

**PUBLIC LAW BOARD NO. 7633**

**Parties to Dispute:**

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**Brotherhood of Maintenance of Way Employees )**

**Division – IBT Rail Conference )**

**and )**

**Union Pacific Railroad Company (former )**

**Missouri Pacific Railroad Company )**

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**Award No. 184**

**Statement of Claim:**

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. J. Garcia, by letter dated August 31, 2020, for an alleged violation of Rule 1.13: Reporting and Complying with Instructions was exceedingly harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP974BF20/1743298 MPR).
2. As a consequence of the violation referred to in Part 1 above, the Organization requests that Claimant J. Garcia:

be made whole, return to work with all vacation and seniority rights unimpaired, that the charge and discipline issued in connection with these charges be removed from his personal record, that he be made whole for all time lost due to discipline issued in connection with these charges, and that he be reimbursed for any additional expenses, including those requested in the August 13, 2020 hearing, incurred that would have normally been covered by Carrier benefits. This is in account the Carrier violated Rule 22, of our Agreement.

\* \* \*

The claimant shall be made whole for all financial loses (sic) as a result of the alleged violation, including compensation for all wages lost, straight time and overtime, to be paid at the rate of position assigned at the time of removal of service, beginning with the day he was removed from service and ending with his retirement date. 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 became 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. Claimant be compensated for any and all losses related to the loss of fringe benefits that can result from dismissal from service, i.e., Health benefits for himself and his dependents, Dental benefits for himself and his dependents, Vision benefits for himself and his dependents, Vacation benefits, Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of the Union Pacific Railroad and a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters. Claimant to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has been taken from him. Such losses can be his house, his car, his land and any other personal items that may be garnished from him for lack of income related to this dismissal.

In short, we herein make the demand that the Claimant be made “whole” for any and all losses related to his dismissal from service.

It is hereby stated that Mr. Garcia be fully exonerated, and all notations of the dismissal be removed from all Carrier records.’ (Employee’s 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 Garcia has been employed by the Carrier for 23 years. Following an investigation held on 8/13/2020, the Claimant was permanently dismissed from service and found guilty of the following:

“On 8/01/2020, while employed as a M/O (Tmt) Pup Tamp, you failed to use the horn on the machine you were operating while traversing through a railroad crossing, as required by the Machine Operators JSA, and after being coached the previous day for the same reason. This is a violation of the following rules(s) and/or policy:

1.13: Reporting and Complying with Instructions.”

The Notification of Discipline Assessed was issued on August 31, 2020 and signed by Jason Rea, AVP Track Renewal and Construction. The Organization appealed the discipline, and the Carrier denied the appeal. The parties were otherwise unable to resolve the dispute and it is now pending before the Board for a final and binding resolution.

On July 29, 2020, the Claimant bumped from Manager Green's 9161 gang where he operated a Pup Tamp machine, to Green's 9162 gang where he operated a tie handler crane (THC). He was operating the tie handler crane when the incident giving rise to this claim occurred.

On July 30, 2020, the Claimant completed the JSA (Job Safety Analysis) log for his equipment noting that the horn on his crane was malfunctioning. A maintenance technician checked the horn on the morning of July 31, 2020 before the shift began and found that the horn was working at that time. The Claimant stated that he explained to the technician that it had failed the day before, and the technician told him there was nothing else that he could do.

Later that day at around 13:26 hours, the Claimant along with the rest of the machine operators on gang 9162 traversed a grade crossing in their respective machines around MP 105.26 in Ware, IL. Manager Green stated that he was observing from a shielded location about 50-75 feet away, and noted that the Claimant, along with multiple others on the gang, failed to sound their horns when traversing the at-grade crossing. Green initiated a "stop the line," a "stop work" order where all work is ceased, and employees are gathered together for a job briefing. Green conducted a Field Training Exercise rules review with all the employees on GCOR Rule 1.3.1. Documentary evidence under the Carrier's COMMIT program shows that Green conducted the Rules Review. Green also referred at the hearing to the action as a "coaching."

On August 1, 2020, the morning after the Rules Review, Manager Gossett in his job briefing discussed compliance with horn blowing at grade crossings. Green along with Day, Assistant Foreman, once again observed the gangs crossing at the same at-grade location from the same location as the day prior. The Claimant, along with three others on the gang, again failed to sound their horns, according to Green. Green stopped the Claimant at the crossing and required that the Claimant test his horn, which was working. Green removed him from service. The Claimant does not deny that when tested after the crossing, his horn was working. Green, after consulting with his Director and AVP Rea determined to charge the Claimant with violating GCOR 1.13, Reporting and Complying with Instructions. The documents show that the other three individuals who Green concluded failed to blow their horns when crossing on two consecutive days were not charged with a Rule 1.13 violation.

The record reflects that the Claimant testified at the hearing that although his horn worked when tested, it was not working all the time, and sometimes was sounding softly. He said that he blew his horn on both days at the crossing, as he always does. He said that he consulted with his son, a diesel mechanic, who believed the problem with the horn had something to do with a leaking air compressor. On the Claimant's JSA log on July 31 and August 1, he noted that the horn was functioning, but reported that the air compressor was leaking. The air compressor controls the operation of the horn.

