

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. 163
Award No. 163

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

1. The Carrier's discipline (dismissal) of Mr. N. Claiborne, by letter dated December 3, 2019, for alleged violation of Rules 1.6: Conduct – Dishonest and EEO Policy: The How Matters was excessive, arbitrary, disparate and imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP533JF19/1732107 MPR).
2. As a consequence of the violation referred to in Part 1 above:

*** the removal of the discipline of dismissal to be dismissed and removed from the Claimant's Personnel Record. Also to be paid and compensated for any and all lost time at the Claimant's respective straight time rate of pay, and any and all overtime to be paid at his respective overtime rate of pay that the gang the Claimant was assigned to was afforded and the employee performing the Claimant's highly recognized work had he not been unjustly and excessively disciplined. Also, to be returned to active service with all seniority unimpaired, and to include any and all holiday, and all lost time to be credited to Railroad retirement, hospitalization, to include physician office visits, hospital stays, dental, prescriptions and vision beginning on November 5, 2019, through and including on a continuous basis until this matter is settled. Also, to include any and all expenses the Claimant may have acquired, to include any and all expenses he may have acquired, to include meals, lodging, and mileage at the negotiated rate of \$. 58 (sic) cents a mile from Mr. Claiborne's place of residence, 207 Brook Court, Red Oak, Texas 75154 to the Holiday Inn, 1311 Wet and Wild Way, Arlington, Texas, and returning to the Claimant's place of residence for his attendance at the Formal Investigation on November 18, 2019, account the Carrier unjustly and excessively charged and disciplined the Claimant without sufficient evidence forcing him in a worse position. Causing him a loss of work opportunity, loss of wages and causing the claimant financial hardship.

* * *

The Organization also requests that within such time in which the Claimant is reinstated back to active service he would not be subject to any additional probation under the current Union Pacific MAPS Policy, specifically “Rule 3.7 Arbitration Decision” in which case the Carrier can revert the employee’s status to a second triggering/training event with a thirty-six (36) month retention period.’ (Employees’ Exhibit ‘A-3’).”

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 November 8, 2019, Investigation held November 18, 2019, “... to develop the facts and determine your responsibility, if any, in connection with the below charge. On 11/05/2019 the Carrier gained knowledge that between April 20, 2019 and October 28, 2019 while working as a Flagging Foreman, you allegedly were dishonest when you falsely claimed per diem on work days that had a work-site reporting location within 50 miles of your permanent residence. If proven this is a violation of the following rule(s) and/or policy:

1.6: Conduct - Dishonest
EEO Policy: The How Matters

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 December 3, 2019, the Carrier found that “... the evidence more than substantially supports the charges against you. The following charge has been sustained:

On 11/05/2019 the Carrier gained knowledge that between April 20, 2019 and October 28, 2019 while working as a Flagging Foreman, you allegedly were dishonest when you falsely claimed per diem on work days that had a work-site reporting location within 50 miles of your permanent residence. This is a violation of the following rule(s) and/or policy:

1.6: Conduct - Dishonest
EEO Policy: The How Matters

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: "EEO Policy: The How Matters". 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 policy 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 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.

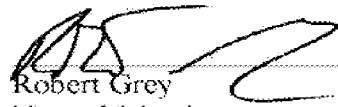
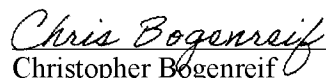
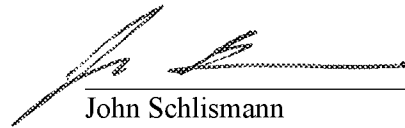
The Board notes however, that in such cases the Rule 22 Investigation record included a Corporate Audit transcript. The Investigation record in this case does not. The Carrier's Corporate Audit "Summary of Interview" exhibit is unsupported by a transcript of the interview.

The Board finds that under the facts and circumstances of this record, the lack of a Corporate Audit transcript in the Rule 22 Investigation record 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

May 18, 2022

Dated