

PUBLIC LAW BOARD NO. 6621

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE**

and

UNION PACIFIC RAILROAD COMPANY

Case No. 55

* * * *

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The Level II (the Level II raised the Claimant's discipline to a Level 5 which resulted in him being dismissed) assessed Assistant Foreman John Villalobos for his allegedly not properly performing his duties between Mile Posts 111 and 112 on the Roseville Subdivision on September 25, 2004, was without just and sufficient cause, based on unproven and disproven charges and in violation of the Agreement (Carrier's File 1417989 D).
2. As a consequence of the violations referred to in Part (1) above, Assistant Foreman John Villalobos shall '... be immediately reinstated to the service of the Carrier to his former position with seniority and all other rights restored unimpaired and that the letter of dismissal also be expunged from his personal record. In addition, Claimant Villalobos shall also be compensated for net wage loss, both straight time and overtime, and benefit loss suffered by him since Claimant's wrongful and unwarranted removal from service and subsequent dismissal.'

Background:

On Saturday, September 25, 2004,¹ Claimant John Villalobos, an employee with seniority as a foreman dating from December 1989, was working as an assistant foreman pending qualification on switch tie gang 8553, which was operating shorthanded. At 5:30 a.m., Foreman George Kent held a job briefing in which he instructed Claimant to take four other employees, including a backhoe operator, to a section of track on the

¹ All dates hereafter are 2004 unless otherwise stated.

Roseville Subdivision, between MP 111 and MP 112. Claimant was to oversee and help complete quality control work including finishing the spiking pattern on thirty-eight ties; fixing bent spikes, down ties, and plates and spikes under rail; and putting anchors on. Claimant was also responsible for getting track and time for the backhoe. Kent's intent was to have the work completed by the end of the day so that a "slow order" (restricting travel to 10 m.p.h.) applicable to the area could be removed.

According to Kent, at approximately 7:30 a.m., Claimant called and said they had no spikes, spiking gun or water. Kent sent two truck drivers to Claimant's location with the items, and told the drivers to stay and help with the work. At 8:15 a.m., Claimant called to ask Kent if they could work under lookout protection. Kent told Claimant they could, and that Claimant should job brief with the dispatcher and not put any equipment (e.g., the backhoe) on the track. At around 1:00 p.m., Claimant called to ask Kent if he could fix an area that needed to be regauged for thirteen ties. Kent said yes, and asked how things were going. Claimant indicated no problems. At approximately 3:30 p.m., Kent called Claimant to ask if the quality control work had been completed. Claimant replied, "I think so." On the following Monday, Kent called Gordon Thompson (supervisor for Gang 7300) on another matter. Thompson, whose gang had performed work on the same area of track between September 24 and September 27, told Kent that the quality control work between MP 111 and MP 112 had not been completed.

On October 10, based on Kent's report to him, Track Supervisor Joe Romero disqualified Claimant from his assistant foreman position. By letter dated October 20, Claimant was instructed by the Carrier to report on November 5 for a formal hearing:

to review your work history and develop facts and place responsibility, if any, that on or about September 25, 2004, you

were allegedly instructed in a morning job briefing by Foreman George Kent to perform quality control work behind the gang between MP 111 and 112 on the Roseville Subdivision. You allegedly failed to assist in the work and/or ensure the work was completed to Union Pacific and/or FRA Standards when you allegedly left bent spikes, down ties, missing rail anchors and twisted tie plates between MP 111 and 112. You were also allegedly observed sitting in a company vehicle reading a newspaper during work hours. You allegedly failed to supervise and engage in work being performed by employees under your supervision.

Your actions could possibly be in violation of the current Union Pacific Rules 1.13, 41.1, 49.1, 44.1, 46.1, and 1.10.

A full hearing was held on November 5, after which the hearing officer dismissed the alleged violation of Rule 1.10, which prohibits reading newspapers or other such materials while on duty. Rule 1.13 requires employees to comply with instructions from supervisors. Rule 41.1 requires foremen, among other things, to supervise and engage in all work performed by the gang; ensure work does not result in an unstable or unsafe track condition; and call on other foremen for assistance, if necessary. Rule 44.1 requires all work on tracks to be performed in accordance with pertinent standards. Rule 46.1 requires track to be maintained in accordance with Federal Railroad Administration (FRA) standards. Rule 49.1 provides: "When renewing ties, ensure that track is fully plated, spiked and anchored, and that cribs are filled in, before leaving track overnight."

