

PUBLIC LAW BOARD NO. 7426
CASE NO. 24

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood of Maintenance of Way Employees that:

1. The discipline (dismissal) imposed on Mr. F. M. Borrue! by letter dated February 2, 2012 in connection with allegations that the Claimant reported Train UP5359 by his location when that train was not by his location was without just and sufficient cause, unwarranted and in violation of the Agreement (System File RC-1245S-451/1569255).

2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Borrue!’s record with seniority and other benefits unimpaired and compensate him for all wage loss suffered including straight time and overtime as a result of the Carrier’s unjust and improper discipline.”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

A Notice of Investigation dated December 28, 2011, was sent to Claimant on the charge of allegedly failing to obtain proper authority to perform bridge repair work, while working as EIC, and by falsely reporting a train location. The investigation was held on January 13, 2012, and on February 2, 2012, Carrier found Claimant guilty of the charges and a violation of Rule 1.6 (Conduct) (1) Careless of Safety and (4) Dishonesty, as well as Rule 42.4.2 (Using Track & Time Authority) and Rule 136.3.1 (Job Briefing for Roadway Work Groups), assessing him a Level 5 dismissal. The instant claim protests that discipline as not substantiated by the record and excessive.

At the time of the incident giving rise to the discipline, Claimant, working as EIC, and his work group were cleaning up the area under the bridge, when he was instructed by his Manager to get track and time for the contractor. He conversed with the dispatcher and was informed that he had to wait on one train - UP 5359 - before he could get track and time, and Claimant relayed the message to his Manager, who was located above and could see the track. Claimant heard a train go by overhead, which was confirmed by his Manager, and he called the dispatcher again for track and time. In response to questions from the dispatcher, Claimant assured him that UP 5359 had gone by and he was given track and time behind that train, and informed the work crew of such. Claimant was under the impression from what was said by his Manager that it was UP 5359 that had gone through, but that was not the case, as that train passed the area shortly thereafter, and the Engineer reported that he saw a crew working on the line. The matter was reviewed by the dispatcher, Claimant and his Manager after the incident, which ultimately led to the Notice of Investigation in this case.

Carrier contends that there is substantial evidence in the record to prove the charges since Claimant's evidence reveals that he did not have a proper job briefing with the dispatcher or verify that it was UP 5359 that went by, or its current location, before he obtained track and time, thereby putting the safety of the crew in danger. It maintains that

the discipline issued to Claimant was consistent with the seriousness of the charges, a Rule 1.6 (1) violation is a Level 5 offense, and the dismissal penalty is not arbitrary or an abuse of discretion since it is consistent with its UPGRADE policy.

The Organization argues that Carrier failed to prove the charges by substantial evidence, noting that there was no acknowledgement of the Manager's role in creating the misunderstanding concerning which train had passed or the fact that he gave the order for Claimant to obtain track and time. It asserts that there is no proof of either carelessness of safety or dishonesty on the part of Claimant, making the imposition of a Level 5 dismissal excessive in this case. The Organization requests that the discipline imposed be removed from Claimant's file, he be returned to work, and made whole for any losses occasioned by his dismissal.

A careful review of the record convinces the Board that, while Carrier met its burden of establishing a violation of Rules 42.4.2 in Claimant's failure to make an independent investigation into the location of UP 5359 prior to informing the dispatcher that it had already passed and securing track and time behind it, when he did not actually see it go by, we cannot conclude that it established a Rule 1.6 Conduct violation under the facts of this case. There is no evidence that Claimant was either careless of safety or dishonest in this incident, despite the potential adverse consequences of failing to properly protect the work crew. Under such circumstances, we find that the imposition of a Level 5 dismissal was excessive, and that it should be reduced to a long term suspension matching the retention period for the Level 4 track and time violation proven. Accordingly, Claimant shall be returned to work with his seniority unimpaired, and be paid for all lost wages and benefits after the 18 month suspension period supported by the facts of this case.

AWARD:

The claim is partially sustained in Accordance with the Findings.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

K. N. Novak

K. N. Novak
Carrier Member

Andrew Mulford

Andrew Mulford
Employee Member

Dated: 5/30/14

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