

1 after the conductor would help me with the brake test, I would have him  
2 come through the cabs of the locomotives behind me, and I would isolate  
3 the lead locomotive, and then I would power test the locomotive. And  
4 the conductor would go over to the engineer's brake stand, say, on the  
5 third locomotive, and he would look on the control stand there and look  
6 at the amp meter, see how much it was loading, and then he would usually  
7 tell me if it was loading over the radio or not. Then he would move up  
8 to the next locomotive and do that. And then that way I knew that the  
9 jumper cable between each locomotive was performing properly so that the  
10 locomotives would product sufficient power to make the road trip.

11 That normally was a duty that was performed by the fireman,  
12 of course, and now I don't have a fireman, so I utilize the conductor to  
13 do that.

14 Q What has been your experience as General Chairman and Vice  
15 General Chairman for the General Committee of Adjustment on Union  
16 Pacific covering the former Chicago Northwestern with respect to the  
17 forced promotion of trainmen and conductors to engine service training?

18 A It has been my experience that the carrier, when it puts out  
19 a bulletin and it doesn't get enough applicants, forces the post '85  
20 trainmen into engine service.

21 Q Was the General Committee of Adjustment that you were Vice  
22 Chairman of at the end of 1995 involved in Award Number 25 of Public Law  
23 Board Number 5137?

24 A Yes, Mr. Clint, I am very familiar with the award, it is off  
25 my home seniority district. It is right out of my home terminal. I

1 know the gentleman involved in the award personally.

2 Q And without reading the entire award, although it is not  
3 that long, a claim was denied of the two trainmen who filed a claim  
4 about their forced assignment to engineer training under Article 13 of  
5 the 1985 UTU National Agreement.

6 A That is what the award determined, yes.

7 Q And I notice the award was signed by -- for the organization  
8 member, D.R. Haack. He was your predecessor as General Chairman?

9 A That is correct, I worked with Mr. Haack at the time.

10 Q And that was at a time when you were Vice General Chairman  
11 of that Committee?

12 A Yes, I was.

13 Q And I notice that the carrier member was Charles R. Wise.

14 A Yes.

15 Q Do you know Mr. Wise as a Union Pacific Labor Relations  
16 officer?

17 A Mr. Wise's position at the time of this award was Director  
18 of Labor Relations, Northern Lines.

19 Q And so this was in the process of the implementation of the  
20 merger of the Union Pacific with the Chicago Northwestern?

21 A That is correct, sir.

22 MR. MILLER: I tender the witness.

23 HEARING OFFICER MANSFIELD: Do you want to move UTU Exhibit  
24 15 into evidence?

25 MR. MILLER: I will do that. I usually wait till after

1 cross, but --

2 HEARING OFFICER MANSFIELD: Well, I have a few questions  
3 before --

4 THE WITNESS: Sure.

5 HEARING OFFICER MANSFIELD: Mr. Babler, you said in your  
6 seniority, in your district, if there is not enough applicants,  
7 voluntary applications from the trainmen, that they will force trainmen  
8 into the engineering -- engineer program, is that correct?

9 THE WITNESS: Yes.

10 HEARING OFFICER MANSFIELD: But you don't know if that is  
11 true in other districts?

12 THE WITNESS: I know it is true in other districts because  
13 we hold the contract for -- on my -- on the portion of the rail that I  
14 have jurisdiction over, there are eight seniority districts. The  
15 employees involved here were on District 2. The same bulletin that  
16 triggered what happened here, they put out a bulletin for seven of the  
17 eight districts for applicants. On two other districts, District 1 and  
18 District 4 and District 2, they forced post '85 trainmen to engine  
19 service. And it has been a consistent interpretation of our award, our  
20 committee of this award that post '85 employees on the CNW lines that I  
21 have jurisdiction over, must accept the motion.

22 HEARING OFFICER MANSFIELD: Okay. Cross-examination?

23 CROSS EXAMINATION

24 BY MR. ROSS:

25 Q This award covered in UTU Exhibit 15 apparently concerns an

1 event that occurred sometime prior to 1995, is that correct?

2 A Yes.

3 Q Do you have any idea as to when those two individuals were  
4 forced to go into engine service?

5 A I have the Bulletin and the award in a file at the back if  
6 we need the exact date, but I believe it was probably 1994.

7 Q That is because in the statement of claim it states the  
8 dates of January 3rd through 7th, 1994?

9 A That's correct. I believe that is when they first entered  
10 it, sir.

11 Q Now apparently in 1994 Mr. Haack or the General Committee  
12 that you represented believed that the carrier had improperly forced  
13 these people into engine service, isn't that correct?

14 A The reason for the dispute at that time, Mr. Ross, was these  
15 two employees had seniority prior to 1985 on other districts. There  
16 were shortages on District Number 2 where they went to, and they made a  
17 voluntary transfer after 1985, and that is where the dispute arose.

18 We said that their previous seniority on other CNW  
19 districts -- I believe they both hired out in 1982 -- and in 1986 they  
20 transferred to Northeastern II, which made them some of the senior  
21 post-'85 employees, and these two gentlemen then were forced because we  
22 had the dispute whether their 1982 seniority on a district that they  
23 were working on initially and then forfeited to come to the Northeastern  
24 II.

25 Q But you were taking the position that they should not have

1       been forced, isn't that right?

2           A       Our position was the 1982 date should apply.

3           Q       And since they didn't have as much seniority in that  
4       district as they had elsewhere, is that what I understand was one of the  
5       bases as to why you processed their claim?

6           A       The reason we processed the claim is our impression or our  
7       interpretation, Article 13 of the 1985 agreement was that they had  
8       already established seniority prior to the implementation of the October  
9       31st, 1985 agreement.

10                  The fact that they gave that seniority up in a continuous  
11       manner -- they went from one district to another -- our position was the  
12       1982 date should apply.

13           Q       In this particular instance though, were they being forced  
14       because they were the most senior trainmen in the district where they  
15       were working?

16           A       Yes, they were the most senior people that had not applied  
17       for engine service.

18           Q       But they were junior -- they could have been junior trainmen  
19       under your scenario, isn't that right?

20           A       Yes, there was. In fact there was junior trainmen that bid  
21       this Bulletin and were not accepted, and there was also junior trainmen  
22       that bid this Bulletin and were accepted. The ones that were not  
23       accepted, I believe there was some discipline problems. There was other  
24       ones we do not allow them to go into the engineer training program until  
25       they have completed the conductor training program.

1 Q Now when you were talking about the area that you have  
2 experience on, it's limited to eight districts, is that right?

3 A It is limited, sir, to the entire CNW lines.

4 Q But that CNW lines is only one of the former railroads that  
5 comprises the entire Union Pacific Railroad, am I correct?

6 A That is correct, sir.

7 Q And how many employees, if you know, are there in engine  
8 service throughout that entire seniority district?

9 A I would believe we would probably have locomotive engineers  
10 or trainmen.

11 Q Locomotive engineers? Let's just limit it to that.

12 A Oh, I would have to say 1600 probably on the CNW lines.

13 Q 1600, and as to the remainder of the approximately 9,000  
14 engineers, you have no contact with them?

15 They are not covered by your General Committee?

16 A No, they are not sir.

17 Q Just one brief question in regard to the video. You were in  
18 the room at the time the video was shown yesterday?