Testifying on his own behalf, Claimant stated that he had not received sufficient training, and that this was his first time overseeing such work. He testified that he had thought the water and spikes were already at the location. He also stated that the work was delayed by two or three hours waiting to get track and time, and that they had to hand-spike because they were unable to get a spiking gun. A track inspector asked Claimant to do the regauging work at a switch, which he performed with one other

employee. While he was performing that work, he left the other employees to finish the quality control work. Claimant testified that at the end of the shift, he walked “98%” of the track. He also stated that he asked the other employees if they had finished the work, and he had no reason to disbelieve them when they told him they had. Claimant further testified:

You know, I depended on those guys to help me. We were short-handed people. And at the beginning of the shift ... [Kent] made the comment ... if you guys finish the work, you can get out early. And the guys knew that we were going to get out early. That disappointed the guys [I]t brought the morale down. Because they knew once they heard about the switch, they were going to be working. And once they saw that work and we couldn't get no track and time, that they were going to be working butts off and they're going to work. We ended up working overtime that day. (Tr. at 284.)

By letter dated December 3, the Carrier found Claimant guilty of the remaining charges, and assessed him UPGRADE Level 2 discipline, stating: “Your current discipline status of Level 4 plus the current discipline of Level 2 now requires the discipline assessment of Level 5. Accordingly, you are hereby assessed with Level 5 discipline and dismissed from the service of the Union Pacific Railroad Company.” The Organization objected by letter dated December 21. The Carrier upheld the assessment by letter dated February 9, 2005. The parties exchanged additional letters and discussed the matter in conference. The matter not being resolved, it was presented to this Board for final decision.

Carrier's Position:

The Carrier contends that Claimant was afforded a full and fair hearing with notice of the charges, the opportunity to defend, and representation. The Organization's assertion that the Carrier failed to provide witnesses necessary for Claimant's defense is

without merit. The Carrier has no obligation under the parties' Collective Bargaining Agreement to provide Claimants' witnesses by bearing the costs related to their appearances at hearing, as the Organization claims. The Carrier is required to provide only those witnesses necessary to establish the facts on which the charges against a claimant are based. If Claimant wanted particular witnesses to testify at hearing, it was his responsibility to arrange for, and pay the expenses of, the presence of those witnesses.

According to the Carrier, the charges against Claimant were proved by substantial evidence. Claimant's own testimony demonstrates that he violated the cited rules. Claimant asserted he did not fulfill the duties assigned him by Foreman Kent because he did not know how to perform them. But the Carrier contends that Claimant's record, as well as the testimony of the Carrier's witnesses, establishes that Claimant was trained and well qualified to perform the duties in question. Moreover, as Kent testified, the quality control work at issue was "mostly common sense." (Car. Exh. B at 234.) Nevertheless, Kent had given Claimant training on how to perform the work, and Claimant had performed the work sufficiently on the days of training. Claimant also disclaimed responsibility for the work because he was an assistant foreman pending qualification. However, the Carrier emphasizes that Claimant undertook the responsibilities of an assistant foreman when he told Kent he would do the work assigned. If Claimant did not have the required skills, he should have asked for help. The Carrier also argues that Claimant admitted that he did not walk the entire track to ensure that the work was properly completed. In stating that he walked only "98%" of the track, Claimant admitted only carrying out "the majority" of his tasks, which is not sufficient. The fact

that the workers might have wanted to leave early did not relieve Claimant of his duty to make sure that the work was properly completed.

The Carrier argues that the Level 2 assessed against Claimant for the rule violations at issue here was neither arbitrary nor capricious. Arbitral precedent has upheld Level 2 discipline assessed for violations of Rule 1.13 alone, and here, several other rules were also violated. The Carrier's UPGRADE policy also has been repeatedly upheld. Claimant was already at Level 4 at the time of the discipline issued here. Having assessed a new Level 2 discipline against Claimant, the Carrier submits that it had no option under the UPGRADE policy but to raise Claimant's discipline status to Level 5.

Organization's Position:

The Organization contends that Claimant was not provided a fair and impartial hearing because witnesses requested by Claimant were not present. The Carrier was obligated to seek out all of the facts regarding the charges, those in favor of Claimant as well as those against him, and should have provided witnesses identified by Claimant as having pertinent information.

The Organization also argues that the record does not support the Carrier's finding that Claimant violated Rules 1.13, 41.1, 46.1, 44.1 and 49.1. Neither Track Supervisor Joe Romero nor Foreman George Kent personally inspected the track between MP 111 and MP 112 to determine whether or not the quality control work assigned to be performed by Claimant's group had been completed. Kent admitted at hearing that the facts as he knew them were based on hearsay from Gordon Thompson, and further testified that Thompson himself did not actually see the track, but relied on information from Foreman Fred Garcia. Garcia's testimony at hearing, however, established only that

he was sent into the same general area to perform the same type of work done by Claimant between September 24 and September 27. The charge under Rule 1.10 was dismissed at hearing because only hearsay evidence was presented to support it. The Organization argues, however, that *all* of the alleged violations were based on hearsay.

