

PUBLIC LAW BOARD NO. 7633

Parties to Dispute:

Brotherhood of Maintenance of Way Employees)
Division – IBT)

and)

Union Pacific Railroad Company (former)
Missouri Pacific Railroad Company)

Award No. 183

Statement of Claim: Claim of the System Committee of the Brotherhood of Maintenance of Way Employees that:

1. The Carrier’s discipline (dismissal) of Mr. D. Fuller, by letter dated September 3, 2020, for alleged violation of Rules 1.6: Conduct – Dishonest; Item 10 – I: Union Pacific Railroad Policies – Statement of Policy on Ethics and Business Conduct – Critical and Rule 1.6 Conduct – which stipulates ‘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’ was exceedingly harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP973PA20/1742606 MPR).
2. As a consequence of the violation referred to in Part 1 above, the Organization requests Claimant D. Fuller be allowed to return to work with all seniority and vacation unimpaired and that the charges and discipline be removed from his personal record and that he be compensated for any lost time such as straight time, overtime, holidays, rest day travel allowance and actual time and mileage for attending this hearing due to discipline issued in connection per letter of September 3, 2020 from AVP Track Renewal & Construction, Jason Rea, resultant from the investigation held on August 18, 2020 and that Claimant receive all benefits he normally would have received but for the Carrier’s violation of Rule 22 of our Agreement.

‘The Organization also requests that within such time in which the Claimant is re-instated 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 the employee’s status to a second triggering/training event with a thirty-six (36) month retention period.’ (Employes’ 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 employee within the meaning of the Railway Labor Act, as approved June 21, 1934; the Board has jurisdiction of the dispute herein; and the parties were given due notice of hearing and participated.

Claimant Fuller has been employed by the Carrier since October 21, 2002. Following an investigation held on August 19, 2020, the Claimant was permanently dismissed from service and found guilty of the following:

“On 6/03/2020, while employed as a Trk Sys Frmn (R), you paid yourself for work you did not perform. This is a violation of the following rule(s) and/or policy:

1.6 Conduct – Dishonest

Item 10-I: Union Pacific Railroad Policies – Statement of Policy on Ethics and Business Conduct – Critical”

At the time of his dismissal, the Claimant had no prior discipline.

The Organization appealed the discipline and the Carrier denied the appeal. The parties were otherwise unable to resolve the dispute and this matter is now pending before the Board for a final and binding resolution.

The record shows that on Tuesday, June 2, 2022, the Claimant was assigned as a track foreman to Gang number 9754 at Roanoke, TX. His work hours were 7:00 a.m. to 5:00 p.m. He worked a compressed 4-10 (Z-6) schedule as a one-man flagging gang which provided on-track safety for a contractor who cleaned the tracks. His schedule was opposite another one-man gang run by Foreman Brooks, also on a compressed (Z-5) schedule. On the first and last Tuesday (referred to as a “turnover Tuesday”) their shifts overlapped. On an overlap day, there would be two individuals where on a normal workday there was only one employee. On this Tuesday, another employee who was new on the job exercised bumping rights to work at the same Roanoke, TX jobsite on Brooks’ gang 9720, leaving the Carrier with three men on the jobsite for a one-man job. The Organization presented evidence that the Claimant determined that, given Covid protocols and three individuals present for a one-man job, he would scout the next tie up location.

The record reveals that Manager Keyes visited the jobsite in Roanoke, TX at approximately noon on June 2nd to have a one-on-one meeting with the newly assigned EIC Packer. The Claimant was not present with the equipment, nor with the company truck. Manager Keyes inquired of Foremen Brooks and Packer as to his whereabouts. Both employees claimed they had not seen him that day. Manager Keyes attempted to contact the Claimant but after about 30 seconds the call was dropped and no contact was reestablished that day. There is a factual dispute about whether the Claimant attempted to contact Keyes after the dropped call.

Manager Keyes checked time entries on June 3rd and found that the Claimant had self-reported 10 hours straight time pay and per diem of \$120.47 for the preceding day. Foremen on one-man gangs are permitted to enter their time into the system. Keyes relayed a possible ethics violation of mishandling time to the Carrier's Values Line.

