

SPECIAL BOARD OF ADJUSTMENT

PARTIES) BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN
TO)
DISPUTE) UNION PACIFIC RAILROAD COMPANY

CONTENTS

STATEMENT OF CLAIM2
OPINION OF BOARD2
 A. Background2
 B. Discussion.....2
 1. The Burden And The Standard Of Review3
 2. The Carrier’s Reasons For Installing Inward-Facing Cameras5
 3. The Organization’s Arguments8
 4. The Carrier’s Other Arguments17
 C. Conclusion18
AWARD21

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 2

STATEMENT OF CLAIM

Claim on behalf of locomotive Engineer K. H. Mohr (hereinafter referred to as Claimant) for one (1) basic day on March 29, 2015 at ID rate account being required to operate an engine with an inward facing camera installed and intended to make a video record of in-cab activity, and thereby being subjected to creation of a video record, the controlling locomotive was the UP7642.

Carrier File No. 1626031

Organization File No. C-0001

OPINION OF BOARD

A. Background

On March 29, 2015, Claimant was called to work to operate Train KG2BR in the Carrier's freight pool operating between Clinton and Missouri Valley, Iowa. The lead locomotive on Claimant's train (UP7642) was equipped with an operational inward-facing camera which had been installed by the Carrier on February 27, 2015. Claim was filed protesting Claimant's having to operate his train with the inward-facing camera.¹

The parties were unable to resolve the dispute and the matter was progressed to this Board.

B. Discussion

The issue in this case concerns the Carrier's ability to install and utilize inward-facing cameras on its locomotives. The Carrier asserts that it has the authority to do so and the Organization disagrees.

¹ Organization Exhibit H; Carrier Exhibit 1.

1. The Burden And The Standard Of Review

Because this is a contract dispute, the burden this Board must apply is to require that the Organization demonstrate a violation of the Agreement. *Third Division Award 35457* (“[t]his is a contract dispute ... [t]he burden is therefore on the Organization to demonstrate a violation of the Agreement.”).

In determining whether the Organization has met its burden, the first inquiry is whether the Organization can point to clear contract language supporting its argument that the Agreement has been violated? *First Division Award 28138*:

The first inquiry in any contract interpretation dispute is whether clear language resolves the matter with the added element that the burden is on the Organization to demonstrate that clear language supports its position. See *Third Division Award 34207*:

The initial question in any contract interpretation dispute is whether clear contract language exists to resolve the matter. Because the burden is on the Organization, the Organization is therefore obligated to demonstrate clear language to support its claim

See also, *Third Division Award 35457* [supra] (“... [B]ecause the Organization has the burden in this case, the first inquiry is whether clear contract language supports the Organization’s position.”).

There is no clear contract language pointed to by the Organization specifically governing, prohibiting, or limiting the Carrier’s ability to install and utilize inward-facing cameras.

The Carrier argues that it “... has an unrestrained managerial right to install & use cameras inside locomotives.”² We disagree. The Carrier’s ability to make managerial decisions is not unrestrained or unfettered, but is subject to limited re-

² Carrier Submission at 13-18.

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 4

view by this Board to determine whether the Carrier's decision was arbitrary or capricious. *First Division Award 26346*:

... [T]his Board disagrees with the Carrier's assertion ... that the Carrier has the "... unfettered ... discretion to determine the conditions under which the employees would be permitted to stop to eat" The Carrier's exercise of a managerial right is not "unfettered" and therefore immune from review by this Board. This Board does not determine whether the Carrier is right or wrong in the managerial decisions it makes. The standard of review of the Carrier's decision making is a limited one — i.e., whether the Carrier acted in an arbitrary or capricious manner. But the Carrier cannot make managerial decisions with impunity — i.e., with "... unfettered ... discretion"

Here, because the burden is on the Organization, the Organization must show that the Carrier's decision ... was arbitrary or capricious. ...

