

PARTIES TO DISPUTE:

UNION PACIFIC RAILROAD COMPANY
AND
BROTHERHOOD OF LOCOMOTIVE ENGINEER AND TRAINMEN

STATEMENT OF CLAIM:

“Request the removal of level 2 discipline from the record of engineer R. W. Wells with him being made whole, which includes but not limited to lost earnings, all vacation rights, cobra payments and any other penalties associated with this discipline.”

FINDINGS:

On February 2, 2003, Engineer R. W. Wells attended a formal conference for the purpose of discussing his failure to adequately protect his assignment and overall excessive absenteeism. On February 28, 2003, Carrier mailed Engineer Wells a letter acknowledging formal conference and directing him to confine his absences to valid illnesses, physical disabilities, or family related emergencies. Engineer Wells was, further, directed to obtain permission to lay off - for any reason - from a local transportation officer.

On November 24, 2003, Carrier mailed Engineer Wells a certified letter, advising:

“You are hereby notified to be present in the Conference Room, 6800, Kirkpatrick Blvd, Houston, Texas, at 11:00 a.m., Wednesday, December 03, 2003, for a formal investigation.

The purpose of this investigation is to develop the facts and determine responsibility, if any, in connection with your alleged failure to comply with instructions directing you to minimize absences from work and meet the employment requirements of your assignment as discussed with Ray Hancock on February 02, 2002, and per investigation on February 13, 2003. In addition, your alleged continued failure to protect employment by excessively absenting yourself from service, August 24 through November 22, 2003, as noted on the attached work history, while employed with Union Pacific Railroad.

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

After mutually agreed upon postponement, formal investigation was convened on December 15, 2003. After reading transcript of investigation, Carrier found Engineer Wells responsible, as charged, for violating GCOR 1.13 – Reporting and Complying With Instructions; and GCOR 1.15 – Duty, Reporting or Absence. Upon a finding of responsibility, Engineer Wells was assessed Level 2 discipline.

Discipline was timely appealed in accordance with labor agreement. Partisan parties have been unable to resolve this dispute on property, and it comes, now, before this Board for final and binding adjudication.

During formal investigation, Carrier introduced into evidence documents and testimony covering period August 24, 2003 through November 22, 2003 – period of time, properly, under review for this investigation. Presiding Officer, also, allowed into the record certain documents and evidence 1) covering time that predated period in question; 2) that was part of evidence in a prior dispute already resolved via formal conference in Carrier's Continuing Operating Rules Education Program, herein after referenced as CORE.

Without abandoning its position that Carrier failed to meet its burden of proof on the merits of this dispute, Organization raised several procedural objections having to do with improper notification; entry and consideration of evidence prohibited by agreement, policy and practice; and failure to allow access to documents and evidence in Carrier's possession, and which Carrier planned to use in formal investigation. Such procedural errors, according to Organization, irreparably damaged Engineer Wells' rights to a fair and impartial investigation. For that reason, it argued, the proceedings should be declared fatally defective, and this dispute should be resolved in Engineer Wells' favor.

We will, first, address Organization's claim that Engineer Wells was improperly notified. Organization pointed out that Carrier included factually untrue and prejudicial information in its letter of notification when it stated Engineer Wells had been investigated on February 13, 2003, for excessive absenteeism; when, in fact, that dispute had been resolved via formal conferencing and participation in Carrier CORE Program.

We concur with Organization that Carrier's letter of notification was improper and prejudicial. Intimations of prior infractions or investigations have no place in a letter of notification. Carrier's prejudicial intent was born out when Presiding Officer allowed into evidence documents and testimony supportive of improper elements of notification letter. There is no way for this Board to know the extent to which the disciplining officer relied on an improper charge and supportive evidence in determining responsibility and assessing penalty. Therefore, an improper notice must nullify the entire proceeding.

Organization raised a second objection to the entry and consideration of evidence prohibited by agreement, policy, and practice when a certain incident – involving a dispute resolved via participation in Carrier’s CORE Program – was prominently featured in letter of notification; and when Presiding Officer allowed supportive evidence of that incident into record of subsequent formal disciplinary investigation. In raising that objection, Organization relied on following language of Carrier’s CORE Program:

“NOTE: This letter is NOT a form of Discipline and will not be used in any subsequent disciplinary proceedings as evidence the employee previously allegedly violated the rules cited. (except as explained at NOTE: on page 4 of this Policy).”

The exception at NOTE, on page 4 allowed Carrier to disregard participation in its Diversion Program and assess discipline where employee was found responsible for a repeat violation of a rule carrying discipline at level 4.

We are in agreement with Organization that based on language in Carrier’s CORE Program, an incident resolved via participation in that program cannot be used as a basis for subsequent discipline. Therefore, it was improperly mentioned in letter of notification; evidence associated, therewith, should not have been allowed into the record. We reemphasize our earlier concern that such evidence unduly influenced the outcome of the formal investigation and created a fatal defect in the proceedings.

Regarding Organization’s objection that Carrier failed to allow access to documents and evidence already in its possession, and that it planned to use in formal investigation, Carrier readily acknowledged – through its behavior – both its obligation as well as its failure to provide such access. Carrier’s Presiding Officer agreed to call a recess for the purpose of allowing Organization an opportunity to review such documents – stating it was, also, his first opportunity to view the documents in question.

To suggest that the Presiding Officer was viewing the documents for the first time stretches this Board’s credulity. But, in any event, Presiding Officer’s offer to recess the formal investigation to allow Organization’s access does not cure Carrier’s obligation to provide access to documents already in its possession – which it fully intends to use in formal investigation – when request is timely made. Such a requirement is fundamental to the principle of fair play, and allows Organization time to perfect its defense and avoids last minute surprises – as we have witnessed in the case before us.

OPINION OF THE BOARD:

As we made our way through this rather lengthy disciplinary investigation – besides concerns, already, noted above – we took judicial note that Presiding Officer used separate and unequal standards for allowing entry of documents into evidence. He refused entry of documents not notarized where offered by Organization, but, apparently, waived the imposition of that prerequisite for documents offered by Carrier.


Presiding Officer’s behavior about which Organization complained, as well as the overall conduct of this investigation, was not in harmony with a fair and impartial investigation. A hearing is not, merely, for the purpose of prosecuting a person who has been charged with violating a rule. Embodied in the concept of “fair and impartial” is the notion that the Presiding Officer will act as a finder of facts – whether good or bad, for or against the employee charged. At no time should he occupy the role of prosecutor, or indicate an interest in either proving the charges or disproving them. He should keep his eye on the one and only purpose: to develop the truth, regardless of the result to either party.

These proceedings, beginning with the letter of notification and ending with the overall conduct of the Presiding Officer, were such a gross breach of Engineer Wells’ due process rights that the hearing must be declared null and void.

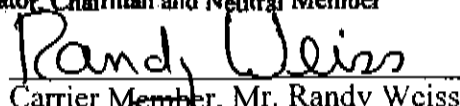
Since this dispute is decided on the basis of procedural error, we need not discuss merits.

AWARD:

Claim sustained per findings above. Carrier is directed to remove discipline from Engineer Wells’ record and compensate him for lost earnings within thirty (30) days of execution of this award by majority members of this Board.


4-25-06
Employee Member, Mr. Lee Pruitt
Brotherhood of Locomotive Engineers &
Trainmen


J. E. (Jim) Nash – Arbitrator, Chairman and Neutral Member


Carrier Member, Mr. Randy Weiss
Union Pacific Railroad Company
April 25, 2006