The Organization notes that Kent testified that a majority of the work to be done was the spiking of thirty-eight single-spiked ties, and suggests that sufficient time to complete the switch repairs, the spiking, and other quality control work may not have been provided. In addition, Claimant asked the employees at the end of the shift if they had finished the quality control work, and they told him they had. Claimant had no reason not to rely on the men's affirmative answers. Furthermore, Claimant was an assistant foreman pending qualification, demonstrating a need for training, which the Carrier did not provide.

Findings:

This case was handled in Executive Session attended by all three Board members: the Neutral Member, Carrier Member, and Organization Member. As a threshold matter, the Board finds that Claimant was afforded a full and fair hearing, with timely notice of the charges, time to prepare a defense, and the opportunity to produce and examine witnesses and evidence. The Organization's claim that due process was not provided is without merit. If Claimant wanted particular witnesses to testify at hearing, it was up to him to arrange for their presence. It is well-settled that the Carrier has no obligation to produce witnesses on behalf of the Organization and Claimant. The Carrier is required to produce only those witnesses necessary to meet the Carrier's burden of proof.

On the merits, the Board finds that the Carrier has met its burden of proof with regard to the charges against Claimant. Claimant held an assistant foreman position—albeit pending qualification—and at the job briefing with Kent at the beginning of the shift on September 25, 2004, accepted the responsibility of acting as foreman for the group of employees sent out to do the quality control work between MP 111 and MP 112. Claimant failed to ensure that the quality control work had been completed. Claimant admitted to leaving the majority of his crew to work on their own when he left the area to perform the regauging work on the switch. While Claimant asserts that he walked “98%” of the track at the end of the shift, he undermines his own statement by also claiming that he relied on the employees he’d left behind to finish the work, and took their word for it that they had. Moreover, when Foreman Kent asked Claimant at the end of the shift if the work had been completed, Claimant replied only, “I think so.” Clearly, Claimant was not sure that the work had actually been completed. It was Claimant’s responsibility as acting foreman to inspect the section of track to make sure the work was satisfactorily finished, and he failed to fulfill this responsibility as instructed by Kent and in accordance with Carrier rules.

Claimant’s assertion that he was not properly trained to do the work in question is without merit. The record shows that he had been trained to perform quality control work and had performed such work before. Kent credibly testified that he personally had shown Claimant how to do quality control work, that the two of them had performed it together behind the gang, and that Claimant certainly did the work satisfactorily on the days on which Kent trained him (Tr. at 217, 236). In addition, if Claimant was unsure how to perform the work, it was incumbent on him to ask for help. Claimant did not

indicate to Kent during any of their several conversations on September 25 that he had run into any difficulty in completing the work or needed any assistance. In a railroad setting, where safety concerns are paramount and work must meet safety standards, performing track work “to the best of one’s ability”—especially when one believes one’s ability is lacking—is not good enough, as an employee of Claimant’s work history should be well aware.

The discipline assessed for the violations in the instant case was Level 2. A Level 2 assessment for Claimant’s failure to comply with a supervisor’s instructions, failure to fulfill his responsibilities as acting foreman, and failure to ensure that work was performed according to Carrier and FRA standards, is not unreasonable. Claimant’s discipline status prior to this matter was Level 4. Under the Carrier’s UPGRADE policy, the combination of the new Level 2 with the existing Level 4 resulted in an assessment of Level 5, or dismissal. The Level 2 assessment in itself, however, was not arbitrary or capricious, or excessively harsh, and this Board can find no basis in the facts of the instant case on which to reduce it. With regard to the resulting Level 5, the Board has no authority to modify discipline properly issued according to the Carrier’s progressive discipline policy. The claim therefore must be denied.

Award:

The claim is denied.


JOAN PARKER, Neutral Member


CARRIER MEMBER
DATED: 2-13-06


ORGANIZATION MEMBER
DATED: 2-13-06

PUBLIC LAW BOARD NO. 6621

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION/INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

And

UNION PACIFIC RAILROAD COMPANY

Interpretation of Award No. 55

Background

The instant determination is issued in response to a request by the Organization for an Interpretation by this Board of its Award No. 55. That case involved discipline assessed John Villalobos for various rule violations he committed in conjunction with work performed on September 25, 2004.

