". For that reason, this Board provided Third Party notice to the United Transportation Union, following which the UTU participated fully in the instant proceedings. At the conclusion of the hearing on March 21, 2001 hearing, all interested Parties requested the Chairman to issue a bench decision in this case, which was rendered in a letter dated March 25, 2001, reading in pertinent part as follows:

Case No. 120 (Claim sustained in part): Claimant D. T. Kavanagh shall be afforded an additional three (3) month period to qualify as an Engineer, such 3-month period to begin running upon his clearance to return to service. Provided he does successfully qualify, he shall be placed in his original slot in the seniority roster, in accordance with controlling Agreements.

In this case, the Claimant was able to pass required examinations while going through formal training at the Carrier's Locomotive Engineer Training School in Salt Lake City but he was unable to qualify in actual over-the-road training. The record shows that Claimant chose not to avail himself of UTU assistance/representation and apparently elected instead to be represented by the BLE as he proceeded through the training process. Perhaps for that reason, Carrier completely failed or neglected to comply with its contractual obligation to communicate with the appropriate representatives of the UTU concerning Claimant's enrollment in and difficulties with satisfactory

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completion of over-the-road portion of the engineer training program. Had Carrier provided these appropriate communications to the UTU General Chairman, the outcome in this case would be no different than that in a similar case on this property was brought before Public Law Board 5912 with Neutral Frank T Lynch. Therein, when problems arose with an employee's training, the Carrier representative (the instructor) contacted the UTU-E Local Chairman, who contacted the UTU-E General Chairman, who corresponded with the highest designated officer of the Carrier authorized to handle such issues. Together, the Parties agreed that the training period of the involved employee in that case would be extended and handled between the Carrier's Manager of Operating Practices and the UTU Local Chairman, with all correspondence between the parties was forwarded to the General Chairman and Labor Relations for monitoring. In those circumstances, PLB 5912 held in Award 169 that Carrier had abided by the Agreement requirements in judging the employee as having failed to satisfactorily complete the training course and termination was the appropriate result under the "self-executing" provisions of controlling Agreements.

In the present case, however, without reaching the merits of Carrier's conclusions that Claimant did not satisfactorily demonstrate competence and ability in the over the road phase of his training, the undisputed failure of Carrier to comply with its contractual obligations to notify the appropriate UTU officials of Claimant's entry into and progress/problems make application of the "self-executing" termination provisions inappropriate in this particular case. Based upon all of the foregoing, this Board concluded that Carrier must allow Claimant an additional opportunity to qualify as an Engineer under terms and conditions set forth in the bench decision, *supra*.

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Claim sustained in part, as indicated in the bench decision rendered on March 25,
2001, *supra*.

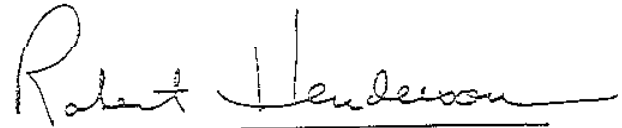


Dana Edward Eischen, Chairman

Dated at Spencer, New York on September 7, 2001



Union Member



Company Member