

PUBLIC LAW BOARD NO. 5912

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PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION)

VS)

NMB CASE NO. 131

AWARD NO. 131

UNION PACIFIC RAILROAD CO.)

STATEMENT OF CLAIM:

Claim of Conductor J. E. Bell for removal of UPGRADE Level 2 from his personal record with pay for all time lost, including time spent attending the investigation, and payment for all wage equivalents to which entitled, with all insurance benefits and any monetary loss for such coverage while improperly disciplined, and claim of Brakeman E. Romiguere for reinstatement to service and removal of UPGRADE Level 2 (resulting in Level 5) from his personal record with pay for all time lost, including time spent attending the investigation, and payment for all wage equivalents to which entitled, with all insurance benefits and any monetary loss for such coverage while improperly disciplined.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved.

The parties to this dispute were given due notice of hearing thereon.

Claimants were summoned for formal investigation on a charge that they "allegedly failed to perform proper air brake test as required" on April 9, 1998. Following the investigation Carrier found claimants at fault and assessed Level 2 discipline under the UPGRADE Discipline Policy. The Level 2 discipline assessed Claimant Romiguere was raised to Level 5 (dismissal from service) based on an asserted application of the progressive discipline procedures set forth in the discipline policy.

The Organization has raised several alleged procedural errors which the Board must examine before looking at the merits of this dispute. The alleged procedural errors are briefly described as:

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1. Claimants were denied a fair and impartial hearing in that Carrier failed to call all material witnesses to testify.

2. There is evidence that claimants were prejudged in that discipline was assessed before the officer issuing such discipline reviewed the transcript of hearing.

3. Carrier violated the Waiver of Hearing Agreement in effect between the parties.

Issue No. 1 above cannot be deemed a procedural error in that there is no showing the requested witness possessed relevant or material information, therefore, the argument concerning this alleged procedural error is overruled.

Issue No. 2 is a more serious allegation in that the hearing was conducted in Las Vegas, NV, on April 27, 1998. The Hearing Officer was W. E. Thurman. The Organization points out that the transcript of hearing was prepared in Glenwood, Iowa, on May 6, 1998, whereas the letters finding claimants at fault were issued in Los Angeles, CA, on the same date--May 5, 1998. The Organization also notes that the letters finding claimants at fault and assessing discipline were written by Carrier's General Manager Jeff L. Verhaal--not by the Carrier Officer who conducted the investigation. The Organization argues that this evidence clearly supports its position that claimants were prejudged and therefore were not accorded the fair and impartial investigation guaranteed by the governing rule.

The Board will here note that the issue of rendering a decision in advance of reviewing the transcript is not a new one on this property. In fact, it is an issue which has been ruled upon on numerous occasions. For example, property Award No. 74, issued by Public Law Board No. 4897, held:

"First, it is apparent that the hearing officer who determined the guilt or innocence of the claimant could not have reviewed the evidence since he did not have the transcript at the time that he issued his letter of discipline, with his conclusion that claimant was guilty. This, in itself, is sufficiently egregious to warrant that the claim be sustained."

See also Awards Nos. 79, 88 and 90 of Public Law Board No. 4897, Award No. 57 of Public Law Board No. 5390, as well as prior Award No. 23 of this Board.

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During oral presentation of the dispute to this Board Carrier stated that it is now possible to E-Mail the transcript from the point of receipt by Carrier to the location of the officer who rendered the decision. We must here note, however, that no evidence was submitted to verify that this 114 page transcript, plus exhibits, had actually been transmitted by E-Mail.

In reviewing the evidence submitted in this dispute, the Board notes that in his letter dated August 24, 1998, appealing the decision of Carrier's Superintendent and General Manager, the General Chairman clearly stated therein that, "Finally, the discipline was prematurely issued in Las Vegas on the same date the transcript was completed in Iowa." It is the opinion of this Board that when this issue was raised in August, Carrier could well have put the issue to rest by offering evidence that the transcript had been sent via E-Mail, however, it did not do so and the Board is now left with deciding whether or not Carrier's General Manager rendered his decisions without first reviewing the transcript of hearing.

Absence any evidence to the contrary, and based on the facts of record before the Board, it is the finding of this Board that there is considerable merit to this Organization objection and we now find that when the decision finding claimants at fault and assessing discipline was rendered prior to a review of the transcript it was an egregious error, sufficient to warrant a ruling that claimants did not secure the fair and impartial hearing guaranteed by the agreement; i.e., the Carrier Officer who rendered the decision prejudged claimants in that he had no firsthand knowledge of the proceedings prior to rendering the decisions.

With respect to Issue No. 3 raised by the Organization concerning alleged violation of the Waiver of Hearing Agreement, the record before this Board is clear that Claimant Romiquiere was issued a notice of proposed discipline, in accordance with the Waiver of Hearing Agreement, and such notice fixed the required discipline at Level 4. The Waiver of Hearing Agreement is specific in its requirements that if discipline is assessed following a formal hearing, such discipline "shall not exceed that originally proposed." Increasing the discipline from the offered Level 4 to Level 5 after the hearing was held was not in accordance with this agreement provision. During the oral presentation of this dispute Carrier objected to inclusion of this issue contending that it was not one raised during handling of this matter on the property. The Board must note, however, that the Form offering Level 4 discipline was issued to claimant by a Carrier Officer, and the decision to raise this to Level 5, following the investigation, was also made by a Carrier Officer. Therefore, the matter was known to Carrier during local handling and it cannot now be successfully argued that this was new argument before this Board.

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Based on the findings of this Board as set forth above; i.e., claimants did not receive a fair and impartial investigation in that their culpability was prejudged, the claim here before the Board must be sustained and the discipline assessed must be set aside.

AWARD

Claim sustained. Carrier is instructed to comply with this award within 30 days of the date hereof.

F. T. Lynch
F. T. Lynch, Neutral Chairman

D. J. Gonzales
D. J. Gonzales, Carrier Member

A. Martin
A. Martin, Employee Member

Award date APRIL 15, 1999