... Whether we agree with the Carrier's decision or logic in this regard is irrelevant. As long as the Carrier can articulate a rational non-arbitrary basis for its decision, this Board has no business second-guessing the Carrier's managerial decisions. ... Stated differently, in making managerial decisions such as the one in this case, the Carrier has the "right" to be "wrong" — it just cannot be arbitrary. ...

See also, Third Division Award 36994:

But the Carrier's right to exercise its managerial prerogatives is not an unfettered and unreviewable one. While it is not the function of this Board to review the Carrier's exercise of its managerial rights to determine whether, in our view, the Carrier's managerial decisions were correctly made, in the exercise of its discretion the Carrier cannot act in an arbitrary fashion. Stated differently, when it comes to exercising its managerial prerogatives, the Carrier has the "right" to be "wrong" — it just cannot be arbitrary.

Arbitrary conduct is action that is taken without a rational basis or justification. And, in these cases, because the burden of proof

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 5

is on the Organization, the Organization must demonstrate the existence of arbitrary conduct. ...

Further, see *Second Division Award 13847* (“[a] Carrier makes an arbitrary decision when it is shown that the decision is without a rational basis, justification or excuse”); *Second Division Award 13843* (“[t]his Board does not second guess those managerial decisions unless the record shows that the decisions were without a rational basis, justification or excuse and therefore arbitrary.”).

Therefore, the narrow question in this case is whether the Organization has carried its burden to demonstrate that the Carrier’s decision to install and utilize inward-facing cameras in its locomotives was arbitrary – *i.e.*, a decision made without a rational basis, justification or excuse.

We find that the Organization has not carried that burden.

2. The Carrier’s Reasons For Installing Inward-Facing Cameras

The Carrier points to several reasons for its installation and utilization of inward-facing cameras:³

- The recommendation of the National Transportation Safety Board (“NTSB”) following investigation of the September 12, 2008 Chatsworth, California collision between a Metrolink commuter train and a Union Pacific freight train resulting in 25 fatalities with the NTSB attributing the cause of the collision to the Metrolink engineer’s failure to respond to a red signal because he was text messaging on a wireless device. The NTSB identified safety issues and made recommendations, including installation of inward-facing recorders “... to verify that train crew actions are in accordance with rules and procedures that are essential to safety as well as train operating conditions.”

³ Carrier Submission Exhibits 6 at vii; 7 at 67; 11 at 47; 13 at Section 20168; 14 at 8-9 (published in the Federal Register, Vol. 81, No. 233/Monday, December 5, 2016/Notices at pp. 87650-87651).

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 6

- The recommendation of the NTSB following investigation of the June 24, 2012 collision near Goodwell, Oklahoma involving two Carrier freight trains resulting in three employee fatalities (two engineers and a conductor), with the recommendation that “All Class I Railroads ... [i]ninstall in all controlling locomotive cabs and cab car operating compartments crash- and fire-protected inward- ... facing audio and image recorders.”
- The Railroad Safety Advisory Committee Task Statement dated March 6, 2014 “To develop regulatory recommendations addressing the installation and use of recording devices in controlling locomotive cabs ... [for] railroad safety purposes ...”
- Federal Railroad Administration rulemaking requirements (limited to commuter and passenger operations) under the provisions of the Fixing America’s Surface Transportation Act (“FAST Act” – 49 U.S.C. 20168(a)) related to installing inward-facing image recording devices in all controlling locomotive cabs and cab car operating compartments.
- The FRA Safety Advisory 2016-03 following an Amtrak derailment in Philadelphia causing eight fatalities (which also references prior incidents including the Chatsworth collision) with the recommendation that:
 - ... Although FRA is in the process of developing a regulatory proposal addressing this statutory mandate [of the FAST Act], FRA encourages railroads to accelerate the installation of the cameras. ...
 - ... FRA remains concerned with the ability to fully investigate accidents that appear to be human factor-caused where there is insufficient information from the controlling locomotive cab or cab operating compartment to conclusively determine what caused or contributed to an accident. Locomotive cab recording information could benefit investigations and help identify necessary corrective actions before similar train accidents occur. Inward- and outward-facing image recording devices would be valuable in revealing crew actions and interactions before, during, and after an accident. FRA also believes that

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 7

inward- and outward-facing cameras will give railroads the ability to monitor crew behavior to ensure compliance with existing Federal regulations and railroad operating rules and deter noncompliance.

