

Public Law Board No. 7633

PARTIES) **Brotherhood of Maintenance of Way Employes 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. I. Dean, by letter dated February 3, 2021, for an alleged violation of Rule 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 ‘... 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 UP709SN21D/1755479 MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant I. Dean shall now be returned to work and ‘... shall be made whole for all financial loses 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.' (Employes' 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, Ivory Dean, has 20 years with the Carrier and was provided with notice that he was being investigated to determine his responsibility for allegedly 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, while employed as a System Trackman, 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. Christopher Murph and Mr. Jessie Bell, were moving work equipment, a tamper, from one location to another about 150 miles away on January 8, 2021. Mr. Murph was the Employee in Charge (EIC). Claimant had a job briefing with Murph and Bell and Supervisor Franklin Oswald, on January 7. Oswald instructed Mr. Ivory to ride with Mr. Murph on the tamper, and have Mr. Bell follow with the work van. The work group was issued a track and time permit for the tamper.

Murph did not ride with Dean on the tamper, but rather traveled in the van, and Bell drove his personal vehicle to the location where the tamper was being moved. Murph communicated the track authority to the Claimant who received it by text on his cellphone while traveling on the tamper. Claimant reached the end of the track authority before Murph arrived at the work location and the Claimant called Murph. There were communications problems because of poor radio and cellphone reception. The Claimant testified that he believed that he had heard Murph, the EIC, provide him with the additional track authority to proceed further onto a siding where a switch was already lined for his equipment to proceed. Dean moved the tamper onto the siding where he did not yet have track authority.

The Dispatcher noticed the violation; put blocks up to protect the Claimant while on the siding; and notified the Corridor Manager who notified Oswald of the track authority violation. The Dispatcher also contacted Murph and told him that the equipment must be cleared from the track immediately and that he needed to talk to his Manager. An investigation was conducted shortly thereafter, and Mr. Dean and Mr. Murph were taken out of service.

The Organization argues that the Carrier improperly introduced evidence of the Claimant's past discipline during the investigation. The conduct raised is not related to the conduct in question in this charge, and was not even reportable to the FRA, according to the Organization. Such information may not be used to establish the guilt of an employee regarding the charge being investigated. The Organization further argues that the Carrier has failed to establish by substantial evidence that the Claimant engaged in intentional violations of its rules and therefore, his conduct does not rise to the level of reckless, willful, or flagrant disregard of the Carrier's safety rules.

The Carrier argues that the introduction of the Claimant's past disciplinary record at the investigation was not relied upon to establish the Claimant's guilt with regard to the charges under investigation. The Carrier relies upon the Claimant's admission that he knew that he was proceeding into the siding without proper authority, and argues that the Claimant received a fair investigation. According to the Carrier, there is substantial evidence that the Claimant committed the misconduct charged, and that the conduct is such a serious safety violation that dismissal is appropriate.

The Board concludes that the procedural issues raised by the Organization do not rise to the level that the claim should be granted on procedural grounds. There is no question here over whether the Claimant moved into the siding without proper authority. He admits that he did so. Therefore, the evidence does not establish that the Carrier relied upon the Claimant's past disciplinary record to conclude that the Claimant engaged in the conduct at issue here. Furthermore, the conduct at issue in this claim was so serious that it clearly formed the basis for the Carrier's reason for imposing dismissal, without any consideration of past discipline.

The Claimant testified that Oswald gave him instructions to ride with Murph. The Claimant testified that he did not intentionally violate any rules or try to put himself in a "careless moment," even though Oswald's instructions were not followed. Dean said he believed that he had to follow EIC Murph's orders involving how the work group would operate that day.

The Claimant candidly admits, however, that he should have waited to be given clear track authority before proceeding onto the siding. He admits that he "jumped the gun" and made a mistake that day when he entered the siding without proper authority. Entering a track without authority is a very serious safety violation because of the danger to the employee, other employees and to the public created by this conduct. The Claimant admitted this mistake and that he jeopardized his safety and possibly the safety of others that day. His conduct rises to the level of a "reckless disregard for the safety of themselves or other employees or the public." Therefore, there is substantial evidence that his conduct was a violation of MWOR Rule 1.6 -- Carelessness.

The Organization argues that the claim must be granted, however, or at least the dismissal reduced, if the Carrier has not established each of the violations cited in the dismissal letter. The Claimant does not admit that he violated the other rules cited, and the Organization argues that he cannot be held accountable for simply following the orders of his EIC.

However, the Claimant knew that the gang was required to re-brief once the conditions of the job changed. He knew that he had to wait for new track authority before proceeding. He knew that he was not supposed to use a cellphone while on Company equipment. The Claimant stated that normally he receives written orders regarding track authority. As one Management witness stated, an employee puts his job on the line when he proceeds further than his track authority without any written evidence of additional time or track authority. Here the Claimant knew that he was at the end of his track authority and informed the EIC. He used the cellphone to discuss track authority, in violation of the rule and his Supervisor's instructions. All he had as evidence of track authority was an unclear message over a cellphone.

Each employee has a responsibility for the rules established by the Company to protect the safety of all employees. Therefore, there is substantial evidence on this record that the Claimant was responsible for violating the cellphone policy and the instructions of his Supervisor. Furthermore, he did not fully complete the job re-briefing before moving forward. The Claimant did not even wait for the text messages that they had used earlier in the day to transmit track authority. Therefore, there is substantial evidence on this record that he violated Rules 2.21 Electronic Devices, 70.3 Job Briefing, and 1.13 Reporting and Complying with Instructions. Most importantly, he violated Rule 136.4 On Track Safety Procedures, which provides that on-track safety will be provided by "exclusive track occupancy." The Claimant did not ensure that he had exclusive track occupancy before entering the siding.

On this record there is substantial evidence that the Claimant demonstrated a reckless disregard for his safety and that of other employees. The Claimant admitted that he occupied track without proper authority. He engaged in a willful disregard of important safety rules and negligence affecting the interest of the Company and its employees, in violation of MWOR 1.6. Under these circumstances, the penalty of dismissal is not arbitrary or excessive.

Award

Claim denied.



Jeanne M. Vonhof
Neutral Board Member



John Schlismann
Employee Member

Dated: July 11, 2024



Chris Bogenreif
Carrier Member