19 A I was here, yes.

20 Q And that video had to do, if you can remember, with some of  
21 the federal railroad regulations, is that correct?

22 A Yes, it did.

23 Q And I believe it was limited to Part 229 of the federal  
24 regulations, the locomotive inspection, is that right?

25 A Yes, it was.

1           Q       Now the things that you were talking about here, for  
2       example, the brake test, that is covered by another part of the federal  
3       regulations, isn't that right?

4           A       It is also part of the inspection process.

5           Q       But basically the rules in regard to how you perform that  
6       test is covered in Part 232 of the federal regulations, isn't that  
7       correct?

8           A       I believe that would be a fair statement.

9           Q       And the video had no reference whatsoever to Part 232?

10          A       I don't know the answer to that.

11          Q       You saw it the same as I did and it only talked about 229,  
12       didn't it?

13          A       I am not an expert on the federal regs, sir.

14                   MR. ROSS: That's all I have.

15                   MR. MILLER: I have no questions, but I would move the  
16       admission of UTU Exhibit 15.

17                   HEARING OFFICER MANSFIELD: Any objection?

18                   MR. ROSS: No objection.

19                   HEARING OFFICER MANSFIELD: UTU's Exhibit 15 is received.

20                                   [UTU Exhibit No. 15 was received into  
21                                   evidence.]

22                   MR. MILLER: UTU's next rebuttal witness is David Hakey.

23                   HEARING OFFICER MANSFIELD: Mr. Hakey, you remain under  
24       oath.

25                   THE WITNESS: Yes, ma'am.

1 Whereupon,

2 DAVID HAKEY,

3 a rebuttal witness, was called for examination by counsel for the United  
4 Transportation Union and, having been previously duly sworn, was further  
5 examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. MILLER:

8 Q Mr. Hakey, again, not to revisit your entire railroad  
9 career, but from 1995 until January of this year, I recall from your  
10 testimony that you worked full-time as a conductor on the former  
11 Southern Pacific Eastern Lines that became part of the Union Pacific  
12 Railroad, correct?

13 A Yes, sir.

14 Q Mr. Hakey, I am going to show you what has been previously  
15 admitted into evidence as BLE Exhibit 10, which is a portion of the Code  
16 of Federal Regulations, Part 240 of Title 49 and specifically page 462  
17 of that exhibit, and specifically 240.117(e), 1 through 5.

18 Do you recall the testimony that Mr. Simmerman gave on  
19 direct examination where he referred to those five failures that an  
20 individual could commit with respect to operating an engine as "the five  
21 cardinal sins"?

22 A Yes, sir.

23 Q Do you know those five actions or failures to be the five  
24 cardinal sins?

25 A Yes, sir.

1           Q           In your experience as a General Chairman and as a conductor,  
2 what happens to conductors on the Union Pacific who commit one of the  
3 five cardinal sins as a matter of the carrier's disciplining them?

4           A           They receive the same discipline as the engineer.

5           Q           Again in your experience as a General Chairman and as a  
6 conductor, what use does the Union Pacific make of event recorders in  
7 assessing discipline against conductors and brakemen?

8           A           They -- predominantly if the carrier detects an overspeed,  
9 they commonly use the data downloaded from an event recorded to cite  
10 that individual, that conductor, for investigation, and they use it to  
11 assess discipline.

12                    I currently am handling a case before Public Law Board 6053  
13 which will heard on August the 5th of this year.

14                    A conductor, W. H. Satterfield, was operating a train from  
15 San Antonio to Taylor. As a result of a train separation, the Manager  
16 of Operating Practices requested that the data be downloaded from the  
17 event recorder on the UP 3578 and SP 8309. After review of that data,  
18 the engineer was charged with the train separation and the conductor and  
19 engineer were charged with an overspeed of the train at Milepost 217 on  
20 the Austin subdivision where the train exceeded the track speed by two  
21 miles an hour and the train speed by 12 miles an hour.

22                    The discipline assessed the engineer and the conductor was  
23 identical.

24           Q           What was that discipline?

25           A           It was a Level 4 under the UP upgrade system, 30 days off.

1           Q       Mr. Hakey, I am going to now hand you what has been  
2 previously received into evidence as BLE Exhibit 8-C, which is a copy of  
3 excerpts from the 1986 BLE national agreement, which was an arbitration  
4 award under the Railway Labor Act and specifically I am going to turn to  
5 page 16 where there appears as Section 3 of Article 8 the so-called  
6 Incidental Work Rule.

7                   Are you familiar with the fact that locomotive engineers may  
8 perform those listed tasks that are incidental to their own assignment?  
9 Are you familiar with that?

10          A       Yes.

11          Q       And that the intent of the rule is not that they violate the  
12 scope rules of other unions?

13          A       No.

14          Q       And I would like to go down through those tasks you and ask  
15 you if you know from your experience on the property who primarily  
16 performs those listed tasks. The first one listed is handles switches.  
17 Whose primary job is it to handle switches on the Union Pacific  
18 Railroad?

19          A       Conductors, trainmen, yardmen.

20          Q       And with respect to the second listed task, would you please  
21 read what that task is?

22          A       Move, turn, spot and fuel locomotives.

23          Q       From your experience, whose primary job is that on the Union  
24 Pacific Railroad?

25          A       Inside hostlers, roundhouse folks, those sort of people.

1 Q What about the third listed task?

2 A Supply locomotives except for heavy equipment and supplies  
3 generally placed on locomotives by employees of other crafts. That  
4 would be the same mechanical forces, inside hostlers. Generally they  
5 perform those tasks.

6 Q You worked on the property when there were firemen that were  
7 in use, correct?

8 A That's correct.

9 Q Was that task you just read one of the attributes of the  
10 fireman position?

11 A Yes.

12 Q Would you read the next listed task?

13 A Inspect locomotives.

14 Q Whose primary function is that?

15 A Primarily engine service.

16 Q And would that have been formerly performed by a fireman?

17 A Yes.

18 Q And the next listed task?

19 A Start and shut down locomotives.

20 Q Again, what if anything did that have to do with jobs  
21 formerly performed by firemen?

22 A Well, they performed those tasks.

23 Q And the next task?

24 A Make head and air tests.

25 Q Whose primary job is that on Union Pacific?

1           A       Well, it is an assignment now that is performed by both  
2 engineers and trainmen because the fireman has been eliminated.

3           Q       And what about the next task?

4           A       Prepare reports while under pay. Conductors prepare reports  
5 while under pay.

6           Q       And most of those reports are done by computer these days,  
7 are they not?

8           A       Most.

9           Q       What is the next listed task?

10          A       Use communication devices, copy and handle train orders,  
11 clearances and other messages, and those functions are performed by crew  
12 members on trains, ground service, engine service. Everybody uses the  
13 communication devices for one purpose or another.

