

PUBLIC LAW BOARD NO. 6040

AWARD NO.85
NMB CASE NO. 85
UNIONCASE NO. 1210868
COMPANYCASE NO. 1210868

PARTIES TO THE DISPUTE:

UNION PACIFIC RAILROAD COMPANY

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
(Eastern District)

STATEMENT OF CLAIM:

Claim of Cheyenne, Wyoming, Engineer, R. E. Carison, for reinstatement and pay for all time lost and all entries of this discipline (UPGRADE Level 1) to be removed from his personal record.

OPINION OF BOARD: Together with Conductor D. Solomon, Engineer R. E. Carison was called for Train QGRNPB-24 at 3:00 a.m. on November 27, 1999, at Rawlins, Wyoming. According to the undisputed testimony of Conductor Solomon, this crew reported to the Yard Office at approximately 2:55 am, obtained appropriate track warrants and orders for that train and went out to the lead to commence the trip. When they boarded the train, however, they discovered that they were on Train QGRNPB-27. Upon returning to the office, Conductor Solomon learned from Ms. V. Hulme, a contract employee assigned as a van driver, that she had forgotten to tell him that the train for which this crew had been called, Train QGRNPB-24, was actually tied down at Table Rock for the Thanksgiving Holiday. It is **not** disputed that Engineer Carison became upset and angry when informed by Conductor Solomon about this mix-up. Before leaving the office to go back to bed, Claimant vented his frustration in a verbal tirade directed at Ms. Hulme.

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A day or two after this incident, Ms. Hulme complained about Mr. Carlson's language and behavior and filed a written statement which her supervisor forwarded to MTO Avery. In that statement, Ms. Hulme alleged, in words or substance, that Claimant had "pointed his finger and screamed 'You're not the goddamn trainmaster, the yardmaster, CMS, or the dispatcher. You're nothing but a damn yard driver. Do your job.'" In addition, Ms. Hulme asserted that she believed that Claimant had been late in reporting for his assignment on the morning in question. MTO Avery then reviewed that statement and interviewing Ms. Hulme, and also interviewed and/or obtained statements from Conductor Solomon, Engineer Ferguson, Conductor Malloy, Engineer Bruce, Conductor Woodland and Engineer Ludwig who allegedly witnessed the incident.

On the basis of this investigation, MTO Avery then issued a Proposed Notice of Discipline, dated December 2, 1999, charging Claimant with violations of UPRR Rule 1.6(7) ("reporting late") and Rule 1.15 ("discourteous behavior"). Following a formal investigation into these charges on December 10, 2000, Carrier found Claimant guilty on both charges and assessed a Level 1 UPGRADE discipline (letter of reprimand). It is noted that the discipline was imposed not only on the basis of alleged inappropriate behavior toward Ms. Hulme by Claimant but also because Claimant allegedly reported late. The only evidence offered in support of the lateness charge was speculation by Ms. Hulme, based on her assertion that she heard and recognized the sound of Claimant's footsteps sometime after his reporting time of 3:00 am. That ephemeral evidence is more than offset by Conductor Solomon's unrefuted testimony that he saw Engineer Carison at the Yard Office when he arrived there at approximately 2:55 am.

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Turning to the second, and far more serious charge, workplace harassment and creation of a hostile workplace environment constitute serious employee misconduct which no employer can be expected to tolerate and which this Board will not condone. If properly proven in a fair and impartial investigation conducted in accordance with the requirements of the System Agreement-Discipline Rule of the UP/BLE Agreement, behavior such as that with which this Claimant is charged would warrant appropriate disciplinary action. However, an employee charged with this or any other type of misconduct and the Organization responsible for representing such charged employees have certain contractually-guaranteed rights under the System Agreement-Discipline Rule.

Included among those rights is the following: "Where request is made sufficiently in advance and it is practicable, the engineer and/or the BLE representative will be allowed to examine material or exhibits to be presented in evidence prior to the investigation." In this case, citing the just-quoted language of the System Agreement-Discipline Rule, Claimant's BLE representative made a timely written request to examine, prior to the investigation, the statements which the charging officer, MTO Avery, had obtained from various witnesses to the incident under investigation. Superintendent Naro denied that request, not because of any assertion that pre-hearing examination of the requested material was not "practicable", but on grounds that "pre-trial discovery is not mandated or practiced with respect to Company investigations in the same manner as rules of evidence apply in a formal court of law. There is no provision in the agreement for preheating discovery."

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As we read this record, in this case the BLE representative did not engage in impermissible “discovery” but rather made an appropriate Agreement-supported request to examine, prior to the investigation, specifically identified materials or exhibits which Carrier had obtained and intended to present as evidence against the charged employee. Subsequent to denying that request, Carrier introduced the requested materials in evidence against Claimant at the formal investigation. In our considered judgement, Carrier thus committed a fatal violation of the quoted language of the System Agreement-Discipline Rule. That violation requires this Board to reverse the disciplinary action.

AWARD

- 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