

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. 166  
Award No. 166

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

1. The Carrier's discipline (dismissal) of Mr. M. Kim, by letter dated November 25, 2019, for alleged violation of Rules 1.6: Conduct – Dishonest, 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. \*\*\*\*" (Employees' Exhibit 'A-1') was excessive, arbitrary, disparate, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP204KM19D/1733931 MPR).
2. As a consequence of the violation referred to in Part 1 above:

'The claimant shall be made whole for all financial loses (sic) as a result of the Carrier's violation of Rule 22, including compensation for the straight time for each regular workday lost and holiday pay for each holiday lost. This is to be paid at the rate of position assigned to the claimant at the time of removal of service. This amount is not to be reduced by earnings from alternate employment, obtained by the claimant while wrongfully removed from service. This should also include any general lump sum payment or retroactive general wage increase provided in any applicable agreement that becomes effective while claimant was out of service. Any overtime needs to be included for the lost overtime opportunities for any position the claimant could have held during the time he was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had he not been removed from service. Any health, dental and vision care insurance premiums, deductibles and copays that he would not have paid had he not been unjustly removed from service.

It is hereby stated that Mr. Kim be fully exonerated, and all notations of the dismissal be removed from all Carrier records.' (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 October 28, 2019, Investigation held November 7, 2019, "... to develop the facts and determine your responsibility, if any, in connection with the below charge. On 10/11/2019, the Carrier gained knowledge that during the time frame of January 01, 2019 through September 30, 2019, you allegedly were dishonest when you falsely claimed per diem for which you were not entitled to. This is a possible violation of the following rule(s) and/or policy:

1.6: Conduct - Dishonest  
SSI Item 10-I: Union Pacific Railroad Policies  
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 November 25, 2019, the Carrier found that "... the evidence more than substantially supports the charges against you. The following charge has been sustained: On 10/11/2019, the Carrier gained knowledge that during the time frame of January 01, 2019 through September 30, 2019, while employed as a Tamper Operator, you were dishonest when you falsely claimed 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  
SSI Item 10-I: Union Pacific Railroad Policies  
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. 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 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.

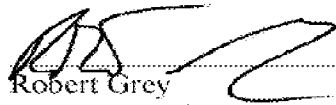
The Board notes however, that in such cases the Rule 22 Investigation record included a Corporate Audit transcript. The Investigation record in this case does not. The Carrier's Corporate Audit "Summary of Interview" exhibit is unsupported by a transcript of the interview.


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.

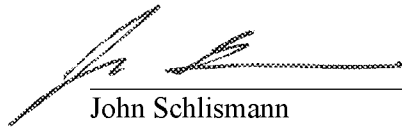
Upon detailed review of the remaining charges and record, the Board finds substantial evidence of negligence on the part of Claimant, but not substantial evidence of dishonesty. In light of the facts and circumstances of the record, the Board concludes that the dismissal should be modified to a long-term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

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Dated