14          Q       What about the next listed task?

15          A       Any duties formerly performed by a fireman.

16          Q       And you have already covered those in some of the earlier  
17 portions?

18          A       Yes.

19          Q       Mr. Hakey, were you in the room yesterday when the BLE  
20 played its Exhibit 17-B, a video of the daily engine inspection?

21          A       Yes.

22          Q       And did that accurately reflect such inspections as you have  
23 been involved in on Union Pacific as a conductor?

24          A       What was displayed on the video was accurate, but it was  
25 incomplete. It did not -- for instance, when they picked up the engine

1 on line, they did not show the engine brake inspection, which is  
2 required by law.

3 Q Was that when they added the engine to the consist?

4 A Yes, sir.

5 Q How is it that that brake inspection is accomplished in your  
6 experience when an engine is added to a consist?

7 A Well, after picking up the engine, and the air hose and the  
8 actuating hoses, main reservoir hoses are connected. The safety chains  
9 are put into place, which both the engineer and conductor participate  
10 in, platforms are put into place when applicable. The engineer will  
11 return to the head end of the engine consist. He will set the automatic  
12 brake valve. And the conductor will inspect the unit to determine that  
13 the piston travel is correct and that the brakes apply, and that the  
14 shoes are on the tire of the wheel properly, just like was mentioned in  
15 the video.

16 Q If mechanical forces are available, who performs the daily  
17 engine inspection?

18 A The mechanical forces.

19 Q Are you --

20 A And that's written in the -- that's written in the rule.

21 Q What qualifications do you have from the carrier with  
22 respect to air brake and train handling?

23 A I'm qualified on the air brake and train handling rules.

24 Q Does the carrier issue you any qualification card of any  
25 sort with respect to that?

1 A Yes, sir, they do.

2 Q Do you have that with you?

3 A Yes, sir, I do.

4 Q Would you get it out?

5 A Well, certainly. I guess Mr. Ross will want to see this.

6 MR. ROSS: You've got another card, too.

7 THE WITNESS: Another certificate.

8 BY MR. MILLER:

9 Q And this certificate that shows your qualification by the  
10 Union Pacific in air brake and train handling is in addition to the  
11 certificate that you showed Mr. Ross when you were presented in our case  
12 in chief. Correct?

13 A That is correct.

14 MR. MILLER: I pass the witness.

15 HEARING OFFICER MANSFIELD: Actually, I have a few  
16 questions.

17 With that card that I just saw also it has on the back of it  
18 reexamination dates. Once you're certified to handle air brakes, do you  
19 have to be reexamined?

20 THE WITNESS: Yes, ma'am.

21 HEARING OFFICER MANSFIELD: How often?

22 THE WITNESS: Yearly.

23 HEARING OFFICER MANSFIELD: Okay. Cross-examination?

24 CROSS EXAMINATION

25 BY MR. ROSS:

1 Q Mr. Hakey, this card that you receive that you've been  
2 talking about is issued by the Union Pacific Railroad. Is that correct?

3 A That's correct.

4 Q And it's a certificate that the Union Pacific itself issues.  
5 Is that correct?

6 A That's correct.

7 Q It's not an FRA certification.

8 A Well, it's issued by the Union Pacific pursuant to a program  
9 developed under FRA guidelines just like the engineer licensing program.

10 Q Yes, but it's not a license to operate the locomotive, is  
11 it?

12 A No, sir.

13 Q Okay. So just a license to check air brakes.

14 A Well, it's not a license, it's a certificate that I'm  
15 qualified to perform those tasks and those duties.

16 Q Okay. Thank you.

17 A You're welcome.

18 Q Now when you were talking about these incidental work  
19 duties, you mentioned something about fueling and sanding, I guess, and  
20 putting various kinds of equipment on a locomotive. And you said that's  
21 performed by inside hostlers. Is that correct?

22 A Yes, sir. Predominantly by inside hostlers.

23 Q Now are those inside hostlers represented by the United  
24 Transportation Union?

25 A Yes, sir.

1 Q On the Southern Pacific?

2 A Well, I don't work for the Southern Pacific anymore.

3 Q Pardon?

4 A I don't work for the Southern --

5 Q Well, how about on the UP former Southern Pacific where you  
6 worked.

7 A Yes, sir.

8 Q You represent those inside hostlers as part of what craft?

9 A I don't represent them. Sam Rudel represents them.

10 Q Okay. Is that right? Now I think you said that nowadays  
11 the mechanical forces perform that kind of work. Isn't that true?

12 A That's correct. Predominantly.

13 Q Predominantly. So --

14 A Yes, sir.

15 Q Inside hostlers don't do that kind of work anymore. Is that  
16 right?

17 A Yes, they do.

18 Q From time to time.

19 A Well, they do it where they -- at locations where they have  
20 inside hostlers. That comes under their duties and their scope.

21 Q And where are inside hostlers normally located?

22 A Englewood Yard, Settagast Yard. I believe they have  
23 hostlers at Strang. I'm not sure about New Orleans.

24 Q Now how often are locomotives started and shut down in your  
25 experience?

1           A       Daily.  Some locomotives daily.

2           Q       What's the normal reason for shutting down a locomotive?

3           A       End of the tour of duty.

4           Q       They shut those down at the end of every tour of duty?

5           A       Yes, sir.

6           Q       I thought it was the practice on most railroads that you try  
7           to keep the engines running.

8           A       No, sir.  The municipalities and the communities around the  
9           rail lines today have complained about that constant rumbling and  
10          pollution, and it's a practice now to shut down the locomotives.  In  
11          fact, the rules require that if the temperature won't drop below 40  
12          degrees, you will shut down the locomotive.

13          Q       Let's turn to this one example that you were talking about  
14          where there was an engineer and a conductor that were charged in regard  
15          to an incident of some two-mile overspeed.  Do you recollect your  
16          testimony on that?

17          A       Yes, sir.

18          Q       Was that conductor a certified locomotive engineer?

19          A       I have no knowledge of that.  I don't know if he was or he  
20          was not.

21          Q       So the conductor got a level 4 discipline.  Is that right?

22          A       That's correct.

23          Q       And that's under the Union Pacific what they call the  
24          upgrade discipline program?

25          A       Yes, sir.

1 Q And the engineer's also covered by that upgrade discipline  
2 program or policy. Is that correct?

3 A Yes, sir.

4 Q Did the engineer get 30 days off also?

5 A Yes, sir.

6 Q Did you represent both of the employees?

7 A No, I did not.

8 Q Did that engineer also receive any additional discipline  
9 from the carrier for the second violation that you mentioned?

10 A I do not know.

11 Q Okay. And do you know whether the individual who was  
12 operating the train as an engineer had his Federal license removed or  
13 suspended?

14 A I do not know.

15 Q Now, are you presently representing that conductor in the  
16 grievance arbitration procedure?

17 A Yes, sir.

18 Q And at what level is that claim or disciplinary action at?

19 A Currently scheduled to be heard before Public Law Board 6053  
20 on August 5.

21 Q And what is the basis of that claim?

22 A That he's not guilty.

23 Q Not guilty. He's not guilty because he wasn't operating the  
24 locomotive? Is that correct?

25 A No, he's not guilty because the speed indicator in the lead

1 unit was inaccurate. In fact, that's the position taken by both the BLE  
2 and the UTU at the disciplinary hearing.

