

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD 6302**

**NMB NO. 191**  
**AWARD NO. 185**

**PARTIES TO DISPUTE**

**CARRIER**

Union Pacific Railroad

**Carrier's File**

1516946

AND

**ORGANIZATION**

Brotherhood of Maintenance of Way Employees  
Division of International Brotherhood of Teamsters

**System File**

B-0819C-102

**STATEMENT OF CLAIM**

1. The discipline (withheld from service beginning September 11, 2008 and subsequent Level 5 – Dismissal effective October 14, 2008) imposed upon Mr. Brian Mintner in connection with an investigation on October 9, 2008 into a Carrier charge that states, . . . While assigned as Track Foreman at Kenosha, Wisconsin, you allegedly failed to release your Track Permit and failed to follow proper procedures to release your permit on September 9, 2008. [The disciplinary action of dismissal] was arbitrary, capricious and in violation of the Agreement.
2. As a consequence of the violation referred to in Part (1) above, Claimant B. Mintner shall now \* \* \* have the discipline of dismissal removed from his record and be returned to his former position with all rights unimpaired and compensated at his applicable rate for all time lost as a result of the improper assessment of the Level 5 Discipline.

### **STATEMENT OF BACKGROUND**

By letter dated September 11, 2008, Claimant, with seniority in excess of thirty (30) years in various classifications within the Maintenance of Way and Structures Department was summoned by Carrier to attend an investigation in connection with the following:

***. . . to develop the facts and place responsibility, if any, regarding the charge, while assigned as Track Foreman at Kenosha, Wisconsin you allegedly failed to release your Track Permit and failed to follow proper procedures to release your permit on September 9, 2008. Your actions possibly violated rule 42.3.1 of the Union Pacific rules effective April 3, 2005.***

Rule 42.3.1: Requesting and Releasing Track Authority reads as follows:

***After an employee requests a track authority, either verbally or by Remote Track Authority, the employee must confirm the limits prior to the authority being issued. This confirmation is intended to ensure that there is no misunderstanding of the limits of the authority.***

***When verbally releasing a track authority, the employee will provide their identification, location and their intent to clear or release an authority, The employee will then ask the dispatcher or control operator to advise when ready. When the train dispatcher or control operator advises that he/she is ready, the employee will release the authority in the normal manner. The employee must then listen carefully to the dispatcher's or control operator's repeat to ensure that the proper track authority is being released.***

***Do not copy, repeat or release a track authority while vehicle or track car is moving.***

The record evidence reflects that by mutual agreement, the hearing was postponed on two (2) occasions and was thereafter convened on October 9, 2008. By letter dated October 14, 2008, signed by A.R. Robinson, Superintendent Transportation Services-Commuter Operations, Chicago Commuter Operations, Claimant was apprised of the following:

***In reference to your investigation which was held October 9, 2008:***

***While assigned as Track Foreman at Kenosha, Wisconsin, you allegedly failed to release your Track Permit and failed to follow proper procedures to release your permit on September 9, 2008.***

***Under the Union Pacific Railroad Policy and Procedures for Ensuring Rules Compliance of which you have received a copy, this incident was Assessed as a Level 5 Discipline – Dismissal, effective this date, October 14, 2008.***

***Please contact Carrier Officer, G. S. Mang, Mgr. of Track Maintenance . . . in order that you may make arrangements to return all company Materials.***

In behalf of Claimant, the Organization filed the timely claim which is here before the Board for resolution.

### **ORGANIZATION'S POSITION**

In its handling of this claim on the property and now its appeal to the Board, the Organization did not challenge Carrier's determination that Claimant failed to properly release his track authority as alleged. Rather, the Organization's defense of Claimant is predicated on the argument that Carrier has misapplied its UPGRADE Discipline Policy by having assessed Claimant the discipline of a Level 5 Dismissal when a correct and proper application would have resulted in the assessment of a Level 4 disciplinary action. The Organization references Carrier's Discipline Policy booklet to note that had Carrier assessed Claimant a Level 4 discipline, Claimant would have been subject to, "Up to 10 days off work without pay or, up to five (5) days training without pay with the additional requirement that he pass necessary operating rules exam or equivalent in order to return to work and, develop a Corrective Action Plan upon return to work.

The Organization submits that by having misapplied its own Discipline Policy, it treated Claimant disparately relative to other employees as well as having violated Rule 19 inasmuch as it failed to produce any evidence to support the assessment of dismissal and, therefore the Level 5 dismissal must be found by the Board to be not only unsubstantiated, but also unfair. The Organization cites Rule 19 – Discipline in pertinent part as follows:

- A. Any employee who has been in service in excess of sixty (60) calendar days shall not be disciplined nor dismissed without a fair and impartial hearing.***

The Organization posits that the discipline assessed Claimant is not in compliance with the Carrier's policy and having failed to comply with their own stated policy, Carrier has demonstrated a blatant departure from the required "fair and impartial" requirements set forth in Rule 19 (A) as quoted above. The Organization asserts that under the circumstances, Carrier's misapplication of its Discipline Policy that resulted in the assessment of dismissal qualifies the discipline as being arbitrary and capricious and therefore, in light of numerous prior Board Awards addressing the very issue involving discipline found to be arbitrary, capricious, discriminatory and unjust, the Board must rule in this case that the dismissal cannot stand. As such, the Organization implores the Board to find to allow Claimant to return to service with all rights unimpaired and be compensated at his applicable rate of pay for all time lost as a result of the improper discipline assessed.

