

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 5905  
AWARD NO. 54, (Case No. 54)**

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

**vs**

**GARY RAILWAY COMPANY**

William R. Miller, Chairman & Neutral Member  
Ryan Hidalgo, Employee Member  
Lauren K. Hart, Carrier Member

**STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:**

- 1. The discipline (dismissal) of Mr. E. Feagin in connection with his removal from service beginning on November 3, 2016 was unjust, unwarranted and in violation of the Agreement (System File C 11 14 16 EJE).**
- 2. As a consequence of the violation referred to in Part 1 above, we request that Claimant E. Feagin be reinstated with all back pay from November 3, 2016 and continuing. Also, that he be reinstated with all seniority and vacation rights unimpaired and all other rights due to him by the collective bargaining agreement.”**

**FINDINGS:**

Public Law Board No. 5905, 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.

The undisputed facts indicate that the Claimant Feagin, a welder foreman, tested positive on a FMCSA random drug test and alcohol test on January 27, 2014. On February 26, 2014, the Carrier agreed to the Organization’s request for leniency regarding Claimant’s discipline, and Claimant entered into a Last Chance Agreement (“LCA”). In signing the LCA Claimant voluntarily elected to waive his right to a formal disciplinary Hearing, to which he was entitled to under Rule 57 of the parties Agreement and accepted full responsibility for the Rule violations and the discipline rendered by the Carrier, instead of facing termination. The Carrier reinstated Claimant to service with seniority unimpaired and without any pay or other benefits for time lost. Carrier agreed to withhold Claimant’s ultimate dismissal and assessed Claimant a 30 calendar day disciplinary suspension on his record. The LCA addressed Claimant’s probationary status

for the next three years and set forth that the Claimant was obligated to comply with multiple Carrier Rules, including the Transtar Maintenance Cardinal Safety Rules and Claimant needed to retain a total demerit accumulation of 99 or less. The LCA further stipulated that if it was determined that Claimant violated any of the Rules specified in the LCA or the Claimant attained a total of 100 or more demerits for any Rule violations, Claimant would be removed from service and returned immediately to dismissed status, with a waiver of his rights under the investigation/discipline provisions of Rule 57.

The Carrier asserted that Claimant violated the language of his LCA having accumulated more than 100 demerits. The Carrier stated that on October 26, 2016, Claimant told Supervisor J. Streeter that he had completed his assigned work on the re-railer, then on October 27<sup>th</sup> Claimant told Mr. Streeter that the reason he did not complete his assigned tasks on October 27 was because he was still working on the re-railer. It further stated that when Claimant was questioned about the inconsistencies of his statements to Supervisor Streeter, Claimant admitted that he made false statement regarding the completion of his work on October 26<sup>th</sup>. The Carrier concluded this was a clear violation of General Rule 1.2 (Rule B).

The Carrier next stated that on November 3, 2016, Claimant failed to properly secure his welder vehicle at the end of his shift and because of that the vehicle filled with water overnight causing it to short out the next day resulting in approximately \$30,000 worth of damage to the vehicle. Carrier again concluded that Claimant's actions were a violation of Rule 1.11.1, 10.4, 19.4, 21.4 and 21.5. Subsequently, on November 11, 2016, the Carrier sent Claimant a letter notifying Claimant of his Rule violations wherein Assistant Superintendent, J. Oelling, assessed Claimant 50 demerits for his false statement to a Supervisor and 60 demerits for his failure to properly secure his welder vehicle. According to the Carrier, it argued that Claimant was subject to dismissal for either offense. Mr. Oelling referred to the language in Claimant's LCA regarding the accumulation of 100 demerits on his disciplinary record and stated that because the Claimant had exceeded that level of demerits he had failed to fulfill the terms of the LCA, thus he was returned to a dismissed status.

It is the position of the Organization that the record shows that the Carrier arbitrarily removed the Claimant from service and failed to provide any measure of "due process" in its handling of the Claimant. It asserted that the Carrier attempted to shut off any avenue for the Claimant or Organization to challenge the Carrier's actions and develop the facts in relation to the Carrier unfounded allegations. It further stated that the Carrier failed to provide sufficient evidence that Claimant was in violation of any Carrier Rule, Policy, or the Reinstatement Agreement.