3 Q Now to your experience, without any exception whatsoever,  
4 you're saying that anytime that there's a violation of these five  
5 cardinal sins, that the engineer and the conductor receive the same  
6 amount of discipline on the UP former Southern Pacific Region. Is that  
7 right?

8 A That's been my experience. Yes, sir.

9 Q Okay. Never been any exception. Do you know of any  
10 exception anyplace on the UP?

11 A Not personally; no.

12 MR. ROSS: That's all I have of the witness.

13 MR. MILLER: I have no further questions.

14 HEARING OFFICER MANSFIELD: Thank you, Mr. Hakey.

15 THE WITNESS: Thank you, ma'am.

16 MR. MILLER: That completes UTU's rebuttal case.

17 HEARING OFFICER MANSFIELD: Okay. Are you going to have  
18 rebuttal witnesses?

19 MR. COHEN: I am going to have one rebuttal witness for sure  
20 and then we will -- may we have five minutes, 10 minutes, whatever, just  
21 to --

22 HEARING OFFICER MANSFIELD: Five minutes. Be back at 11:15.

23 [Recess.]

24 HEARING OFFICER MANSFIELD: Back on the record. You need to  
25 swear in the witness.

1 Whereupon,

2 RICHARD RADEK,

3 a witness, was called for examination by counsel and, having been first  
4 duly sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. COHEN:

7 Q Mr. Radek, would you be kind enough to state your name and  
8 address for the record?

9 A My name is Richard Keith Radek. My address is 1370 Ontario  
10 Street, Suite 500, Cleveland, Ohio.

11 Q Would you spell your last name, please?

12 A Radasindogek.

13 Q Mr. Radek, I am going to briefly go through your career with  
14 the -- first as an employee from 1965 to 1969 on the Chicago and  
15 Northwestern Railroad as a fireman, is that correct, sir?

16 A Yes.

17 Q And as I understand it, you then were out of the railroad  
18 industry until 1974 when you returned to that same railroad as a  
19 trainman?

20 A Right.

21 Q And in July of 1974 you became qualified as an engineer --  
22 or is it July of '76?

23 A Yes.

24 Q And you were actively employed on the CNW railroad as an  
25 engineer from July of '96 until the middle of 1981?

1 HEARING OFFICER MANSFIELD: Do you mean '76?

2 THE WITNESS: Seventysix.

3 BY MR. COHEN:

4 Q Seventysix to the middle of '81?

5 A Right.

6 Q And in 1981 you were hired by the Brotherhood of Locomotive  
7 Engineers and named as the representative on the National Railroad  
8 Adjustment Board in Chicago, the First Division?

9 A Correct.

10 Q And as I understand it, you were then residing in Chicago  
11 during the first period of time when you received that assignment?

12 A Until 1987.

13 Q Till 1987. And then in 1987, you relocated to Cleveland,  
14 Ohio?

15 A Correct.

16 Q But you remained the BLE representative on that particular  
17 Railroad Adjustment Board in Chicago?

18 A Yes.

19 Q And, in fact, you have continued in that capacity up to and  
20 including the present date?

21 A Yes, for the whole period since 1981.

22 Q Now, in addition to performing that function on behalf of  
23 the Brotherhood of Locomotive Engineers, did there come a point in time  
24 when you were named the Director of the Arbitration Department of the  
25 BLE?

1           A        Yes.  I was named Director, I believe, in 1986 or 1987, if  
2 memory serves me correctly.

3           Q        And you have continued to serve in that capacity to date as  
4 well?

5           A        Yes, I have.

6           Q        And, lastly, to round out your administrative  
7 responsibilities and authority, you also are the individual at the BLE  
8 headquarters who is in charge with the administration of the Engineer  
9 Certification Program, is that correct?

10          A        That's true.

11          Q        Insofar as your union office is concerned, you were elected  
12 Vice President in 1996?

13          A        Correct.

14          Q        And you still hold that elected office today?

15          A        Yes.

16          Q        Now, during the period of time, I believe you have alluded  
17 to approximately 18 years, from 1981 to date, why don't you just briefly  
18 give us a sense of the number of arbitration cases relating to the Union  
19 Pacific Railroad that you have been -- and its predecessor companies,  
20 that you actually have handled?

21          A        Relating only to the Union Pacific, I would say that there  
22 have been several hundred arbitration cases that I have personally  
23 handled, and probably several hundred others I have been involved with  
24 in one way or another.

25          Q        And when you say handled, are we speaking about preparing

1 the case for arbitration?

2 A And arguing the case.

3 Q And arguing the case before an arbitrator?

4 A Correct.

5 Q All right. And in your capacity as well as the Director of  
6 the Arbitration Department, do you also become involved in analyzing and  
7 discussing strategy with other of your colleagues concerning arbitration  
8 cases that they are actually handling?

9 A Absolutely. Arbitration in this industry is a review  
10 proceeding, as you probably know, so we try to build the record in  
11 handling so that we have a better chance for success when that record is  
12 reviewed.

13 Q And how many other individuals besides yourself constitute  
14 the Arbitration Department of the BLE?

15 A Well, currently I have two assistants and one secretary.

16 Q Now, during the course of the hearing to date, there has  
17 been a significant discussion about the incidental work provision of the  
18 BLE collective bargaining agreement. Are you familiar with that, sir?

19 A Yes.

20 Q And as well there has been discussion about the 1986 side  
21 letter agreements between the BLE and the national carriers concerning  
22 the so-called present and available language of that basic agreement.  
23 Are you familiar with that as well, sir?

24 A Yes.

25 Q And could you just tell us, subsequent to the 1986 agreement

1 being entered into, with the accompanying side letters which establish  
2 the parameters under which an engineer could be obliged to handle or  
3 throw switches, how many -- how much activity has that generated for you  
4 in your capacity as head of the Arbitration Department?

5 A Well, I would say there have been half a dozen or more  
6 disputes that arose that I was involved in that dealt with that  
7 particular topic.

8 Q Okay. And what was the nature of those disputes, in general  
9 terms?

10 A Well, the disputes arose because engineers were required to  
11 handled switches. At times they thought that the trainman on the crew,  
12 who traditionally has done that work, was present and available and  
13 should have done it, rather than, you know, the engineer throwing the  
14 switch himself.

15 Q And as a result of those disputes being called to your  
16 attention, have a series of cases actually been processed to and heard  
17 by and decided by arbitrators concerning that precise question?

18 A Yes. There have been some cases that have gone to  
19 arbitrators and been decided, and probably some that didn't make it that  
20 far.

21 MR. COHEN: Let me at this point request that we mark for  
22 identification -- it is going to be a package, I am trying to do this as  
23 package. What is our number, 28?

