

**Case No. 191**  
**Award No. 191**

**Public Law Board No. 7633**

**PARTIES**     **) Brotherhood of Maintenance of Way Employees Division**  
                  **) – IBT Rail Conference**  
**TO**             **)**  
                  **)                     and**  
**DISPUTE**     **)**  
                  **)**  
                  **) Union Pacific Railroad Company (former Missouri Pacific**  
                  **) Railroad Company)**

**Members of Board:**

**Jeanne M. Vonhof, Chairman and Neutral Member**  
**Chris Bogenreif, Carrier Member**  
**John Schlismann, Employee Member**

**STATEMENT OF CLAIM:** “Claim of the System Committee of the Brotherhood that:

1.     The Carrier’s discipline (dismissal) of Mr. C. Murph, by letter dated February 3, 2021, for an alleged violation of Rules 1.6: Conduct – Carelessness; 2.21: Electronic Devices; 70.3: Job Briefing; 136.4: On-Track Safety Procedures; 1.13: Reporting and Complying with Instructions; and additionally Rule 1.6 Conduct – which stipulates that ‘... 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 UP707SN21D/ 1755469 MPR).
2.     As a consequence of the violation referred to in Part 1 above, Claimant C. Murph shall now ‘... be returned to work on his position of Forman (sic), and the claimant shall be made whole for all financial losses as a result of the violation, 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.’ (Employees’ Exhibit ‘A-2’).”

### **Findings of the Board**

The Board upon consideration of the entire record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended and that the Board has jurisdiction over this dispute.

The Claimant, Christopher Murph, has five years of service with the Carrier. He was provided with notice that he was being investigated to determine his responsibility for being careless of safety when he had a track authority violation on January 8, 2021, on the Pine Bluff Subdivision. The investigation was held on January 25, 2021, and, via letter dated February 3, 2021, the Claimant was dismissed. The Carrier concluded from the evidence provided at the investigation that the Claimant was careless of safety and was responsible for a track authority violation while he was the Employee in Charge (EIC). The Carrier concluded that the Claimant violated MWOR 1.6 Conduct - Carelessness; 2.21 Electronic Devices; 70.3 Job Briefing; 136.4 On Track Safety Procedures; and 1.13 Reporting and Complying with Instructions. Based on these determinations and the language in MWOR 1.6, the Carrier dismissed the Claimant from service.

The Claimant and two other employees, Mr. Ivory Dean and Mr. Jessie Bell, were moving work equipment, a tamper, from one location to another location about 150 miles away on January 8, 2021. The Claimant was the Employee in Charge (EIC). He had a job briefing with Dean, Bell and Supervisor Franklin Oswald, on January 7 and then another job briefing only with Oswald before beginning work on January 8. Oswald said that at both briefings he instructed the Claimant to ride with Mr. Dean on the tamper, and have Mr. Bell follow with the work van. The Claimant said that Oswald gave this instruction on January 7 but did not repeat it on January 8. The work group was issued a track and time permit for the tamper.

The Claimant did not ride with Mr. Dean on the tamper, but rather traveled in the van, and Bell drove a personal vehicle to the location where the tamper was being moved. The Claimant communicated the track authority to the tamper operator by text on his cellphone; he said that his phone text included a screenshot from his laptop. Mr. Dean reached the end of the track authority and spoke to the Claimant. There were communications problems because of poor radio and

cellphone reception. The Claimant attempted to reach the Dispatcher to be issued additional track authority to proceed further. Before additional track authority was issued, Dean moved the tamper onto a siding where he did not have track authority.

The Dispatcher noticed the violation, contacted the Claimant and told him that the equipment must be cleared from the track immediately. The Dispatcher blocked the track in the meantime and told the Claimant that he needed to talk to his Manager. The Dispatcher also notified the Corridor Manager who notified Oswald of the track authority violation. An investigation was conducted shortly thereafter, and the Claimant and Mr. Dean were taken out of service.

The Claimant was charged with violations of multiple rules. The Organization argues that there were procedural violations in this case, particularly in prejudging Claimant's guilt and removing him from service before a formal investigation was conducted. In addition, the Organization argues that Claimant only came on this crew a few days earlier, was bumped out of the position before he even began work, but agreed to stay on the gang for a few days to clear up some work in this location. According to the Organization, there is not substantial evidence that the Claimant was guilty of an intentional violation of MWOR 1.6 or the other rules cited. In addition, the Organization argues that the imposition of dismissal on the record of this case is arbitrary and excessive.

The Carrier argues that no procedural violations were committed during the investigation which were serious enough to overturn the Carrier's action. In addition, the Carrier argues that there is substantial evidence that the Claimant was guilty of the violations charged. Finally, the Carrier argues that the penalty of dismissal is not arbitrary or excessive, considering the seriousness of the violations.

