

PUBLIC LAW BOARD NO. 6885

PARTIES TO THE DISPUTE:

UNION PACIFIC TRANSPORTATION CO.
(WESTERN LINES)
[Formerly Southern Pacific Transportation Company]

-and-

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and TRAINMEN

STATEMENT OF CLAIM:

Claim of Southwest Hub Engineer R. K. Curtin, for removal of a "FIRST OFFENSE" Violation of the Union Pacific Attendance Policy from his record, full seniority and all other employment rights restored and that he be compensated for all time lost in connection with Claimant's assessment of a "FIRST OFFENSE" Violation, on August 25, 2004. Further, Claimant's annual vacation rights should be restored, and he should be compensated accordingly. In addition, Claimant's personal record should be completely expunged of any notation or record pertaining to this case.

OPINION OF BOARD:

Engineer R. K. Curtin, ("Claimant") , established a seniority date with the Carrier as a Switchman/Brakeman/Conductor on May 24, 1995 and as an Engineer on October 2, 1999. During the first half of 2004, he worked as an Engineer assigned to the SP317 RE72-Tucson, AZ. Lordsburg, N.M. through freight pool, under the direct supervision of designated Field Officer, D. Kroese. Based on a review of the Claimant's work and lay off record ostensibly conducted by Mr. Kroese on August 8, 2004, he was served on August 9, 2004 with the following notice to attend a formal investigation into whether he had committed his "First Offense" under the Carrier's Train, Engine and Yard ("TE&Y") Attendance Policy, issued January 15, 2004:

You are hereby notified to be present in the Union Pacific Yard Office Conference Room, 1255 South Campbell, Tucson, Arizona, on Tuesday, August 17, 2004, at 1300 hours, for a formal investigation,

The purpose of this investigation is to develop the facts and determine responsibility, if any, in connection with your alleged violation of the Union Pacific Attendance Policy effective January 15, 2004, as a result of your alleged continued failure to protect employment by excessively% absents yourself from service between February 1, 2004, through August 8, 2004, while employed as an Engineer with Union Pacific Railroad.

You are charged with responsibility which may involve a violation of the General Code of Operating Rules, Rules 1.13, and 1.15 as adopted and modified by Union Pacific Railroad.

You are entitled to representation and witnesses in accordance with agreement provisions. Any request for postponement must be submitted in writing, including reason therefor-re, to the undersigned.

Pursuant to the BLE Labor Agreement, you are advised that the disciplinary assessment for these allegations may result in a finding of "First Offense" under the Company's Attendance Policy. Should you wish to waive this hearing, I may be contacted to arrange an informal conference prior to the investigation.

On the basis of the August 17, 2004 formal investigation, Carrier found the Claimant culpable as charged and assessed his personnel record with a "First Offense" warning, as follows:

This letter refers to the Formal Investigation held at Union Pacific Railroad Office in Tucson, Arizona, on August 17, 2004

The evidence adduced at this investigation established that you failed to protect employment by excessively absents yourself from service during February, March and June, 2004, while employed as Engineer with Union Pacific Railroad.

Your actions are in violation of the Union Pacific Attendance Policy and General Code of Operating Rules, Rules 1.13, and 1.15, as adopted and modified by Union Pacific Railroad.

Therefore, you are hereby notified that a "First Offense" Violation of the Union Pacific Attendance Policy is being recorded on your personal record. You are instructed to immediately mark up and remain available on a full time basis.

For reasons explained fully, *infra*, based on the unique facts of this particular case, which demonstrate a fatal violation of the Claimant's contractual due process rights under ¶3 of the System Agreement-Discipline Rule, we reverse the August 25, 2004 assessment of a "First Offense".

Unlike the previous Time and Attendance Policy the new Policy is not linked directly to the "UPGRADE" Discipline system but the TE&Y Policy is similar to old Time and Attendance Policy in that it focuses on operating employees with a pattern of frequent Friday/Saturday/Sunday (weekend) layoffs, frequent holiday layoffs, sick/sickness in family layoffs without medical documentation, or whose "overall level of attendance/availability is noticeably lower than their peers". The new T. E. & Y. Attendance Policy calls for counseling and compliance warnings for the "First Offense", followed by counseling and compliance warnings for the "Second Offense"; but escalates directly to termination of employment for the recidivist violator who commits a "Third Offense" of the Policy.

In other words, an employee will be informed by the issuance of a "First Offense" notice to comply with instructions and to protect his/her employment. An employee who subsequently persists in non-compliance with the Policy will be issued a "Second Offense" notice, with repeated instructions to comply plus a warning that the next offense will mean termination. If the employee still persists in violation of the Policy, the recidivist offender will be issued a "Third Offense" notice and permanently dismissed from Carrier's service.

In arbitration before a variety of tribunals, that new Policy has withstood direct challenges to its validity as an exercise of reserved managerial discretion under the CBA. Thus, most such cases now coming to arbitration concern the propriety of Carrier's application of the Policy to a specific employee in the context of facts and circumstances in specific situations. *See* Award No. 44, PLB 6712 (UTU vs. UP)-Referee Richter - First Offense; Award No. 45, PLB 6712 (UTU vs. UP)-Referee Richter - First Offense; Award No. 61, PLB 6712 (UTU vs. UP)-Referee Richter First Offense; Award No. 62, PL 13 6712 (UTU vs. UP)-Referee Richter - Second Offense; Award No.