24 MS. VIRK: Yes.

25 MR. COHEN: All right. We are going to mark for

1 identification a series of arbitration awards. With one exception, they  
2 are all awards. The exception I will discuss in a moment.

3 MS. SCHWARTZ: This is the Incidental Work Rule.

4 MR. COHEN: This is the Incidental Work Rule, yes, the  
5 package. Okay. One to the Hearing Officer and one to the witness,  
6 please, Angie.

7 HEARING OFFICER MANSFIELD: Mr. Cohen, do you want to have  
8 these marked as BLE 28A, 28B?

9 MR. COHEN: Yes, I do. I do.

10 HEARING OFFICER MANSFIELD: Okay.

11 MR. COHEN: And as we are marking them, may I have just a  
12 moment to just crossreference you to a particular paragraph so you will  
13 know what it is we are citing for. We are not going to have the  
14 discussion with the witness of any extent, but I thought you would like  
15 that, to at least see that.

16 Mr. Miller, as I go through each one I am going to just make  
17 a reference to the particular paragraph we would focus your attention  
18 on. 28A is Award Number 24295 and at page 3 of that award there is the  
19 final paragraph before the award sustaining the claim, which I would  
20 like to call to your attention. 28B.

21 28B is Award Number 24288, which has been alluded to  
22 previously as the so-called 700 foot rule case, in which the arbitrator  
23 ruled that if a trainman or conductor was within 750 feet from where the  
24 switch was located, he was present and available within the meaning of  
25 the side letter that has been entered into evidence in this proceeding,

1 that is the last paragraph of that award.

2 [BLE Exhibits Number 28A and 28B were  
3 marked for identification.]

4 MR. COHEN: Exhibit 28C is Award Number 24477 and that  
5 appears --

6 [BLE Exhibit Number 28C was marked for  
7 identification.]

8 MR. MILLER: No, I have 24288.

9 HEARING OFFICER MANSFIELD: 24477, you want to be 28C?

10 MR. COHEN: Hang on one second. I think I do, but now I  
11 have done it to myself. Okay. No, 24288 was the 700 foot case, that  
12 was B -- B.

13 HEARING OFFICER MANSFIELD: Okay.

14 MR. COHEN: Then I said next 24477, and that is the 2700  
15 foot case in which the arbitrator ruled when the trainman was onehalf  
16 mile away, i.e., 2700 feet, he was not present and available. That  
17 should -- that is number 24477.

18 HEARING OFFICER MANSFIELD: So that would be 28C?

19 MR. COHEN: Correct.

20 MR. MILLER: 24477. Okay.

21 MR. COHEN: Sorry, Clint. Do you have it now?

22 MR. MILLER: There are other awards interspersed in my  
23 packet.

24 HEARING OFFICER MANSFIELD: Yeah, no. Mine, too.

25 MR. MILLER: Okay.

1           MR. COHEN: I apologize for that. Okay. Then the next  
2 should be Public Law Board Number 5263, Case Number 70, Award Number 24,  
3 claim of engineer D.J. Hawley.

4           MR. MILLER: Okay.

5           HEARING OFFICER MANSFIELD: That would be 28D?

6           MR. COHEN: 28D.

7                                 [BLE Exhibit Number 28D was marked for  
8                                 identification.]

9           MR. COHEN: Then just hold the -- well, there appears  
10 immediately after that, or there should appear, in that same case, an  
11 employee's exhibit ex parte submission submitted by David Haack. I want  
12 to say it correctly.

13          MR. LINSEY: Haack.

14          MR. COHEN: Haack. David Haack, General Chairman. That was  
15 the brief that was submitted by the UTU in that case, page 12. At page  
16 12 I just wanted to highlight that last paragraph of the position that  
17 the UTU took in that matter, which has been the subject of some  
18 testimony here before. That is 28D.

19          HEARING OFFICER MANSFIELD: So you want that to also be part  
20 of 28D?

21          MR. COHEN: Yes. Part of 28D. Then I have got, next I have  
22 Award Number 10, Public Law Board 5089, an award of Francis X. Quinn,  
23 and the operative rationale appears at the bottom of the first page and  
24 the top of the second page. Once again, it addresses the question of  
25 what does present and available mean.

1 MR. MILLER: I don't know where that is.

2 MR. COHEN: 28E.

3 HEARING OFFICER MANSFIELD: 28E.

4 [BLE Exhibit Number 28E was marked for  
5 identification.]

6 MR. MILLER: Okay. Here it is. All right.

7 MR. COHEN: Okay. And lastly, 28F, I would like marked,  
8 Public Law Board Number 6263, Award Number 8, and the rationale in that  
9 award appears beginning at the next to the last -- well, the next to the  
10 last full paragraph at the bottom of page 2, beginning with the  
11 sentence, "This case arose because there were two ways the move could  
12 have been made." Et cetera. Okay.

13 MR. LINSEY: What was the last one, George?

14 MR. COHEN: The last one is --

15 HEARING OFFICER MANSFIELD: It is the Chicago and  
16 Northwestern case.

17 MR. COHEN: Chicago and Northwestern Transportation Company,  
18 Claim Number 20, Engineer R.D. Dedman, two pages. R.D. Dedman.

19 [BLE Exhibit Number 28F was marked for  
20 identification.]

21 BY MR. COHEN:

22 Q Now, Mr. --

23 MR. COHEN: May I proceed?

24 HEARING OFFICER MANSFIELD: You may.

25 MR. LINSEY: Excuse me. B is page number 70, Award Number

1 24? What is that date?

2 MR. COHEN: B is 24288.

3 BY MR. COHEN:

4 Q Now, Mr. Radek, I take it in your world, in your parlance,  
5 this is part of the evolution of the interpretive process with respect  
6 to these -- the words that we just cited in the agreement?

7 A Yes.

8 Q And in addition to these awards, are there still ongoing  
9 issues and questions concerning how the terms "present and available"  
10 for purposes of the handling of switches, subparagraph 8 and the  
11 supplying of the locomotive engine in subparagraph C are still working  
12 their way through the grievance arbitration process?

13 A There are such cases, yes.

14 Q And as far as the BLE is concerned, has the BLE accepted the  
15 proposition that at 2700 feet that would result in the conclusion that a  
16 train service employee is not present and available?

17 A Not necessarily, no.

18 Q And are there any pending cases, as we sit here today, that  
19 raise questions such as that?

20 A There are pending cases, although I am not certain if they  
21 are specific to the Union Pacific.

22 Q But I take it is fair to say 13 years after the side letters  
23 were entered into and the basic Section 3 was agreed upon, there are  
24 still open issues as far as your office is concerned?

25 A Absolutely.

1           Q       And in the course of becoming prepared to deal with the BLE  
2 agreement and the application of the BLE side letters, have you also had  
3 occasion to become familiar with the UTU's issues and the UTU's cases  
4 that have been processed to arbitration under the UTU agreement?

5           A       Yes, I have discussed them with several UT officers in the  
6 development of those cases.

7           Q       And turning your attention specifically to Exhibit -- BLE  
8 Exhibit 28D, Public Law Board Number 5263, I note in the caption that is  
9 a case that involved the United Transportation Union and the Chicago and  
10 Northwestern Transportation Company, is that correct?