On June 9th, Keyes contacted the Claimant again to inquire about his whereabouts on June 2nd. The Claimant informed him he had driven his personal vehicle to the next tie-up site for the contractor in Denton, TX. The evidence demonstrates that foremen scout tie-up locations at the next worksite as part of their duties. According to Keyes, the Claimant told him he worked at Denton until 3:00 p.m. The Claimant did not report back to Roanoke. Keyes removed him from service pending an investigation. Packer and Brooks provided written statements attesting to the Claimant's absence from Roanoke on June 2nd.

The Values Line investigation uncovered that the Claimant amended his time report on June 12th to reflect 10 hours vacation time and no per diem. According to the Claimant, because he could not prove that he was where he was (at Denton), he changed his time for June 2nd to vacation time with no per diem charge.

The record disclosed that Keyes held a conference call on March 3, 2020 with his four foremen, including the Claimant, to discuss how to handle "turnover" days when both foremen were working one-man gangs at the same jobsite. He said that he instructed employees that "turnover" days were full workdays of 10 hours and if they had concerns about working a one-man job on an overlap day, they needed to have a conversation with him or Supervisor Yates and take either vacation, personal, or no-pay days to cover any time they did not work.

The Carrier maintains that it has met its burden of proving, by substantial evidence, that the Claimant engaged in the misconduct for which he was disciplined. The Claimant's absence from the Roanoke jobsite was verified by employees at that location. The Claimant admitted he was not at the Roanoke jobsite. He acknowledged that he left somewhat early. His conduct showed an attempt to defraud the Carrier by claiming pay for time not worked. He only amended his time report to claim vacation after being confronted by his Manager. His misconduct constituted a breach of trust, and his dismissal for dishonesty was warranted. The penalty was consistent with the seriousness of the offense, and the Claimant received a fair and impartial hearing.

The Organization contends that the Claimant was not afforded a fair and impartial hearing due to procedural flaws. First, the Carrier failed to specify the precise charges against him as required by Rule 22. The Carrier cited "Item 10-I: Union Pacific Policies – Statement of Policy on Ethics and Business Conduct" which was vague and insufficient to put the Claimant on notice of specifically how he violated the 37 page How Matters policy. In addition, the Carrier prejudged the Claimant's guilt by calling the Values Line and removing the Claimant from service prior to an investigation. Finally, the Claimant failed to call Brooks and Packer as witnesses, which denied the Claimant an opportunity to face his accusers.

On the merits, the Organization argues that the Carrier failed to meet its burden of proof by failing to establish that the Claimant failed to perform any work that day or intended to defraud the Carrier. Manager Keyes admitted that it was permissible for the Claimant to scout out other

tie-up locations. And given that there were three people scheduled at Roanoke for a one-person job, and the ongoing Covid pandemic, it was a reasonable and safer use of the Claimant's time to work at another location. The Claimant talked briefly to Keyes on June 2nd and it is unlikely he would have claimed, after talking to Keyes, that he was working if he was not working that day. The Organization contends that Management has not proven, by substantial evidence, that the Grievant was not working at all that day.

Furthermore, the discipline imposed was arbitrary and punitive, rather than corrective, according to the Organization. The Claimant did not reap any benefit to which he was not entitled. When he changed his time from 10 hours pay and per diem to vacation time, he was taking advantage of a benefit he had earned and there was no loss to the Carrier. However, the Claimant realized a loss for the hours he worked on June 2nd. Importantly, the Claimant had no record of prior discipline over his seventeen-year career. Finally, the Organization urged the Board to not remain silent in its award on the Claimant's lack of prior discipline, should a remedy be awarded.

The Board has carefully reviewed the entire record and all the arguments advanced by the parties. The Board does not find that the Organization's procedural arguments require sustaining the claim. However, the Carrier has not met its burden of proving, by substantial evidence, that the Claimant performed no work for the Carrier that day, although he admitted to leaving early.

Nevertheless, the absence of any financial loss to the Carrier, coupled with the absence of disciplinary infractions over the Claimant's seventeen-year career, persuades the Board that the penalty of dismissal is excessive and harsh, punitive rather than corrective. The dismissal will be reduced to a long-term suspension without backpay.

AWARD

Claim sustained in accordance with the Findings. Claimant is reinstated with full seniority but without backpay at a MAPS-2 status, with a 36- month review period. The Carrier is directed to comply with this Award within 30 days of the date that any two members of the Board affix their signature to the Award.

Signature 

Jeanne M. Vonhof
Neutral Board Member



John Schlismann
Employee Member
Date: November 22, 2023



Chris Bogenseif
Carrier Member
Date: 11/27/2023