...

Although the FRA has not yet acted to publish requirements for inward-facing cameras, according to the Carrier, “[g]iven the above context and absent any agreement prohibition, UP was motivated to respond proactively to the impending FRA mandate by launching the process of installing inward facing cameras in its locomotive fleet.”⁴

Again, because this is a management rights issue, the question here is whether the Organization has carried its burden to show that the Carrier’s decision to install and utilize inward-facing cameras in its locomotives was arbitrary or capricious – *i.e.*, a decision made without a rational basis, justification or excuse.⁵ Clearly, concerns the Carrier had about safety and employee operations consistent with safety-related operational rules, coupled with express recommendations from the NTSB, the FAST Act and statements from the FRA concerning the need for inward-facing cameras form that rational basis, justification or excuse for the Carrier to install and utilize inward-facing cameras in its locomotives as it did in this case.

And these are not hypothetical concerns from the Carrier’s perspective. The Carrier’s trains have been involved in collisions resulting in fatalities (*e.g.*, the September 12, 2008 Chatsworth, California collision and the June 24, 2012 collision

⁴ Carrier Submission at 12.

⁵ In its August 26, 2016 letter, the Organization does not disagree with that standard (Organization Exhibit M at 2):

... [W]hen management exercises its rights, it must do so reasonably, and in a way that furthers a legitimate business interest. Conversely, when an asserted right is exercised without such a foundation, it is unreasonable, arbitrary and thus improper.

And in its Submission at 19, the Organization cites this neutral’s award in *Third Division Award 36994*, quoted *supra* stating the standard of review in management rights disputes.

near Goodwell, Oklahoma) which underpinned recommendations from the NTSB and statements from the FRA concerning the need to install inward-facing cameras.

The Carrier's installation and utilization of inward-facing cameras in the Carrier's locomotives was therefore not arbitrary and came under the umbrella of the authority of the Carrier's managerial prerogatives.

3. The Organization's Arguments

The Organization's well-framed arguments do not change the result.

First, the Organization argues that the Carrier's installation and utilization of inward-facing cameras violated Article XVII, Section 3 of the May 1986 Award of Arbitration Board No. 458, which reads [emphasis supplied by the Organization]:⁶

ARTICLE XVII LOCOMOTIVE DESIGN, CONSTRUCTION AND MAINTENANCE

* * *

Section 3 – Locomotive Design and Construction

In recognition of the desirability of consultation with the General Chairman (Chairmen) prior to the ordering of new Locomotives, *or while formulating plans to modify or retrofit existing locomotives, the parties agree that, before any design and construction changes in locomotives are made which change safety or comfort features of the locomotive, the designated officer of each individual railroad will contact the General Chairman (Chairmen) providing him with the opportunity to furnish the carrier with his recommendations for full and thoughtful consideration by the carrier.*

This Section 3 does not disturb existing local agreements that set forth required specifications for particular locomotive appurtenances or components.

⁶ Organization Submission at 6-11.

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 9

The language in Article XVII, Section 3 emphasized by the Organization – “... desirability of consultation with the General Chairman (Chairmen) prior to the ordering of new Locomotives, or while formulating plans to modify or retrofit existing locomotives, the parties agree that, before any design and construction changes in locomotives are made which change safety or comfort features of the locomotive ... providing him [the General Chairman] with the opportunity to furnish the carrier with his recommendations for full and thoughtful consideration by the carrier” – is not applicable to the placement of inward-facing cameras in the Carrier’s locomotives.

Article XVII, Section 1 of the May 1986 Award of Arbitration Board No. 458 addresses the kinds of conditions in locomotives leading to implementation of the provisions of Article XVII, Section 3 for the Organization’s input on recommendations:

Section 1 – Maintenance Of Locomotives

The parties recognize the importance of maintaining safe, sanitary, and healthful cab conditions on locomotives.