11          A       Yes.

12          Q       Is that one such case involving the UTU that you have had  
13 discussions with UTU representatives about?

14          A       Yes, it is.

15          Q       Okay. And attached to that particular award, there is a  
16 brief that was submitted by the representative of the UTU in that  
17 particular case. Could you tell us how you became familiar with that  
18 document?

19          A       We had discussions with local UTU officers and our General  
20 Chairman had discussions with the UTU. I believe we even provided  
21 copies of our submissions in earlier cases for them to use in preparing  
22 their own case for arbitration.

23          Q       And has there been, on the BLE's part, an ongoing concern  
24 about the jurisdiction of the craft of trainman and train service man?

25          A       Yes.

1 Q Particularly with respect to the application of the  
2 Incidental Work Rule?

3 A Definitely.

4 Q And even more particularly with respect to the present and  
5 available provision?

6 A Yes.

7 MR. COHEN: I would like to have received in evidence  
8 Exhibits 28A through F.

9 MR. MILLER: I have no objection.

10 HEARING OFFICER MANSFIELD: 28A through F -- BLE 28A through  
11 F are received.

12 [BLE Exhibits Number 28A through 28F were  
13 received in evidence.]

14 BY MR. COHEN:

15 Q Now, Mr. Radek, I would like to for a moment -- and I  
16 apologize, something has happened. I will direct your attention to  
17 another subject area which I know is near and dear to your heart, that  
18 is to say, discipline -- discipline of locomotive engineers. And would  
19 you be kind enough to sort of just give us an overview of your  
20 experience in being involved in handling discipline cases on behalf of  
21 locomotive engineers represented by the BLE?

22 A Am I restricted in time as to my response?

23 Q Yes, you are. Nine o'clock tomorrow is when we are  
24 reconvening.

25 HEARING OFFICER MANSFIELD: I just have a question. Are you

1 limiting this to UP?

2 MR. COHEN: Yes, I will.

3 HEARING OFFICER MANSFIELD: But you didn't say that.

4 MR. COHEN: Well, under Florida East Coast, there is  
5 probably an interest in everything. But I think for the purposes of  
6 today, given the scope of his experience, we will.

7 HEARING OFFICER MANSFIELD: For the sake of economy.

8 BY MR. COHEN:

9 Q Let's focus, if you would be kind enough, Mr. Radek, on your  
10 experience with respect to UP discipline matters. I take it there are  
11 some UP disciplines of locomotive engineers, sir?

12 A There have been quite a number of disciplines and many of  
13 those cases are filed for adjudication at the First Division. Many of  
14 those cases, when -- at the outset, when charges are preferred against  
15 an employee, we will be called to consult so that we can help build  
16 defenses. We can provide authorities when that seems to be helpful or  
17 appropriate.

18 I would say since 1981 I have probably been involved in  
19 discipline matters involving 500 Union Pacific engineers, I can say that  
20 without, you know, being afraid to be challenged on the facts.

21 Q And in the course of preparing a case on behalf of a  
22 locomotive engineer with respect to discipline imposed upon him by the  
23 company, have you also become familiar with situations where discipline  
24 had also been imposed by the company on another member of the operating  
25 crew with respect to the same incident?

1 A Yes.

2 Q And what has your experience been in that regard?

3 A Basically, when the two employees are involved in the same  
4 incident, and when it has involved the operation of the train, the  
5 engineer is usually disciplined to a greater degree than would be his  
6 counterparts on the crew.

7 Q Now, we have heard testimony over the course of the last day  
8 indicating from the UTU that it is their experience that in those  
9 instances, the discipline imposed on the locomotive engineer and the  
10 conductor or trainman, arising out of a particular -- the same incident,  
11 have been identical. Do you agree with that?

12 A No, especially not at the outset. I think it is  
13 predominantly more the case that the engineer would be more heavily  
14 disciplined than the train service employee if it involved the operation  
15 of the train.

16 Q Okay. And when you say at the outset, are you referring to  
17 the initial discipline imposed by the company, by UP?

18 A Yes.

19 Q And implicit in your reference to the outset is that  
20 something might happen after that discipline had been imposed by the  
21 company. Is that correct?

22 A Yes.

23 Q And what are you referring to specifically?

24 A Well, in grievance handling and in arbitration, sometimes  
25 discipline is modified, and that would certainly be the case in some of

1 these instances that you've referred to, for a number of reasons.  
2 Anyone that's familiar with the arbitration of these cases would know  
3 that there are ways that discipline ultimately is changed, although I  
4 would say where the violation that was alleged clearly involved the  
5 operation of the train, even when discipline is modified, the engineer  
6 usually ends up being more severely punished.

7 Q Now in connection with this proceeding, do you recall my  
8 requesting of you to take a look at some of your files and select a  
9 number of arbitration awards which on their face indicated that the  
10 company had imposed different and more severe discipline on an engineer  
11 than on a conductor?

12 A Yes.

13 Q Okay. And I'd like now if I might -- and in response to  
14 that, you were kind enough to fax me a number of documents. Is that  
15 correct?

16 A That's correct.

17 Q Okay. I'd like now to --

18 MR. MILLER: Are these in order?

19 MR. COHEN: Mr. Miller, you have no standing at this point  
20 to be critical of George Cohen on that. But the answer is hopefully.

21 MR. MILLER: I did until yesterday.

22 MR. COHEN: My wife once said to me don't bring that subject  
23 up, you have no standing. Okay. In any event, I'm going to try to do  
24 that as best we can.

25 HEARING OFFICER MANSFIELD: Are these the Exhibit 29?

1           MR. COHEN: These will be. And I will say this very slowly  
2 to allow Mr. Miller to shuffle those papers.

3           The first one is A, 29A, Engineer P.C. Tucker, Public Law  
4 Board No. 5383. Okay?

5                               [BLE Exhibit No. 29A was marked for  
6                               identification.]

7           MR. COHEN: Second one, B, Award No. 521, Engineer R. E.  
8 Nevens, Nevens.

9                               [BLE Exhibit No. 29B was marked for  
10                              identification.]

11          MR. COHEN: Third award, Public Law Board No. 5383, or Award  
12 No. 587, Fireman R. T. Moss, Moss, C.

13                              [BLE Exhibit No. 29C was marked for  
14                              identification.]

15          MR. COHEN: You see, Mr. Miller.

16          MR. MILLER: You got mine right.

17                              [Laughter.]

18          HEARING OFFICER MANSFIELD: You got mine right, too.

19          MR. COHEN: And get the witnesses' this time.

20          And D will be Award No. 23857 -- 23857, Engineer D. M.  
21 Greer, Greer.

22                              [BLE Exhibit No. 29D was marked for  
23                              identification.]

24          MR. COHEN: And E will be Award No. 24424, Engineer Rowitz,  
25 Rowitz.

1 [BLE Exhibit No. 29E was marked for  
2 identification.]