Case No. 55 was presented to this Board on September 29, 2005, and it was finalized on February 13, 2006. The Award held as follows:

The discipline assessed for the violation in the instant case was Level 2. A Level 2 assessment for Claimant's failure to comply with a supervisor's instructions, failure to fulfill his responsibilities as acting foreman, and failure to ensure that work was performed according to Carrier and FRA standards, is not unreasonable. Claimant's discipline status prior to this matter was Level 4. Under the Carrier's UPGRADE policy, the combination of the new Level 2 with the existing Level 4 resulted in an assessment of Level 5, or dismissal. The Level 2 assessment in itself, however, was not arbitrary or capricious, or excessively harsh, and this Board can find no basis in the facts of the instant case on which to reduce it. With regard to the resulting Level 5, the Board has no authority to modify discipline properly issued according to the Carrier's progressive discipline policy. the claim therefore must be denied.

Pursuant to Award No. 55, Claimant was dismissed from the service of the

Union Pacific Railroad. Thereafter, on March 21, 2006, Referee Steven M. Bierig rendered NRAB Third Division Award No. 37747. The claim in that case was filed at Third Division on June 24, 2004 and argued before Referee Bierig on July 19, 2005. In the March 21, 2006 Award, Bierig stated:

The Board finds substantial evidence in the record to sustain the Carrier's position that the Claimant violated the relevant Safety Rules. There was a credibility dispute between the Claimant and Supervisor Swore as to whether the Claimant had requested a longer hook. As noted above, the Board is not in a position to re-litigate the investigation. Therefore, we affirm that the Claimant violated Rules 1.1.2 and 70.1.

However, as to the penalty assessed, we must agree with the Organization. A review of the reinstatement Agreement dated November 17, 1997 does not indicate that the Claimant was reinstated with a Level 3 Upgrade and, therefore, the Claimant was not on notice of such Upgrade. Because no such notice was provided, the Level 4 Discipline imposed will be reduced to a Level 1 Upgrade.

Consistent with the Bierig award, the Carrier reimbursed Claimant for his 30-day suspension. That payment was mailed on May 8, 2006. In the meantime, on April 18, 2006, the Organization's General Chairman wrote the Carrier requesting that in light of NRAB Third Division Award No. 37747, "Claimant be returned to service with seniority and other rights unimpaired and compensated for all wage loss suffered." General Chairman Below concluded his letter by stating that if the Carrier was not agreeable to Claimant's reinstatement, the case should be submitted to Public Law Board 6621 for an Interpretation of Award No. 55 in light of Third Division Award No. 37747. By letter dated May 11, 2006, the Carrier replied to General Chairman Below's letter and advised that it would not reinstate Claimant, but it was willing to submit the matter to PLB 6621 for an Interpretation.

On July 6, 2006, the Carrier received a letter from the Employee Member of PLB 6621, and the Carrier responded in correspondence dated July 13, 2006. The dispute over

Claimant's status was not resolved, however, and following one postponement requested by the Organization, PLB 6621 convened on January 10, 2008 to discuss the issues raised by the parties' request for an Interpretation of Award No. 55.

Contentions of the Organization

The Organization contends that Claimant's dismissal should be set aside. While Award No. 55 sustained Level 2 discipline, the Board in that case considered Claimant's prior disciplinary record, which indicated Level 4, to uphold the Level 5 dismissal. In other words, the majority in Award No. 55 relied on a Level 4 in combination with a proven Level 2 to raise the discipline to a Level 5. But since the Level 4 discipline was reduced to a Level 1 in Award No. 37747, the Organization submits that Claimant's discipline record should be at a Level 3. Consequently, Claimant should be restored to service and made whole.

Contentions of the Carrier

The Carrier contends that the Organization, in effect, is asking the Board to compel the Carrier to reinstate Claimant for reasons other than a violation of the Collective Bargaining Agreement, but since the Carrier's discipline policy (UPGRADE) is not a negotiated instrument, the Board has no standing to interpret it. UPGRADE is a unilateral Carrier policy, not subject to interpretation by a Public Law Board whose jurisdiction is confined to determining whether the controlling collective bargaining agreement has been breached.

The Carrier further contends that while NRAB Third Division Award No. 37747 reduced the penalty assessed Claimant in another disciplinary incident, the Carrier is not required to reinstate him to service. The request for an Interpretation is, in the Carrier's

view, akin to a request for a leniency reinstatement on behalf of Claimant, but leniency reinstatements are solely within the Carrier's discretion. Additionally, the decision reached by PLB 6621 in Award No. 55 was neither arbitrary nor capricious. Rather, it was based on the record evidence and Claimant's overall disciplinary record. Given the provisions in the Public Law Board Agreement which state that the decision of the Board shall be final and binding, the Carrier asserts that it is improper for the Organization to seek a reversal of the decision in Award No. 55.