This Agreement affirms the carriers’ responsibility to provide and maintain the aforementioned conditions particularly, although not limited to, such locomotive cab conditions as: heating, watercoolers, toilet facilities, insulation, ventilation-fumes, level of cab noise, visibility, lighting and footing.

The parties recognize that one way to achieve and maintain safe, sanitary, and healthful cab conditions on locomotives is by establishing procedures on each railroad for monitoring cab conditions and expediting the reporting and correction of maintenance deficiencies.

The Carrier’s installation and utilization of inward-facing cameras designed for safety and monitoring employee performance does not fall under the umbrella of

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 10

items for “... safe, sanitary, and healthful cab conditions ... although not limited to, such locomotive cab conditions as: heating, watercoolers, toilet facilities, insulation, ventilation-fumes, level of cab noise, visibility, lighting and footing” given as examples in Article XVII, Section 1. Nor do the installation and utilization of these cameras come about as a result of the Carrier’s “... formulating plans to modify or retrofit existing locomotives ... design and construction changes in locomotives ... which change safety or comfort features of the locomotive ...” as provided in Article XVII, Section 3. While the implications of installation and utilization of the cameras are significant to the Organization and the employees, the mere installation of a relatively small camera does not fall into the types of changes contemplated by the clear language of Article XVII – *i.e.*, for “... safe, sanitary, and healthful cab conditions ...”

If the skilled negotiators who put together the language in Article XVII intended the result urged by the Organization, they could have merely had Article XVII read along the lines of [underscored language added, removed language stricken, emphasis added]:

Section 1 – Maintenance Of Locomotives

The parties recognize the importance of maintaining safe, ~~sanitary~~, and healthful cab conditions on locomotives.

This Agreement affirms the carriers’ responsibility to provide and maintain the aforementioned conditions, ~~particularly, although not limited to, such locomotive cab conditions as: heating, watercoolers, toilet facilities, insulation, ventilation-fumes, level of cab noise, visibility, lighting and footing.~~

The parties recognize that one way to achieve and maintain safe, ~~sanitary~~, and healthful cab conditions on locomotives is by establishing procedures on each railroad for monitoring cab conditions and expediting the reporting and correction of maintenance deficiencies.

* * *

Section 3 – Locomotive Design and Construction

In recognition of the desirability of consultation with the General Chairman (Chairmen) prior to the ordering of new Locomotives, or while formulating plans to modify, ~~or~~ retrofit, or change existing locomotives, the parties agree that, before *any design and construction* changes to locomotives, locomotive appurtenances or components in locomotives are made which change or modify ~~safety or comfort~~ features of the locomotive, the designated officer of each individual railroad will contact the General Chairman (Chairmen) providing him with the opportunity to furnish the carrier with his recommendations for full and thoughtful consideration by the carrier.

This Section 3 does not disturb existing local agreements that set forth required specifications for particular locomotive appurtenances or components.

The above language would give the Organization input into *any* type of changes made to locomotives, including installation and utilization of inward-facing cameras. However, Article XVII does not read that way and is limited to the kinds of changes given as examples in Section 1 – *i.e.*, “... particularly, although not limited to, such locomotive cab conditions as: heating, watercoolers, toilet facilities, insulation, ventilation-fumes, level of cab noise, visibility, lighting and footing.” That kind of limiting language used as examples does not cover the installation and utilization of equipment such as inward-facing cameras.

Second, the Organization’s argument that the Carrier took legal steps to have the dispute over installation and utilization of inward-facing cameras declared as a minor dispute is also not persuasive.⁷ The only question before this Board is the contractual one concerning the Carrier’s ability to install and utilize those devices.

⁷ Organization Submission at 6-8.