### **CARRIER'S POSITION**

Carrier advances the following two-fold defense relative to having assessed Claimant the Level 5 discipline of dismissal in addressing the commission of the subject offense, to wit:

1. Carrier asserts that the assessed discipline was not under all the prevailing circumstances arbitrary, capricious, nor an abuse of managerial discretion; and
2. The Organization's request of this Board to interpret Carrier policy rather than any provision or provisions of the controlling collective bargaining agreement in the absence of any demonstrated collective bargaining agreement violation is improper and, therefore, there is no basis for the Board to alter the discipline imposed.

With regard to number 1, above, Carrier asserts the evidence adduced at the investigation of Claimant's misconduct was more than substantial, and therefore there is no basis for the Board to conclude otherwise. Carrier notes that once a finding of an employee's wrongdoing has been established by substantial evidence, the Board lacks authority to overturn the level of discipline assessed, even though it may seem harsh, unless it can be sufficiently demonstrated to be arbitrary, capricious, or an abuse of managerial discretion. In the case at bar, Carrier submits the discipline assessed Claimant cannot be said to be arbitrary, capricious or an abuse of managerial discretion given that compliance with on-track safety procedures is vital to ensure the safety of those on or near the tracks, of the trains which operate on those tracks, and of the employees and passengers who occupy the trains.

With regard to number 2, above, Carrier asserts the Organization's entire argument contending it did not correctly apply its UPGRADE Discipline Policy is not only inaccurate but it is also misplaced. Carrier notes that it is well established that an

arbitral panel will only disturb discipline assessed if a carrier violates the employee's collective bargaining rights. As such, Carrier asserts that Boards do not interpret a carrier's unilateral discipline policy and cites in support of this contention Award No. 55 of Public Law Board 6621 and Award 11 of Public Law Board 6402. In the latter case, Carrier notes that the Board declined to alter the dismissal that had been imposed, concluding it was not required to interpret the discipline policy but instead it reviewed the facts of the rule violation in the case before it and the claimant's history of prior discipline to determine whether the discipline was arbitrary or capricious. Carrier further notes that when the Board determined that the discipline assessed was not arbitrary, the Board upheld the discipline without interpreting the UPGRADE policy.

In the case at bar, Claimant's discipline record shows a long history of discipline assessments including a prior dismissal and reinstatement on a leniency basis. Carrier submits that with this atrocious record, Claimant has not demonstrated that he is an employee it should be required to retain. Based on Claimant's overall work record and prior disciplines assessed, Carrier asserts his termination of employment for having violated a serious safety rule cannot be deemed as harsh or an abuse of managerial discretion.

Finally, Carrier maintains that the Organization's contention that violation of Rule 42.3.1 is not designated as a Level 4 offense is simply not accurate. Carrier explains its UPGRADE policy clearly provides that "where rule numbers are shown, it includes Sub-Rules unless specified otherwise. Carrier notes that Rule 42.3 Main Track Authority is included as a Level 4 offense, not a Level 3 offense as the Organization contends. Thus, Carrier asserts, while it remains its position that such policy interpretation is not at issue in this case, there would be no reason to disturb the discipline assessed even under the theory advanced here by the Organization.

Based on the foregoing argument asserted, Carrier respectfully requests the Board to either deny or dismiss the subject claim in its entirety.

## **FINDINGS**

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

In consideration of all argument advanced by the Organization and the Carrier, the Board finds it is in full agreement with Carrier's position that it would be improper for us to render any findings involving the interpretation and application of Carrier's UPGRADE

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Disciplinary Policy. We affirm the principle that with respect to determinations associated with individual claims pertaining to the quantum of discipline assessed, our sole and only role is to divine whether the discipline is found to be arbitrary, capricious, discriminatory or, an abuse of managerial discretion. Under all the given circumstances of the instant case, there is nothing in the record proceedings that indicates the discipline of dismissal assessed Claimant meets any of these criterion for either reversing or reducing Claimant's termination of employment. Accordingly, we rule to deny the subject claim.

**AWARD**

**Claim Denied**

  
George Edward Larney  
Neutral Member & Chairman

  
B. W. Hanquist  
Carrier Member

  
T. W. Kreke  
Employee Member

Chicago, Illinois

Date: Nov 19, 2010