In June 2020 the Claimant was removed from service by Manager Green for allegedly committing a violation of Rule 1.6 by cursing in front of other employees due to a machine failure. He was reinstated on July 22, 2020 just seven days prior to his removal on August 1, 2020. The Claimant was reinstated pursuant to a waiver at a MAPS 2 status. The record does not reflect any other discipline to the Claimant during his tenure with the Carrier.

The Carrier argues that it has met its burden of proof. The Claimant failed to comply with his supervisor's instructions and the instructions contained in the JSA when he, on two back-to-back occasions, failed to sound his horn at an at-grade crossing. Since the Claimant was already at a MAPS 2 status, dismissal from service was appropriate. The Carrier maintains that the Organization's contention that the Claimant's equipment was faulty is without merit because the Claimant admitted that his horn was working when stopped on August 1. There is arbitral precedent that an admission of guilt is a waiver of any procedural objections because the Claimant has already convicted himself.

According to the Carrier, removal from service was appropriate under the circumstances. The Claimant clearly failed to comply with instructions, which is a critical rule violation. Based on his current MAPS 2 status, the Carrier was fully within its rights to dismiss the Claimant from service under its progressive disciplinary policy. Furthermore, the Claimant was afforded all due process and accorded a fair and impartial hearing. Discipline was assessed in compliance with the MAPS policy, and it should not be disturbed.

The Organization contends that the Carrier violated Rule 22 when it failed to put the Claimant on notice of the specific charges against him. The Notice of Investigation referred to the Claimant as a Machine Operator "Pup Tamp." The Claimant was operating a THC (crane), an entirely different piece of equipment.

The Carrier also impermissibly predetermined the Claimant's guilt when it removed the Claimant from service on August 1, 2020 and withheld payment. Furthermore, the Carrier allowed someone other than the hearing officer to make credibility determinations, who was not present at hearing. Significantly, the Reviewing Officer, Rea, participated in determining to charge the Claimant with the violation of GCOR Rule 1.13. This was a breach of the Claimant's right to a fair and impartial hearing.

On the merits, the Organization argues that the Carrier failed to meet its burden of proof. The Carrier elevated GCOR Rule 1.13 to a critical event without proving that the Claimant flagrantly disregarded his supervisors' instructions. GCOR Rule 1.3.1 was not entered into the record and thus, the Carrier cannot meet its burden of proving the Claimant violated the Rule. The Claimant logged that his horn was not working on July 30, 2020 and made a later report about the air compressor and cannot be taken to task for a Rules violation when the cause was a malfunctioning horn.

The Board concludes that the Organization's procedural claims are not sufficient to merit overturning the dismissal. However, the Carrier has not proven by substantial evidence that the Claimant violated Rule 1.13. Claimant acknowledged that his horn did work when tested after he was stopped on 08/01/2020. However, the Claimant also stated that he blew his horn both on 07/31/2020 and 08/01/2020, and that there were problems with the horn working consistently and loudly enough during this period. The Claimant reported the horn as not functioning properly on his maintenance log for 7/30/2020, the day before either of the incidents here. Although the Claimant did not report a problem directly with the horn after 07/30/2020, he reported a problem with a leaking air compressor, which controls the operation of the horn, on the maintenance logs for August 1, when Management contends that he failed to blow his horn.

Violation of Rule 1.13 for failing to follow Management's instructions is a serious critical violation which requires substantial evidence of the employee's intent to disobey Management's instructions or rules. The Claimant has 23 years of service, with no history of this kind of conduct. The Carrier argues that the Claimant admitted that his horn worked on the day in question, demonstrating his guilt. However, there is sufficient evidence from his testimony at the hearing and from the Carrier's maintenance records that the Claimant reported problems with the horn's operation immediately before and during the period when the Carrier concluded that he had deliberately not blown his horn at the crossing. Because of the evidence in the record that the Claimant was reporting malfunctions in systems affecting the operation of his horn, the Board concludes that the Carrier has not established, by substantial evidence, that the horn failure was due to the Claimant engaging in intentional repeated violations of instructions and rules, rather than equipment failure. There is not substantial evidence on this record that the Claimant engaged in flagrant disregard of his supervisor's instructions so as to violate Rule 1.13.

**AWARD**

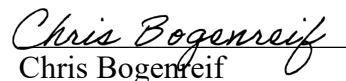
Claim sustained. Claimant is reinstated to service at Claimant's former position, with full seniority unimpaired, and made whole for losses caused by his dismissal. Claimant's record shall not contain any MAPS status pertaining to this matter. The Carrier is directed to comply with this Award on or before 30 days following the date by which any two members of the Board have affixed their signatures hereto.

Signature 

Jeanne M. Vonhof  
Neutral Member



John Schlismann  
Employee Member  
Date: November 22, 2023



Chris Bogenreif  
Carrier Member  
Date: 11/27/2023