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 12

Third, the Organization points to an April 24, 2014 Memorandum of Understanding and Intention (“MOUI”) between the Carrier and the Organization which provided that without waiving their underlying positions, the parties “shall meet on a periodic basis to discuss matters pertaining to the use of the inward facing cameras and the videos they produce”; the MOUI was in effect “for a period of no less than 180 days” with the ability of either party to terminate thereafter and with the further provisions that:⁸

* * *

3. While the terms of this Agreement remain in effect, applicable time limits pertaining to time claims or grievances regarding the installation or use of inward-facing cameras or the associated recording they produce are suspended. Any such time claims or grievances filed will be automatically held in abeyance until this agreement is terminated.

* * *

The Organization then references the October 1, 2014 Carrier’s internal employee news publication UP/Online which provided that:⁹

* * *

For an initial pilot period as the technology is implemented, UP will suspend discipline and provide coaching for most rules violations involving safety, operations and electronic device use.

⁸ *Id.* at 9-10; Organization Exhibit F. We note that paragraph 2 of the MOUI provides that “[a]ny discussions and topics raised in connection with the UP and BLET meetings during the effective dates of this ... Memorandum ... shall be without prejudice to either party’s legal or contractual position and shall be non-referable in any forum ... [and i] is expressly understood and agreed that this commitment shall survive and remain in effect notwithstanding termination of this agreement.” *Id.* The parties have both referred to the MOUI and actions taken pursuant to that agreement (in addition to the Organization’s references to the MOUI, *see* Carrier Submission at 28-29; Carrier Exhibit 26). Therefore, for purposes of this proceeding, the parties have waived the provisions of paragraph 2 of the MOUI.

⁹ *Id.* at 10; Organization Exhibit O.

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 13

However, discipline will be administered for policy violations related to EEO, workplace violence and vandalism

* * *

The Organization next points to the Carrier's letter dated November 20, 2015 informing the Organization that it was exercising its right to terminate the MOUI effective January 1, 2016.¹⁰

From this, the Organization argues that the Carrier's position that it met its obligations under Article XVII, Section 3 to take the General Chairmen's "... recommendation for full and thoughtful consideration" turns that language into "merely a 'meet and listen' requirement ... [which] is an untenable interpretation of Section 3 because it would render the provision meaningless."¹¹

The Carrier has a different view of its obligations under Article XVII, Section 3 with the Carrier maintaining that it met those obligations:¹²

It is also worth emphasizing, in this regard, that even in those circumstances when Section 3 is considered applicable it merely requires the Carrier to grant the Organization's affected General Chairman the "opportunity to furnish the carrier with his recommendations for full and thoughtful consideration by the Carrier". Whether or not the above on-property meetings were done under the ambit of Section 3, something which the Carrier has argued was unnecessary, the fact remains that the Organization was granted a full opportunity to express their concerns and recommendations, not only through Labor Relations avenues but also through UP's Operating and Safety Leadership teams. Nothing in Section 3 requires the Carrier to accede to the Organization's objections if, in the Carrier's view those objections or recommendation changes at issue are not appropriate. The Carrier has heard the Organization's objections to inward-facing cameras and has carefully and fully considered those views. The

¹⁰ *Id.*; Organization Exhibit G.

¹¹ Organization Submission at 10.

¹² Carrier Submission at 29.

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 14

UP has taken measures to ensure that the privacy of our crew members is respected and protected consistent with UP's safety and business objectives. ...

By the clear language of Article XVII, Section 3, there is a limited obligation on the Carrier to give the General Chairman "... the opportunity to furnish the carrier with his recommendations for full and thoughtful consideration by the carrier." Article XVII, Section 3 imposes no bargaining obligation on the Carrier, nor is there a requirement that the parties reach agreement with respect to installation and utilization of inward-facing cameras. Had the parties intended such a result, clear language would have easily so provided. The parties did not draft and agree upon that kind of language. The parties only agreed that the Carrier would give the General Chairman "... the opportunity to furnish the carrier with his recommendations for full and thoughtful consideration by the carrier."

Given that the Organization has the burden here, the question is whether the Organization has demonstrated that the Carrier did not give "... full and thoughtful consideration" to the Organization's position on installation and utilization of inward-facing cameras. Just from looking at the Organization's arguments and exhibits, we cannot find that the Organization has met that burden.

