

PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance  
of Way Employees Division - IBT

and

Union Pacific Railroad Company  
(Former Missouri Pacific Railroad Company)

Case No: 151  
Award No: 151

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. J. Gutierrez, II, by letter dated September 9, 2019, for alleged violation of Rules 1.6: Conduct – Dishonest, 1.13: Reporting and Complying with Instructions, SSI Item 10-1: Union Pacific Railroad Policies and Rule 1.6 Conduct – which reads: 'Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported' was severe, harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP944PA19/1729142 MPR).
2. As a consequence of the violation referred to in Part 1 above:

'We hereby request that the charges and the discipline be removed from Welder Jose A. Gutierrez, II, personal record, and that he be compensated for any lost time such as straight time, including overtime, holidays, travel expenses and mileage for attending this hearing at the rate of .58 cents per mile from his residence to the address in which this investigation took place and any other benefits that he might have lost if any due to discipline issued in connection with these charges that would have normally been covered by the Carrier.

The Organization also requests that within such time in which the Claimant is re instated (sic) back to active service that he would not be subject to any additional probation under Union Pacific MAPS Policy specifically "**Rule 3.7 Arbitration Decision**" in which case the Carrier can revert employees (sic) status to a second triggering/training event with a thirty six (36) month retention period.' (Emphasis in original) (Employees' Exhibit 'A-2')."

FINDINGS

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as

amended; this Board has jurisdiction of the dispute herein; the parties were given due notice of hearing before this Board and they participated therein.

The Claimant was disciplined pursuant to a Notice of Investigation dated August 15, 2019, Investigation held August 20, 2019, "... to develop the facts and place your responsibility, if any, in connection with the below charge.

On 08/02/2019 the Carrier gained knowledge that during the month of July 2019 you allegedly falsified your worksite reporting location which allowed you to gain per diem for which you were not entitled to. This is a possible violation of the following rule(s) and/or policy:

Rule 1.6: Conduct – Dishonest  
Rule 1.13: Reporting and Complying with Instructions  
SSI Item 10-I: Union Pacific Railroad Polices  
Rule 1.6: Conduct- which reads:

"Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported."

Under the MAPS Policy, this violation is a Dismissal event. Based upon your current status, if you are found to be in violation of this alleged charge, Dismissal may result.

In a discipline letter dated September 9, 2019, the Carrier found that "... after carefully considering the evidence adduced at the hearing, I find that the evidence more than substantially supports the charges against you. The following charge has been sustained:

On 08/02/2019, while employed as a Welder, the Carrier gained knowledge that during the month of July 2019, you falsified your worksite reporting location which allowed you to gain per diem for which you were not entitled to. This is a violation of the following rule(s) and/or policy:

1.6: Conduct - Dishonest  
1.13: Reporting and Complying with Instructions  
SSI Item 10-I: Union Pacific Railroad Polices  
Rule 1.6: Conduct - which reads:

"Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported."

Additionally, Rule 1.6: Conduct stipulates that any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the

company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.

Based on your current record, you are hereby dismissed from all service with the Union Pacific Railroad.

The Organization appealed the discipline and the Carrier denied the appeals. The dispute was not resolved during a settlement conference and progressed to arbitration. This matter is now before the Board for final and binding resolution. The Board has carefully reviewed the entire record in this case, including the arguments and awards provided in support of the parties' respective positions, whether or not specifically addressed herein.

The Organization raised Rule 22(c)(1) "precise charges" procedural violation defenses to the Notice of Investigation. Under the facts and circumstances of this case, the Board finds this persuasive with respect to the charge: "SSI Item 10-1: Union Pacific Railroad Policies". Rule 22(c)(1) of the parties' Agreement requires the Carrier to provide "... precise charges sufficiently in advance..." of the Investigation. Said charge fails to meet said requirement. Consequently, the Board excludes the charge, and the policies admitted into the record in support of the charge.

The Organization raised a number of Rule 22(a)(1) "fair and impartial hearing" procedural violation defenses to the Carrier's Corporate Audit "Special Investigation – Theft of Time and Per Diem" in this case. The Board notes that in Award 45, PLB 7633 held, in pertinent part, that "Rule 22 is not intended and cannot be read to include investigations by Corporate Audit. Therefore the Claimant was not authorized a duly accredited representative when questioned by Corporate Audit." Evidence from Corporate Audits, including those conducted telephonically, has been accepted by PLB 7633. This includes bargaining unit member statements and/or admissions allegedly made during Corporate Audits.

The Board notes however, that in such cases the Rule 22 Investigation record included a Corporate Audit transcript. The Investigation record in this case does not. Corporate Audit's conclusory summarizations and characterizations of alleged Audit statements and/or admissions are unsupported by Audit transcript. Additionally, at the Investigation Claimant denied making key alleged Audit statements and/or admissions which at the Investigation the Carrier attributed to Claimant.

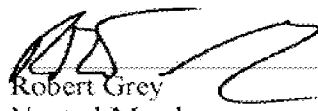
The Board finds that under the facts and circumstances of this record, the Carrier's Rule 22 Investigation use of alleged Corporate Audit statements and/or admissions, unsupported by Audit transcript, violated the "fair and impartial hearing" requirement memorialized by the parties in Agreement Rule

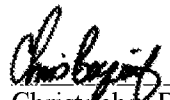
22(a)(1). Consequently, the Board excludes from the record alleged Corporate Audit statements and/or admissions, and evidence derived therefrom.


Upon detailed review of the remaining charges and record, the Board finds substantial evidence of negligence on the part of Claimant, but not substantial evidence of dishonesty. In light of the facts and circumstances of the record, the Board concludes that the dismissal should be modified to a long-term suspension.

AWARD

Claim sustained in accordance with the Findings. Claimant is reinstated to service with full seniority unimpaired, but without back pay, at MAPS Training 1 status with a 12-month retention period. The Carrier is directed to comply with this Award on or before 30 days following the date by which any two members of the Board have affixed their signatures hereto.

  
Robert Grey  
Neutral Member

  
Christopher Bogenreif  
Carrier Member

  
John Schlismann  
Organization Member

January 19, 2022

Dated