26, PLB 6719 (UTU vs. UP)-Referee Binau - First Offense; Award No. 27, PLB 6719 (UTU vs. UP)-
Referee Binau - Second Offense; Award No. 79, PLB 6729 (BLET vs. UP)-Referee Kenis Second
Offense; Award No. 87, PLB 6729 (BLET vs. UP)-Referee Kenis - First Offense; Award No. 25,
PLB 6753 (UTU vs. UP)-Referee Binau - Second Offense.

As we have previously noted, whether the matter involves a 1st, 2nd or 3rd "offense", however,
the factual record in each such case must be closely scrutinized in arbitral review to ascertain
whether the Carrier met its burden of showing that the charged employee was indeed an "offender",
whether the employee provided adequate persuasive evidence to rebut, justify or mitigate his/her
apparent culpability and whether the proper level of penalty was assessed by the Carrier. In this
particular case, however, the Organization has persuasively shown that a fundamental violation by
Carrier of the Claimant's rights under the System Agreement-Discipline Rule precludes us from even
reaching the countervailing merits issues of *prima facie* culpability and/or mitigation raised on this
record.

In this particular case, the record shows that the new TE&Y Policy was promulgated in mid-
January 2004, but Engineer Curtin's immediate supervisor did not monitor his CMS Work and Lay
Off record to check for compliance until half a year later. According to Manager Kroese's
testimony, when he finally did check into the Claimant's attendance record on or about August 15,
2005, he took exception primarily to what appeared to be TE&Y Policy violations which had
allegedly occurred six (6) months earlier, in February 2004. Moreover, the "1st Offense" discipline
assessment of late August 2004, which is appealed in this proceeding, is based primarily upon such
alleged violations in which February-March 2004.

Since January 2004, the three (3) "offense" system of discipline in the new TE&Y Policy has been separate from the five (5) progressive "levels" of the UPGRADE Discipline Program. However, arbitral review of both of those employee discipline programs is premised on the interpretation and application of the collectively bargained provisions of the System Agreement-Discipline Rule. Some of the most important requirements of that System Agreement-Discipline Rule are found in the timely handling mandates of ¶3:

Within 10 days of the time the appropriate company officer knew or should have known of an alleged offense, the engineer will be given written notice of the specific charges against him or her. The notice will state the time and place of the investigation and will be furnished sufficiently in advance to allow the engineer the opportunity to arrange for representation by a BLE representative (s) (the BLE Local Chairman or other elected BLE Officers) and witnesses. The notice will propose discipline to be assessed if investigation is waived and designate a carrier officer who may be contacted for the purpose of arranging for an informal conference on the matter. . .

The first sentence of the foregoing paragraph manifests the mutual aversion of the Parties to negative effects of lax rule enforcement, stale charges and assessment disciplinary penalties long after alleged offenses; all of which negatively impacts the legitimate interest of the Employer in effective administration of its disciplinary systems and the legitimate interest of the Organization in contractual due process for charged/disciplined employees. The most obvious negative result is summarized by the aphorism "justice delayed is justice denied"; but another problem which both Parties manifestly intended to discourage by the first sentence of ¶ 3 is managerial condonation of rule violations followed by a belated "crackdown".

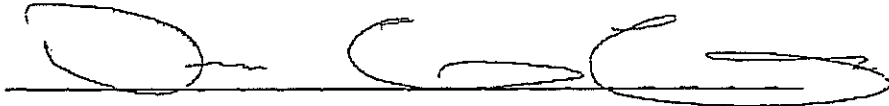
It is contrary to the letter and intent of that contract provision for a supervisor to procrastinate in monitoring rule compliance by an Employee and/or fail to point out his ongoing alleged violations for a six (6) month period, before citing and disciplining that individual for those previously overlooked violations. Such blatant condonation unfairly sends the offending Employee a false

signal that noncompliance will be tolerated indefinitely and simultaneously erodes the effectiveness of published Employer pronouncements that wilful violations of properly communicated rules will have disciplinary consequences. In our considered judgement, those results are contrary to the letter and spirit of the first sentence of ¶ 3 of the System Agreement-Discipline Rule, *supra*.

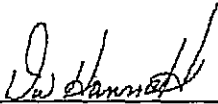
In most hierarchical organizations, from armies to unions to railroads, the task of monitoring/enforcing compliance with policies issued by general officers falls most heavily on the most over worked and understaffed managers--first level supervisors. Whether it was fair to expect this manager to be up to speed out of the box when the TE&Y Policy was implemented is not for us to say. But it is our responsibility to determine whether the Collective Bargaining Agreement was violated when the Carrier waited half the year before monitoring the Claimant's attendance rule compliance and then assessed a disciplinary penalty based on alleged offenses, most of which were five to six months old. A majority of this Board is persuaded that the "First Offense" citation issued to Engineer Curtin on August 25, 2004, for alleged past unjustified absences far outside the "rolling 90-day" period which the Carrier typically monitors for Attendance Policy, must be voided for violation of the first sentence of ¶ 3 of the System Agreement-Discipline Rule.

AWARD


- 1) Claim sustained.
- 2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.
- 3) Jurisdiction is retained for the sole purpose of resolving any disputes which may arise between the Parties regarding the meaning, application or implementation of this Award.



Dana Edward Eischen, Chair



Union Member



Company Member

June 28, 2007