This record shows that the parties entered into the April 24, 2014 MOUI with the agreement to "... meet on a periodic basis to discuss matters pertaining to the use of the inward facing cameras and the videos they produce", which the Carrier maintained until it exercised its right to terminate the MOUI effective January 1, 2016. From that alone, the MOUI addressing meeting over the installation and utilization of inward-facing cameras was in effect for a period approaching two years. There was also a period when, instead of imposing discipline, the Carrier provided coaching for most rules violations involving safety, operations and electronic device

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 15

use. And the Carrier asserted in its June 2, 2015 letter that “[t]o date, multiple meetings have been held with the Organization to listen and respond to the various concerns from the affected General Chairmen”,¹³ which – at least as for the holding of meetings – the Organization does not refute. While the Organization asserts that “... the Carrier may have gone through the motions by meeting with the General Chairmen and/or their designees ...”,¹⁴ there is no dispute that the Carrier met with the Organization discussing the installation and utilization of inward-facing cameras. As the Organization states, the parties did meet under the MOUI (“[f]rom the outset of these discussions ... [giving the further example that i]n the June 25, 2014 meeting, the Organization also informed the Carrier of our concerns that some managers might use the video recordings for the purpose of ‘fishing’ for rule violations under the guise of investigating a triggering event”).¹⁵

However, it does not follow, as the Organization argues, that “... the Carrier’s blanket refusal to alter its unilateral plans for IFC installation and usage makes clear that it gave no consideration whatsoever to the Union’s position, much less the ‘full and thoughtful consideration’ required by Article XVII, Section 3.”¹⁶ The Carrier was not obligated to bargain with the Organization under Article XVII, Section 3. If the Carrier had a bargaining obligation under that language, there might be a requirement (but not a mandate) that there be evidence of changing positions and making concessions. And that provision does not require the Carrier to reach agreement with the Organization. All the Carrier was obligated to do under Article XVII, Section 3 was provide the General Chairmen “... with the opportunity to fur-

¹³ Organization Exhibit I at 4. *See also*, Organization Exhibit J where the Carrier listed dates of meetings on the topic of “Inward facing camera”.

¹⁴ Organization Submission at 11.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 11.

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 16

nish the carrier with his recommendations for full and thoughtful consideration by the carrier.” Given the above, the Organization has not demonstrated that the Carrier failed to meet that obligation. More specifically, the Organization’s seeking that the Carrier agree “... to our reasonable requests: that the cameras be turned off when the train was not in motion; that data recorded by the cameras be deleted immediately following a routine trip; and that only the lead cab be videotaped allowing for some privacy on trailing units”,¹⁷ is not a demonstration that the Carrier failed to meet its obligation under Article XVII, Section 3 to give “full and thoughtful consideration” to the Organization’s position. The bottom line is the Carrier did not agree with the Organization’s position. Even if a bargaining obligation was imposed by Article XVII, Section 3 (which was not), the Carrier’s failure to agree to the Organization’s requests is not enough to support the Organization’s position in this case.

Fourth, the Organization argues that the Carrier possesses no other rights in the Agreement upon which it can rely to justify installation and usage of the inward facing cameras.¹⁸ That argument misplaces the burden. As discussed *supra* at (B) (1), the burden is on the Organization to demonstrate a violation of relevant contract language – *i.e.*, that Carrier cannot install and utilize inward-facing cameras. In a contract dispute such as this, it is not the Carrier’s burden to demonstrate that there is language specifically allowing it to do so.