The Carrier emphasizes that in Award No. 55, the Board found that the Carrier proved the charges against Claimant with substantial evidence. The penalty was fair, especially in light of Claimant's overall employment record, which reflects numerous disciplines, including seven disqualifications from positions and a prior dismissal and leniency reinstatement. While the Organization argues that the Carrier should not have considered Claimant's entire record in making a decision about his reinstatement, the Carrier disagrees and further submits that in 1997, Claimant was treated the same as other employees who returned to work as a result of a leniency reinstatement.

Opinion

First, it is important to emphasize that this Interpretation is not about the validity of the Carrier's UPGRADE disciplinary policy. That policy, which was unilaterally promulgated, has been upheld by numerous Referees and is not subject to modification through arbitration. In any disciplinary case, the role of the Referee is to determine whether or not the Carrier has proved disciplinary charges through the presentation of substantial evidence and, if so, whether the Carrier, in imposing discipline, has been

arbitrary or capricious, or in any other manner has abused its managerial discretion under the UPGRADE policy.

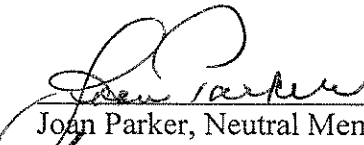
In the instant case, this Board determined that the Carrier sustained its burden of proof and fully demonstrated that Claimant was guilty of several rule infractions on September 25, 2004. The Board sustained the discipline assessed by the Carrier, taking into consideration the fact that Claimant was at disciplinary Level 4 at the time that the Award was rendered.

The Board issued a final and binding decision in accordance with the Agreement between the Union Pacific Railroad Company and the Brotherhood of Maintenance of Way Employees, which clearly states: "Awards of the Board shall be final and binding on the parties...." This Agreement, as well as the entire labor relations scheme to which the parties adhere under the Railway Labor Act, would be undermined if a public law board reversed itself after issuing a final and binding award solely as a result of another arbitration decision, which was subsequently rendered in another case and which was based upon facts not even in the Record before it. Such action by a public law board in the posture of issuing an "Interpretation" would lead to havoc and would encourage parties to question the finality of adverse awards based upon all kinds of information developed after the fact.

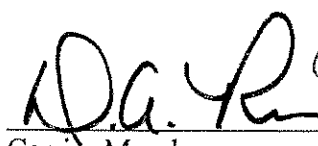
Here, the Carrier had the discretion to reconsider Claimant's disciplines after Award No. 55 and Third Division Award No. 37747 were issued. However, it declined to rescind Claimant's Level 5 dismissal, and this Board does not believe it has the contractual authority to demand that such action be taken.

In the instant case, it must also be emphasized that Claimant was notified of his pending appeals, and he agreed to progress his case to PLB 6621, knowing that the Bierig Award was pending. Apparently, he believed that there was a strategic advantage in advancing Case No. 55 instead of waiting for the outcome of the Third Division claim. It is not this Board's responsibility to now correct Claimant's error in judgment regarding the processing of his claims. Moreover, this Board was never requested to delay the issuance of its decision until the Third Division ruled on Claimant's Level 4 discipline, even though that might have been a sensible course of action. For the Organization now to argue that this Board needs to reverse its decision because of what occurred afterward in another case suggests that the finality of Award No. 55 was subject to post-decision events and that this Board had a role to play in the ordering of Claimant's appeals. Neither of these positions has merit.

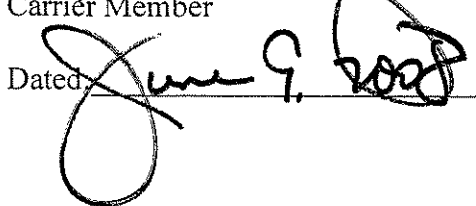
This Board correctly evaluated the testimony and evidence in the Record before it, and it determined that the discipline which the Carrier assessed was appropriate. Having duly considered the Organization's request for reconsideration, the Board respectfully declines to modify its Award for the reasons set forth above.

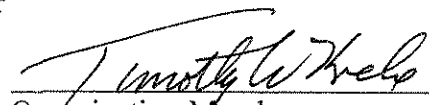


Joan Parker, Neutral Member



Carrier Member

Dated:  June 9, 2008



Timothy W. Phelps
Organization Member

Dated:  June 9, 2008