3 MR. COHEN: I'd like to specifically call your attention  
4 to -- well, I think I'll hold that and I'll let that all speak for  
5 itself.

6 I'll modify that for one second.

7 On Exhibit C, Exhibit C, I'd like to call your attention to  
8 the language of the award at page 2, the final paragraph, saying the  
9 Board finds that the engineer's performance was as poor or worse than  
10 that of his fireman. The engineer position is one of greater  
11 responsibility, but the occupant was not disciplined, whereas the  
12 fireman was found at fault.

13 And there are similar provisions -- similar rationale found  
14 throughout these five awards.

15 Lastly, Madam Hearing Officer, we did include E for a  
16 supplemental purpose as well, and that's reflected in the last paragraph  
17 of the last page, page 8 of Exhibit E, which specifically confirms what  
18 has been said during the course of the hearing, namely that the First  
19 Division does not have the authority to reimburse a claimant for lost  
20 wages incurred during the period where his or her license revocation  
21 took place pursuant to the disciplinary procedures that arise out of the  
22 Federal Railway Administration.

23 BY MR. COHEN:

24 Q Mr. Radek, are these some -- are these the cases that I  
25 asked you to provide to me in connection with this hearing on this

1 point?

2 A Yes.

3 Q All right. In more general terms, are there in your  
4 experience other situations in which arbitrators have in fact ruled that  
5 engineers have the greater responsibility imposed on them than other  
6 operating members of the crew?

7 A Well, depending on what the offense was and, you know,  
8 without consideration that there might be mitigation specific to one  
9 individual or another. Generally the case law is pretty clear that the  
10 engineer is held to a higher degree of responsibility when the offense  
11 involves operating the train or the engine.

12 Q Mr. Radek, there has been some testimony about the UP's  
13 upgrade discipline policy. Are you familiar with that, sir?

14 A Certainly.

15 Q And there's been specific testimony as to what happens with  
16 respect to the Level 4 discipline. Would you just tell us what your  
17 understanding of that situation is?

18 A The upgrade policy is a system that the Union Pacific has  
19 promulgated which would discipline employees in certain classes of -- or  
20 penalty classes for the type of offense that was involved.

21 Q And what is a Level 4 discipline mean?

22 A Level 4 discipline I believe would be the employee would be  
23 assessed a 30day suspension.

24 Q Now directing your attention at the situation where on the  
25 one hand a locomotive engineer receives a Level 4 discipline and that

1 when I conductor or trainman receives a similar Level 4, what have been  
2 the implications in your experience as a result of that, first as to the  
3 engineer?

4 A They just simply impose it on the engineer and where there  
5 are revocation consequences, the suspension would correspond sometimes  
6 precisely in terms of the duration to the revocation of the engineer's  
7 certification. It would run together, in other words.

8 Q It would run together.

9 A In other words, concurrently.

10 Q And once the engineer has in fact had his or her license  
11 revoked for a 30day period, what further consequences could befall that  
12 engineer if he or she was to engage -- commit a further violation of the  
13 five cardinal sins, as they are referred to?

14 A Well, if the violation is within 36 months of the date of  
15 the first violation, he would be revoked for one year.

16 Q And in your experience is there any comparable discipline  
17 that could be imposed on the conductor or trainman in that circumstance?

18 A No, not with respect to the certification. In connection  
19 with upgrade for the same offense, the railroad would impose the same  
20 level but then when that happens we find cases where the trainman  
21 despite being placed at, say, Level 4 of the upgrade was allowed to  
22 return to service much sooner than the expiration of that time, whereas  
23 the engineer almost in every case serves the entire length of the  
24 suspension.

25 Q And in your experience, has that actually happened/

1           A       Well, certainly.  Most recently in a case involving an  
2 engineer by the name of Parks.  I believe the trainman was returned to  
3 service in 12 days where the engineer had to serve the 30day suspension.

4           Q       Looking at Level 4 discipline, is there a normal timeframe  
5 after which one could expect that there would be expunging of the  
6 particular record that was generated by having had Level 4 discipline  
7 imposed on that person?

8           A       I think under the upgrade, after it's been revised, there's  
9 a 24 month period after which that discipline would come off the  
10 employee's record.

11          Q       How does that compare with what happens in terms of the  
12 certification revocation situation?

13          A       Well, certification regulation, the revocation or the  
14 probationary period is longer.  Actually it runs to five years over the  
15 span of three potential offenses.

16                   MR. COHEN:  "I" is a generic term here.  I have one last  
17 question of the witness.

18                   BY MR. COHEN:

19          Q       There's been a lot of different nuances testified to.  In a  
20 situation in which we have a certified engineer operating the locomotive  
21 and by happenstance the conductor member of that crew also is a  
22 certified engineer -- have situations taken place like that, to the best  
23 of your knowledge?

24          A       I think there have been some, yes.

25          Q       And as a result of the operation of the train -- the

1 engineer who is responsible for that operation is found to have  
2 committee a violation of one of the five cardinal sins.

3 Have you any experience as to the comparable impact and the  
4 consequences that has had on the locomotive engineer who was at the  
5 throttle versus the conductor who also happened to be a certified  
6 engineer?

7 A FRA's policy is that they would decertify the person that  
8 was actually operating the train at the time of the occurrence and that  
9 would be true whether there were a student engineer or some other  
10 certified person in the cab.

11 There was some evolution in the case law there too, where I  
12 think initially they wanted to or they would decertify all of the  
13 individuals involved but that has been modified in recent years.

14 Q And your reference to the word policy, are you from your own  
15 experience do you know that there has been an application of that policy  
16 along the lines you have just discussed?

17 A Absolutely. I handle decertification cases for the  
18 organization and I know personally of those very things.

19 Q And directing your attention just at UP, has there been a  
20 substantial number of decertification proceedings in your experience?

21 A Yes. There have probably been hundreds each year of  
22 decertifications. How many actually get into the appeals process, it  
23 would be less of course than the total number of decertifications that  
24 took place.

25 Q And I take it by your answer your familiarity with that

1 situation is limited to those instances where the appeal process has  
2 been generated?

3 A In most cases -- my direct knowledge -- yes.

4 MR. COHEN: I have no further questions.

5 HEARING OFFICER MANSFIELD: I have a few questions.

6 MR. COHEN: But I didn't, I don't believe I moved the 29 --

7 MR. MILLER: 28 --

8 MR. COHEN: I did 28.

9 HEARING OFFICER MANSFIELD: No. 28 has been moved; 29A  
10 through E moved into evidence -- any objection?

11 MR. MILLER: I only object to 29D, which is an award  
12 involving the Illinois Central Gulf Railroad, which I don't think can  
13 have any application here.

14 The rest of them are Union Pacific or Union Pacific  
15 predecessors, the Chicago Northwestern, and the Union Pacific hasn't  
16 merged with the Illinois Central yet.

17 HEARING OFFICER MANSFIELD: Is that true?

18 MR. MOORE: Yes, that's true.

19 HEARING OFFICER MANSFIELD: Well, I think that is an  
20 appropriate objection. 29D applies to Illinois Central Gulf Railroad,  
21 which is not part of the Union Pacific system.