Fifth, citing to academic works, the Organization argues that studies have shown that individuals who are under observation tend to make mistakes, thereby making the Carrier’s decision unreasonable.¹⁹ The science – and the Organization –

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 16-17.

may well be correct. However, in these management rights disputes “... the Carrier has the ‘right’ to be ‘wrong’ — it just cannot be arbitrary.” *First Division Award 26346; Third Division Award 36994, supra.* At best, the Carrier was “wrong” in its decision to install and utilize inward-facing cameras. For this Board to find the Carrier’s being “wrong” in a management rights dispute after the Carrier has shown that it made its decision with “a rational basis, justification or excuse” which was not arbitrary, would amount to this Board’s “second-guess[ing]” that managerial decision. This Board does not have that authority. *First Division Award 26346; Third Division Award 36994; Second Division Awards 13847; 13843, supra.*²⁰

4. The Carrier’s Other Arguments

The Carrier asserts that past practice and public policy support its ability to install and utilize inward-facing cameras.²¹

With respect to past practice, the Carrier argues that “... for many years UP employees, including locomotive engineers, have worked on UP’s property where cameras have been installed – on locomotives, other operating vehicles, in yards, shops, terminals, office buildings, and inside of crew vans.”²² Specific examples are then given.²³ In light of the result in this matter denying the claim on a management rights basis, the Carrier’s past practice arguments along with the Organization’s rebuttal²⁴ are moot and need not be addressed.

For the same reason, the Carrier’s public policy argument is also moot, but needs to be briefly discussed.

²⁰ The Organization’s arguments concerning the Carrier’s past practice assertions (Organization Submission at 12-14) are resolved *infra* at B(4).

²¹ Carrier Submission at 18-35.

²² *Id.* at 18-19.

²³ *Id.* at 19-23.

²⁴ Organization Submission at 11-14.

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 18

This is a board of arbitration. Our function is limited to interpreting the parties' negotiated *contract* language. Matters of statutory interpretation are properly left for the courts. *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 57 (1974) ("... the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land ... the resolution of statutory or constitutional issues is a primary responsibility of courts ..."). And with respect to violation or compliance with public policy, that too is a function left to the judicial process and is not for arbitrators to decide. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) ("... 'the question of public policy is ultimately one for resolution by the courts'" [citing *W.R. Grace & Co v. Rubber Workers*, 461 U.S. 757, 766 (1983)]). This Board therefore expresses no opinion on whether public policy supports the Carrier's decision to install and utilize inward-facing cameras in its locomotives. Public policy issues are simply not before us.

C. Conclusion

This is a big dispute. The Carrier's reasons for installing and utilizing inward-facing cameras are safety-related and, given the instances of collisions resulting in loss of life, injuries and millions of dollars in damages coupled with recommendations from such bodies as the NTSB and the FRA along with provisions of the FAST Act (for commuter and passenger service) favoring installation of inward-facing cameras, the Carrier's decision to install and utilize inward-facing cameras as a means of assuring and verifying that employees operate safely and in accord with the Carrier's operating rules make up the foundation for our determination that the Carrier's actions had a rational justification and thus did not fall to the level arbitrary decision making. Because this is a management rights case with a limited re-

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 19

view standard of determining only whether arbitrary decision making has been demonstrated, that is as far as this Board can go.

However, while not sufficient to change the result, the Organization raises valid concerns on behalf of the employees. Are there limits as to time and place when the inward-facing cameras should be on and recording? Given the small space in which train crews work in locomotives, the cameras capture personal activities of the train crews such as when they eat, use the restroom facilities, etc. From a practical standpoint, are there times when the employees' privacy concerns during long stops when there is no activity serve no real practical safety-related goal which was the basis for the Carrier's exercise of its managerial prerogatives? On the other hand, while the Organization is of the opinion that there are already sufficient means to verify employee compliance with rule requirements already in place (*e.g.*, through surveillance of radio transmissions and locomotive event recorders),²⁵ the existence of a real-time video record of actual employee performance from the inward-facing cameras may well prove to shield and exonerate employees from charges of misconduct or improper operating practices. Balanced against all of this, of course, is the deterrent effect coming from employees knowing that their operations are being recorded, which serves to better assure safe operating practices and avoidance of the potential for the kinds of tragic incidents resulting in loss of life, injuries and damage that caused the Carrier to implement the camera installation – all of which impact the safety of other employees and the public.

And from a personal view of this dispute resolution process by the neutral member of this Board, for the over 30-years that I have been serving as a referee in this industry, when claimants appear at board hearings there is a uniform thread that comes through when they address the tribunals (and which also often appears

²⁵ Organization Submission at 20.