The Organization argued that the LCA's modification of the Claimant's collective bargaining rights under Rule 57 only applied during the probationary period and if the Claimant violated specific Rules or conditions and/or attained a total of 100 or more demerits for Rules violations. However, there was nothing in the LCA that could be construed as the Claimant acceding all of his rights to fair treatment or his right to challenge any purported Rule violations.

The Organization further contended that the Carrier incorrectly argued that the February 26, 2014 LCA allowed it to dismiss the Claimant without recourse to a "fair and impartial" Hearing in accordance with Rule 57. It argued there is no such support for the Carrier's action in the subject reinstatement agreement or the parties collective bargaining agreement. Nor is there any agreement support for the Carrier's denial of any benefits of due process based upon its speculative determination that the Claimant violated Rules without offering any proof or evidence of its allegations. Therefore, the Organization concluded that Carrier's actions were improper and unfair and the Carrier's attempt to defend its failure to produce facts based upon the February 26, 2014 LCA cannot stand to defeat the claim. It closed by asking that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier's position that the Claimant violated the terms of his Last Chance Agreement. It argued that Claimant chose to violate multiple Rules on October 27, 2016 and November 3, 2016, and based on the clear language of his LCA, the Carrier appropriately returned Claimant to a dismissed status as both offenses were of a serious nature. In addressing the two alleged offenses the Carrier argued the record shows that the Claimant did not properly fulfill his work assignment on October 26, 2016, and then was less than forthright to his superior about the completion of the work which was verified on the following day, October 27, when Claimant admitted that he made false statements regarding the completion of the work in question. It next argued that Claimant failed to properly secure his welder vehicle at the end of his shift on November 3, 2016, which resulted in the vehicle being filled with water overnight causing it to short out the next day. Carrier stated that negligence caused approximately \$30,000 worth of damage to company property. The Carrier reasoned that because of the aforementioned violations the Claimant failed to fulfill the terms of the LCA and was properly returned to a dismissed status.

Lastly, the Carrier argued that the Organization's argument that the Carrier had denied the Claimant "due process" was an argument without substance. It argued that the Claimant waived any right for a Hearing and/or appeal of his termination when he signed his LCA in 2014 and the Carrier continued to deny that the Claimant or the Organization had any grounds for

appeal. It concluded the dismissal was appropriate and it asked that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the record of the case and it is determined that when the Claimant signed the LCA Claimant voluntarily elected to waive his right to a formal Investigation in accordance with Rule 57 during the probationary period. The secondary question is whether or not the Claimant and/or Organization gave up their right to appeal Carrier's decision to return the Claimant to a dismissed status. The parties have offered the Board multiple Awards for consideration that each party argues supports its respective position.

The Carrier relies upon several Awards which it argued determined that the Claimant and/or Organization did not have a right to appeal the dismissal of the Claimant. It points with special emphasis to a decision between the United Steel Workers of America, Local 1013 and the Fairfield Southern Company, Inc., (Grievance No. FS61214-2) as being on point with the instant dispute. In that decision the Arbitrator determined that the LCA had no less than two provisions that specifically stated that the Claimant forfeited his right to appeal the Company's decision and one specific provision wherein the Organization relinquished any and all right to appeal or grieve Company's decision to dismiss Claimant in accordance with the terms of the LCA. This Board takes no exception to the reasoning expressed in that decision nor do we disagree with the other Awards offered by the Carrier. However, it is noted that the other Awards offered by the Carrier do not address the appeal of grievances in the same fashion as the aforementioned Award. For example, Third Division Award No. 13621 determined that the Claimant in that dispute gave up the right to a formal Investigation, but it did not address whether or not the Claimant had the right to appeal the Carrier's actions. Instead it took up the question posed by the Organization and decided that the Claimant violated the terms of the LCA on three occasions.