22 MR. COHEN: We put this in the package for the basic  
23 proposition that there is a recognition that there is a greater  
24 responsibility and companies and arbitrators have to recognize the  
25 greater responsibility that an engineer has. That is the purpose for

1 which we offer the documents.

2 HEARING OFFICER MANSFIELD: Well, I understand. However,  
3 you have many documents in the record that do that same thing that are  
4 limited to Union Pacific.

5 I am going to sustain the objection and will admit 28A  
6 through C and E, but I will not admit 29D -- 29, I'm sorry.

7 [BLE Exhibit Nos. 29A, 29B, 29C, and 29E  
8 were received into evidence.]

9 [BLE Exhibit No. 29D was rejected.]

10 HEARING OFFICER MANSFIELD: Can I ask just a few questions?

11 MR. MILLER: Sure.

12 HEARING OFFICER MANSFIELD: When did the, as far as you  
13 know, the upgrade discipline policy, when was that implemented?

14 THE WITNESS: Oh, I think it was about five years ago.

15 HEARING OFFICER MANSFIELD: And under the upgrade discipline  
16 policy, does the level of offenses in terms of time, you know, 30 days,  
17 six months, follow the same time periods as the suspension of  
18 certification under the regulations?

19 THE WITNESS: No. There's some correspondence but it is not  
20 handinglove.

21 HEARING OFFICER MANSFIELD: Okay. Can you tell me where it  
22 corresponds and where it doesn't? Obviously there is a Level 4 that  
23 corresponds to the 30 days.

24 THE WITNESS: That's it. Level 5 is dismissal under the  
25 upgrade policy.

1 HEARING OFFICER MANSFIELD: Okay, so if an engineer had a  
2 second incidence, he would have his certification suspended for -- I  
3 don't remember --

4 THE WITNESS: 12 months.

5 HEARING OFFICER MANSFIELD: for 12 months. In your  
6 experience, would that engineer on Union Pacific also receive Level 5  
7 discipline under the upgrade discipline policy?

8 THE WITNESS: Not always.

9 HEARING OFFICER MANSFIELD: Okay, but a conductor who was on  
10 a Level 5 would be removed from employment? Is that correct?

11 THE WITNESS: If he was assessed Level 5, that's dismissal.

12 HEARING OFFICER MANSFIELD: And while I understand what  
13 these discipline arbitration showed, do you also have UP arbitration  
14 decisions in your files where the conductor and the engineer are given  
15 the same level of discipline regarding only UP discipline? I am not  
16 talking about the certification.

17 THE WITNESS: I would imagine we do, although I can't  
18 specifically recall one right now.

19 HEARING OFFICER MANSFIELD: Did you check those or did you  
20 only check ones where there was a different level of discipline?

21 THE WITNESS: Well, the check was fairly casual. We just  
22 maintain a file of these showing that the engineer has greater  
23 responsibility and, quite frankly, we try to use those to mitigate  
24 engineers' discipline, and those came from this file. They are just,  
25 you know --

1 HEARING OFFICER MANSFIELD: So your file is standing for  
2 certain propositions in arbitration awards?

3 THE WITNESS: Exactly.

4 HEARING OFFICER MANSFIELD: Okay.

5 CROSS EXAMINATION

6 BY MR. MILLER:

7 Q Mr. Radek, are you responsible for handling arbitrations or  
8 even grievance handling the discipline claims that relate to conductors  
9 and trainmen on Union Pacific

10 A Only in limited instances.

11 Q And would those be when it was a member of the BLE?

12 A Sometimes. Sometimes it is just an individual that wants  
13 the BLE to handle the case or asks us to advocate.

14 Q But it is fair for the most part conductors' discipline  
15 claims on Union Pacific are handled by UTU, isn't that right?

16 A Definitely yes.

17 Q Okay, and with respect to the testimony that you had about  
18 conductors and engineers on Union Pacific being assessed the same  
19 discipline but the conductor got back earlier in further grievance  
20 handling you don't know the reason why the conductor got back early, do  
21 you?

22 A Always

23 Q I mean it could have been because of more effective  
24 representation, correct?

25 A If you think so.

1 [Laughter.]

2 MR. COHEN: I'll stipulate to that.

3 MR. ROSS: That he thinks so?

4 [Laughter.]

5 BY MR. MILLER:

6 Q Mr. Radek, with respect to your testimony concerning  
7 throwing switches, isn't it true that unless an individual, whether it  
8 be an engineer or conductor, files a claim on the property, neither you  
9 nor the UTU see anything with respect to whether an individual did or  
10 did not throw a switch, correct?

11 A That's right.

12 Q And in your experience would it be fair to say that not all  
13 things that either organization considers a violation are filed by the  
14 employees they represent?

15 A That's true.

16 Q Do you know if under FRA regs whether a carrier is permitted  
17 to let a decertified engineer under the FRA rule come back into train  
18 service?

19 A I'm not quite sure I understand "permitted."

20 Q Does the FRA make carriers bar decertified engineers from  
21 service as a conductor or trainman?

22 A No, they take a neutral position as to what an employee  
23 would be able to do who's certified. In some instances that employee  
24 may have seniority in another craft, and arbitrators have held that that  
25 employee would have a right to exercise it.

1           Q       Right.  So in other words the FRA does not by its own  
2 regulations bar a return to service in train service by a decertified  
3 engineer.

4           MR. COHEN:  I'll let him answer that, but I think it's clear  
5 that the regulations would speak for themselves.  Either they do or they  
6 don't.

7           MR. MILLER:  Well, he's already gone fairly far down the  
8 road.

9           You know, I'll withdraw the last question.  It was answered.  
10          I have no further questions.

11         HEARING OFFICER MANSFIELD:  Any redirect?

12         MR. COHEN:  No.

13         HEARING OFFICER MANSFIELD:  Okay.  Thank you very much.

14         [Witness excused.]

15         HEARING OFFICER MANSFIELD:  Any further witnesses?

16         MR. COHEN:  We need a five minute break to discuss that.  We  
17 actually need ten, but I'm asking --

18         HEARING OFFICER MANSFIELD:  I'm giving you five.

19         MR. COHEN:  That's what I thought.  Well, I wanted to win.

20         [Recess.]

21         HEARING OFFICER MANSFIELD:  Let's go back on the record.

22         The hearing -- as I understand it, both sides have now  
23 rested.  We're going to have closing arguments beginning at 9:00 a.m.  
24 tomorrow morning.  There is a sign-in sheet.  You cannot get in the  
25 building unless you're on the signin sheet.  It will be at the front

1 desk. I will be in here early to ensure that our doors are open, but  
2 you're going to need to be on the sign-in sheet. Is there anybody who  
3 wants to be here tomorrow who has not signed in?

4 Okay. Then the hearing is closed for today, and we will  
5 recess until tomorrow morning at 9:00 a.m. Thank you very much.

6 [Whereupon, at 12:11 p.m., the hearing was recessed, to  
7 reconvene at 9:00 a.m., Saturday, July 10, 1999.]

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