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 20

in investigation transcripts reviewed by the boards). That thread is the employees' stated love for their jobs and the thrill and responsibility that come from being members of a train crew operating such powerful and sophisticated equipment. Granted, those employees who appear before the boards I serve on are typically in trouble for alleged misconduct, but that love of job is no doubt shared by the thousands of employees who are not facing charges of misconduct. It is those employees who work in compliance with the rules and exhibit consistently high performance who may now find use of the inward-facing cameras as the equivalent of George Orwell's theme from his book "1984" of "Big Brother is Watching You" as a working condition. The Carrier's ability to potentially watch and record their every move – work related and not – may cause the employees to believe that some managers will be searching and combing through the video records in a quest to find minor rule violations solely to impose discipline. If that is how the Carrier's managerial right to install and utilize inward-facing cameras will be used by some managers, then that love of job and high performance exhibited by those employees will no doubt be diminished – ultimately to the Carrier's detriment.

Hopefully, through informal discussions, the parties will now be able to reach some common understanding for reasonable ground rules governing the use of inward-facing cameras and utilization of the records made from those cameras beyond those put in place by the Carrier. Perhaps the rulemaking process of the FRA (when, and if, they get around to it) will help. We obviously express no opinion on what, if any, those ground rules should be. In this case, we only find that the Carrier's decision to install and utilize inward-facing cameras in its locomotive fleet was not an arbitrary managerial decision, thus requiring that this Board deny the claim.

Union Pacific Railroad and BLET
Inward-Facing Camera Dispute
Page 21

AWARD

Claim denied.

Edwin H. Benn

Edwin H. Benn
Neutral Member

Alamh West

Carrier Member

Marcelus Reef

Organization Member

Dissent attached

Dated: 1/24/18

SPECIAL BOARD OF ADJUSTMENT
BLET Northern Region GCA v. UP
Neutral Member Edwin Benn
Inward Facing Camera Dispute
Carrier File No. 1626031 - Organization File No. C-0001

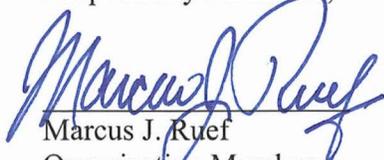
Organization Member's Dissent

I disagree with, though understand, the Neutral Member's decision to reject this most important claim. In doing so, I respect and appreciate the learned Neutral Member's recognition and enunciation of the clear limits to managerial discretion and his rejection of the Carrier's suggestion that its discretion is unfettered. Indeed, the line of authority he used to outline his view of those limitations came largely from his own prior decisions, many of which the Organization cited in setting forth its understanding of that topic.

In the course of denying the Organization's claim, the Neutral Member cited a variety of external influences as providing the Carrier with a rational basis for installing and then utilizing the Inward Facing Camera (IFC) during the time operations are underway. Unfortunately, the Neutral Member did not address the absence of rationality for using the IFC to make in-cab recordings during periods when no operational activities are underway, primarily during extended stops which routinely last many, many hours. This is an issue of extreme importance to all operating employees as it is motivated solely by Carrier managers' desire to scrutinize employees they don't like and attempt to find some reason to impose discipline. That is not a rational basis; it is simply a form of unwarranted surveillance unnecessary to achieving any legitimate Carrier objective.

The Neutral Member was obviously troubled by this prospect as he spoke to it at great length, going so far as to recount his many decades of experience deciding minor disputes in this industry. He explained how this experience has led to his understanding that career rank and file railroaders largely enjoy their work, and offered a prescient prediction that this negative environmental change will destroy those positive occupational facets. As the Labor Member, I am very disappointed that the Neutral Member didn't go further in this regard, but I acknowledge that the actual claim presented did not include this element in its underlying facts. I anticipate that the Neutral Member's *obiter dicta* will inform discipline cases in the future involving employees subjected to such misguided and unnecessary Big Brother tactics.

Respectfully submitted,


Marcus J. Ruef
Organization Member