Removing an employee from service while an investigation is not uncommon and does not establish that his guilt has been prejudged. The practice protects important interests of the Carrier while the Claimant is provided with a full and fair investigation into the alleged violations. The Board concludes that there were no procedural violations during the investigation that rose to the level of requiring that the claim be sustained on that basis.

The Carrier argues that the Claimant violated explicit instructions regarding the work assignments for the employees in the work group on the day in question. The Claimant testified that Oswald provided him as the EIC with the authority to make day-to-day decisions about the work. The Organization argues that the Claimant made assignment changes within the scope of this authority, based upon safety and efficiency.

There is substantial evidence in the record that Oswald gave clear instructions for the staffing of the work assignments for this work group, even stating that he brought Bell into the group just to drive the van, so that the Claimant could accompany Dean on the tamper. Oswald testified that he gave these instructions so that there would be clear communication between the EIC and the tamper operator as they made this move of 150 miles. The Claimant does not deny that he received the instructions from Oswald. He testified that he had Bell drive his personal

vehicle to the tie-up site in order to prevent employees backtracking in the dark, and to prevent the payment of overtime.

The problems in cellphone and radio transmissions that in this case contributed to a violation of track authority would not have been a problem if the Claimant had been on the tamper with the tamper operator, as instructed. In addition, Claimant had end-of-limits software with him that would have provided an additional warning that they did not have track authority before Dean moved the tamper onto the siding. The Claimant admitted that the violation of track authority likely would not have occurred if he had been riding with the tamper operator, as instructed.

The Organization's argument is not convincing that the Claimant was operating under the authority provided to him by Oswald to make day-to-day decisions. Oswald gave Claimant clear instructions about the staffing of the job and Mr. Murph failed to follow them. There was no change in conditions that would justify the Claimant making a change in the clear instructions given to him by Supervisor Oswald, such as the emergence of a significant safety issue that was unknown to Oswald when he provided the instructions. In addition, Claimant's change in the staffing duties caused him to order Dean to use his cellphone on the tamper, which violated other instructions that Oswald had given to the crew as well as the Company policy that personal electronic devices are not permitted on the equipment. Therefore, the Carrier has provided substantial evidence that the Claimant violated Rule 1.13, Reporting and Complying with Instructions.

If the Claimant had been with Dean on the tamper, as originally planned by their Supervisor, communication by radio or cellphone would not have been necessary. In addition, once Dean contacted the Claimant that he had reached the end of his track authority, the Claimant should have made it clear to Dean that he must wait and may not proceed until they finished a clear re-briefing. He should also have made clear to Dean that he could not move until he received at least the same kind of evidence of track authority that they had used earlier in the day, or at the very least, to have Dean repeat back to him the additional track authority verbally and waited for the Claimant's assent. The Claimant failed to conduct an adequate re-briefing necessary when conditions change. Furthermore, by using informal methods of communicating track authority throughout the day; failing to use the planned in-person communication that would have been available if they had been riding together; and failing to complete the track authority forms properly, the Claimant's conduct made it substantially more likely that there would be a mistake over track authority like the one that occurred on this day. On this record, the Board concludes that there is substantial evidence that the Claimant's conduct violated Rules 70.3 Job Briefing and 136.4 On Track Safety Procedures.


Employees must ensure that they have proper track authority before fouling a track with maintenance equipment. In this case the Claimant had the additional responsibility as an EIC to obtain proper track authority for his work group, and to properly communicate that authority to them. The Board concludes that the Carrier has established substantial evidence on this record that the Claimant's conduct violated MWOR Rule 1.6 – Carelessness. The Organization argues that the Claimant's conduct does not rise to the level of a "reckless disregard for the safety of themselves or other employees or the public." However, the Claimant failed to follow the clear directives of his Supervisor intended to ensure the safety of this procedure for moving of maintenance


equipment on January 8, 2021. Because Claimant had very limited time on this work crew, he should have consulted with Oswald in the morning before making the major change in work assignments he made shortly after he met with Oswald. By failing to do so, he was careless of safety and his conduct contributed to a serious safety situation, the fouling of a track with the tamper. Occupying track without proper authority risks serious safety consequences, including being struck by other equipment which has track authority, derailment, and the risk of serious injury to employees. For these reasons the Board concludes that the penalty of dismissal in this case is not excessive, arbitrary or unwarranted.

#### **Award**

Claim denied.

  
\_\_\_\_\_  
Jeanne M. Vonhof  
Neutral Board Member

  
\_\_\_\_\_  
John Schlismann  
Employee Member

  
\_\_\_\_\_  
Chris Bogenreif  
Carrier Member

Dated: July 11, 2024