The Organization, is not without arbitral support, and has offered several Awards which it asserted speak to the proposition that employees who sign LCA's are entitled to fairness and those employees or their Organization may challenge the Carrier's action which might be deemed as being detrimental to the Claimant and when challenged the Carrier has an obligation to offer sufficient evidence to justify its actions. (See for example: Decision No. 5750, SBA No. 18) Again, the Board does not take exception to the reasoning expressed in the aforementioned Award or the other attached Awards introduced by the Organization.

It is clear that after reviewing the Awards offered by the parties that the various LCA's examined by those Awards differed from the subject LCA. This Board stipulates as did several of the Awards offered by the parties that LCA's should be encouraged as they are a positive effort

by the parties to rehabilitate employees and return them to productive careers within the industry. The parties in this dispute are commended for their efforts in this endeavor as well.

Turning to the instant dispute Paragraph 3 of the LCA states in pertinent part: **“...you will be removed from service and returned immediately to a dismissed status, with waiver of your rights under the investigation/discipline provisions of the controlling agreement (Rule 57).** The Board understands that Rule 57 includes the right of appeal, but because the aforementioned provision of the LCA does not specifically state that Claimant gave up his right of appeal the Board is concerned that Claimant may have inferred that he only gave up his right to a formal Investigation. The Board recognizes that the next to last paragraph, almost as a closing thought, is more specific. However, the Board believes that because the LCA concluded by stating that it established no precedent for future action that the parties are better served, in this instance, on a non-precedential basis, to determine whether or not the Claimant was treated fairly.

The record indicates that on November 11, 2016, the Assistant Superintendent, J. Oelling, wrote the Claimant the following:

**“On October 26, 2016 you reported to Supervisor Jack Streeter that you had completed your assigned work on the rerailer. On October 27, 2016 you subsequently reported to Mr. Streeter that the reason you hadn’t completed your assigned tasks on that date was because you were still working on the rerailer. When questioned, you admitted to Mr. Streeter that you had in fact stated the prior day that the work in question was complete. Your actions constitute making false statements to a supervisor in violation of the following rule:**

**General Rule 1.2 (Rule B)**

**Subsequent to the foregoing incident, on November 3, 2016, you failed to properly secure your vehicle at the end of your shift. As a result, the vehicle filled with water overnight causing it to short out the next day. Your negligence in this respect resulted in approximately \$30,000 worth of damage to company property. Your actions were in violation of the following rules:**

**Rule 1.11.1**

**Rule 10.4**

**Rule 19.4**

**Rule 21.4**

**Rule 21.5**

**As you are aware, on February 26, 2014 you entered into a Last Chance Agreement ("LCA") with the Carrier following an incident on January 27, 2014...."** (Underlining Board's emphasis)

The record is clear that the Claimant never challenged either of the statements. Claimant never denied making false statements to his Supervisor about the completion of his assigned tasks nor did the Claimant deny that he failed to properly secure his vehicle. Nothing prevented the Claimant from offering a statement that contradicted the Carrier's assertions if he disagreed with what was stated. Arbitral precedence has consistently determined that unrefuted or unchallenged statements are considered to be factually correct. The Board reiterates that the Claimant offered no rebuttal to the Carrier's statements or any reason as to why those statements should be considered factually incorrect. Claimant's silence on these issues only confirmed the Carrier's substantive reasons for returning the Claimant to a dismissed status. It is determined that the Carrier met its burden of proof that Claimant was guilty of the aforementioned infractions.

The Board finds and holds that the Carrier properly returned the Claimant to a dismissed status in accordance with the February 26, 2014, Last Chance Agreement ("LCA") and the discipline will not be disturbed and the claim will remain denied because it was not contrary to the LCA Agreement, nor was it arbitrary, excessive or capricious.

**AWARD**

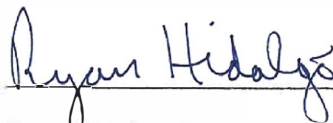
Claim denied.



William R. Miller, Chairman & Neutral Member



Lauren K. Hart, Carrier Member



Ryan Hidalgo, Employee Member

Award Date: 10-29-18