

## PUBLIC LAW BOARD NO. 7633

Case No.: 17/Award No.: 17

System File No.: UP: 1576496/BMWED: UP440LW12

Claimant: Richard J. Dunlap, III

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. Richard J. Dunlap III for an alleged violation of Union Pacific Rule 1.6 Conduct (1) Careless of Safety, (2) Negligent, (4) Dishonest, (5) Immoral, and the part that 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 the performance of duty will not be tolerated," along with Rule 44.1 Work Standards, as contained in Maintenance of Way Rules, Rule 4.15.5 Repair and Maintenance Plug Rail Replacement and Rule 4.15.6 Remedial Action as contained in the Engineering Track Maintenance Field Handbook 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 October 10, 2012 the Claimant was directed to attend an investigation and hearing on November 1, 2012 "to develop the facts and place responsibility, if any, that while employed as Welder on Gang 1250 at Hooker, Oklahoma, near Milepost 457.03, at approximately 1030 hours on October 1, 2012, you allegedly failed to make a proper repair to the track by reinstalling a defective rail and trying to hide the defective rail by painting over the red paint and attempting to remove the markings on the rail that noted the defect present. This is considered to be an act of willful disregard of the safety of the railroad, not to mention dishonest and immoral.

The letter further noted that substantiated allegations would place the Claimant in violation of the Rules set forth above in Part 1 of the Organization's Statement of Claim. Additionally, the notice informed the Claimant that he was being withheld from service pending the results of the investigation. The investigation was postponed until November 7, 2012 by mutual agreement.

**Carrier Position:**

There is substantial evidence establishing the Claimant's carelessness and negligence, including his admission that he installed a defective rail, which could have resulted in a catastrophic incident. The Claimant's disregard for safety was a very serious infraction that justified dismissal. The Board should not set aside the Carrier's disciplinary determination. There is strong decisional support for the Carrier's action. The Claimant was provided a fair and impartial hearing. The two statements that were not allowed in evidence were read into the closing statement so that they could be reviewed. The Organization's inability to question Rachel Daneef because she was not at the hearing did not prejudice the Claimant since she simply issued the Notice of Investigation and had no direct knowledge of the events in question.

**Organization Position:**

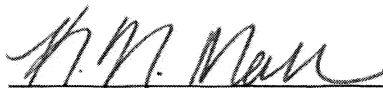
The Claimant was denied a fair and impartial hearing. The Hearing Officer would not allow the handwritten, signed statements of Brandon McBride and Abel Olvera onto evidence, instead allowing them to be read into the Organization's closing statement. The statements have shown that the Claimant did not install defective rail or paint over indications of defects on the rail. Also, the Carrier did not provide Director Operations Support Daneef, who issued the Notice of Investigation, as a witness. There is ample support, including on-property awards, demonstrating the Carrier's responsibility to present all witnesses with pertinent information. Furthermore, Carrier has not met its burden of proof because it has not shown that the Claimant removed a defective rail and then used it to replace another rail elsewhere or that he used paint to conceal marking on the rail showing that it was defective. The Carrier has relied on conjecture and speculation. The dismissal was excessive because the Carrier has not shown a violation of all seven rules listed in the charges and because dismissal is punitive rather than corrective.

**Findings:**

The matter has been settled between the parties, therefore the case is dismissed.



Andrew Mulford, Organization Member



Katherine N. Novak, Carrier Member

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

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I. B. Helburn, Neutral Referee

Austin, Texas  
January 15, 2015