

PUBLIC LAW BOARD NO. 7633

Case No.: 14/Award No.: 14
System File No.: UP:1572495MPR/BMWED:
UP433LW12
Claimant: Walter R. Washington

UNION PACIFIC RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Organization's Statement of Claim:

1. The Level 5 UPGRADE discipline assessment (dismissal from service) to Mr. Walter R. Washington for an alleged violation of Union Pacific Rule 1.6 Conduct; Rule 1.1.2 Alert and Attentive; Rule 1.13 Reporting and Complying with Instructions; Rule 8.2 Positions of Switches; Rule 8.3 Main Track Switches; Rule 8.8 Switches Equipped with Locks, Hooks, or Latches, and Rule 70.1 Safety Responsibilities was harsh and unjustified.
2. As a consequence of the violation referred to in Part 1 above, the Claimant shall have the Level 5 removed, the Railroad will reinstate the Claimant immediately to his former position and/or right to exercise his seniority and compensate the Claimant for all lost time he could have worked and for any and all expenses he incurred while being dismissed from service.

Facts:

By letter dated July 24, 2012 the Claimant was directed to attend an investigation and hearing on August 7, 2012: "to develop the facts and place responsibility, if any, that while employed as a Track Foreman on Gang 3898, on the Enid Subdivision, near Milepost 322.5, on July 12, 2012, you allegedly failed to return the switch to normal position, for main track movement, and lock it in that position. You then cleared the UP6517 South, allegedly causing the lead engine to enter the switch, going into emergency, stopping short of entering the 727 track, containing on-track Tie Gang equipment."

The letter further noted that the failure, if substantiated, would constitute a violation of the rules set forth in the above-noted Statement of Claim and that the

Claimant could be assessed Level 5 discipline (permanent dismissal) under the Carrier's UPGRADE discipline policy.

Carrier Position:

More than substantial evidence supports the decision to dismiss the Claimant. He was solely responsible for the switches within his limits and no other employee indicated that he/she had operated a switch within authority limits. Clearly the Claimant was careless and negligent. The proven carelessness was serious enough to warrant dismissal, which the Board should not overturn. The Claimant received a fair and impartial hearing devoid of egregious procedural errors that violated the Claimant's due process rights and would justify setting aside the discipline.

Organization Position:

The Carrier has not met its burden of proof. The Claimant's testimony and statement establish his proper performance of duty and there is no evidence to show that train UP6517 entered protected territory. The Carrier's circumstantial evidence must give way to three statements from Trackmen who saw the Claimant properly align the switch main to main. The discipline was excessive and unwarranted, serving only to punish rather than correct. The Claimant, a 38-year employee, was a dedicated, hard worker. Dismissal for apparently following all relevant rules and regulations was inappropriate.

Findings:

The Organization has not alleged procedural defects in this case, therefore the Board has not considered such defects. There is no question that the switch near MP 322.5 on the Enid Subdivision had not been realigned for main track movement. The Board believes that had the switch been realigned, surely the Carrier would not have sent MTM Sanderson and Track Foreman Worley to investigate and get a statement from the Claimant and the Claimant would not have been sent for a drug test. The question then becomes: Is there substantial evidence that the Claimant failed to realign the switch?

The parties do not disagree that the Claimant as Track Foreman was the EIC responsible for the switches within his limits, nor do the parties disagree that the lock found on the ground beside the switch belonged to Gang 3898. If the switch had been properly realigned at about 1150 as stated by the Claimant and in the three statements from Gang members, then the lock should have been on the switch and not on the ground. Alternatively, the switch was properly realigned at 1150 and thereafter lined for the siding. There is no reason to believe that such action would have been taken by somebody not in Gang 3898 since the lock showed no sign of being tampered with and somebody not a member of that Gang would not have had a key. If the lock was removed by a member of the Gang after 1150, the Claimant as EIC had no explanation

for how or why that might have happened. Having considered all of the evidence, the Board finds that the Claimant was properly held responsible and that the above-noted question must be answered affirmatively.

In considering the discipline imposed, the Board has carefully considered the cases provided by the parties, with particular emphasis on those cases involved this Carrier and this Organization. There can be no argument that safety must be a paramount concern every minute that any employee is on duty in any capacity. This is an industry in which breaches of safety rules can lead to extensive property damage, serious injury and even death. This Board and other Boards have so noted in prior awards. The Claimant's lapse in this case cannot be understated. It did not lead to serious consequences, but it might have.

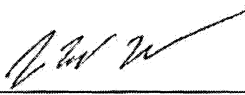
At the same time, the Claimant's 38 years of service is deemed significant. His record is not perfect, but includes only four disciplinary measures prior to this latest dismissal, with the first three disciplinary actions the result of various attendance issues. The Board has considered the July 2006 dismissal and reinstatement for a safety issue and has also considered the six years that have passed without discipline since then and the Claimant's Level 0 UPGRADE status at the time of this latest discipline. All things considered, the Board believes that corrective discipline is more appropriate than a punitive dismissal. This case bears similarities to PLB No. 6402, Case No. 111 in which a claimant with 23 years of service was dismissed for a violation of Rule 1.6 Careless of Safety after having caused a collision resulting in property damage. At the time that claimant was at Level 0 UPGRADE and had gone 10 years without discipline. The Board, chaired by Referee Martin H. Malin, reinstated the claimant without compensation. We take the same approach in this case on a non-precedential basis.

Award:


Claim sustained in part and denied in part.

Order:

The Board, after consideration of the dispute identified above, hereby orders that the Level 5 UPGRADE discipline (dismissal from service) be expunged from the Claimant's record and that it be replaced with reinstatement without compensation. The Carrier is to make the award effective on or before thirty (30) days after the award is adopted.



Andrew Mulford, Organization Member



Katherine N. Novak, Carrier Member

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AWARD 14

A handwritten signature in cursive script, appearing to read 'I. B. Helburn', followed by a horizontal line.

I. B. Helburn, Neutral Referee

Austin, Texas
January 15, 2015