

PUBLIC LAW BOARD NO. 7633

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)
DIVISION – IBT RAIL CONFERENCE)
and)
UNION PACIFIC RAILROAD COMPANY (FORMER)
MISSOURI PACIFIC RAILROAD COMPANY))

STATEMENT OF CLAIM

“Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. J. Zamora, Jr., by letter dated April 18, 2023, for an alleged violation of Rule 1.6: Conduct – Dishonest; and additionally, Rule 1.6 Conduct 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 and 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 UP401RR23/1786903 MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Zamora, Jr. shall now be returned to work with the dismissal expunged from his personal record and:

**** Claimant be immediately reinstated to service and compensated for all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service excluding all outside wages. 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 all losses related to his dismissal from service. The Organization request that in such time in which Mr. John Zamora be re-instated to service that he would not be subjected to any additional probation under the Union Pacific MAPS Policy Specifically Rule 3.7 Arbitration decision in which the carrier can revert employee status to a second triggering/training event with a 36-month retention period.

As a remedy for this violation, the suspension should be set aside, and the claimant shall be made whole for all financial and benefit losses because of the violation. Any benefit lost including vacation and health insurance benefits shall be restored. Restitution for financial losses because of the violation shall include all straight time pay, overtime pay, and loss of holiday pay for time Mr. John Zamora EID (0036631) was held out of service and that Mr. Zamora be returned to service.’ (Employees’ Exhibit ‘A-2’).”

FINDINGS

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction of the dispute herein, and that the parties to said dispute were given due notice of hearing in the matter and participated therein.

John Zamora, Jr. (the Claimant) at the time of his dismissal by the Carrier held the job of Welder, with 27 years of service. By letter dated March 21, 2023 (which replaced an earlier letter of March 16, 2023), he was requested to report for a hearing on March 23, 2023, to develop the facts and determine his responsibility, if any, in connection with the following charge:

On 03/15/2023, at the location of Dilley, TX, near milepost 324.02, Laredo Subdivision, at approximately 15:37 hours, while employed as a Welder, you allegedly falsely reported your production reporting to reflect work that was not done. Your text message as well as daily production reporting indicated that the frogs at CPJ 324, North Switch Leona and CPJ 326, South Switch Leona were ground due to weather conditions in Laredo preventing joint elimination. Upon inspection after the end of your shift the frogs at both locations were found to not have been worked on. This is a possible violation of the following rule(s) and/or policy:

1.6: Conduct – Dishonest

The March 21 letter further stated, “Under the MAPS Policy, this violation is a Dismissal event. Based upon your current status, if you are found to be in violation of this alleged charge, Dismissal may result.” After a postponement at the Organization’s request, the hearing was held on April 6, 2023.

On March 15, 2023, the Claimant was employed as a Welder under the Charging Officer whose position was that of Manager of Track Maintenance. His shift hours were 7:00 a.m. to 3:30 p.m. His assignment that day was to weld joints to eliminate defects in Laredo, Texas, between mileposts 400 and 404. At 3:29 p.m. the Conducting Officer texted the Claimant for a welding report. The Claimant texted him back, “Two frogs ground it was raining in Laredo stayed until 11 didn’t look like it was going to clear up soon so decided to grind frogs did j324 and j326.” The Conducting Officer had been nine miles north of Laredo that morning and did not experience any rain. This made him suspicious. He was driving north at the time, and at 3:37 p.m. he stopped to inspect the switches at Leona. He started with the north switch.

The Conducting Officer introduced into evidence a copy of a weather report for Laredo, Texas, for March 15, 2023. It showed no rain in Laredo between 6:00 a.m. and 12:00 p.m. that day. He inspected and took photos of the frogs at the north and south Leona switches, and it was “very obvious nothing had been done, no grinding work at all.” The Conducting Officer also entered into the record a copy of the daily production report submitted by the Claimant for March 15, 2023. It states that he worked eight hours that day, and that he was on track three hours grinding frogs. He next entered into the record exhibit 19, which, according to the Conducting Officer, “It’s our reps score card. Reps show the amount of points that you’re given for each task that you complete during the day, as compared to the number of hours worked on the gang.” The Conducting Officer identified the daily production report submitted for the Claimant’s gang for March 15, 2023, and it credited them with a total of 24 points.

The Conducting Officer introduced into evidence a railroad timetable that showed that, between the time that the Claimant reported that he had ground frogs on the Leona switches and the Conducting Officer’s inspection of the switches, only one train had traversed the track on which the Claimant represented that he had ground frogs. The Conducting Officer also checked the records to find out if the Claimant had requested track protection or had done fire risk assessment for the track area in

question for the relevant time period on March 15, 2023. He found no documentation that the Claimant had either requested track protection or done a fire risk assessment, both of which were required for the grinding work the Claimant reported that he did on the frogs.

In response to questions by the Organization representatives, the Charging Officer testified as follows. The photos he took of the frogs in question show that no grinding was done on them. He did not inspect anything else on the frogs other than grinding because of the report he received. He did not look at the cotter keys, the tight bolts, or the wedges. If it were raining, you probably would not grind on a frog with an electric grinder, but you do have a hydraulic grinder on the truck also. In his photo of the first location he does see a cotter key that looks brand new. There appeared to be some cotter pins. In inspecting a switch, there are a lot of components that one has to look at such as gauge and line. The Claimant was required to call or text his Manager (the Charging Officer) every afternoon after he was off, if the Manager was not at the depot, to report his production. The figure of 24 total points shown on the gang's production report for the day refers to points under the rep system. Each task that you complete and that is reported into the system, you get a certain number of points for. The number of Reps judges a gang's production for the day.

Following the testimony of the Charging Officer in answer to questions of the Union representatives, the assistant hearing officer put questions to him about hearing Exhibit 18. Exhibit 18 is headed Detailed Gang Production Report. It states that in the Laredo subdivision in the South Texas Service Unit gang No. 1128 consisting of 3 men under the supervision of the Claimant's Manager (the Conducting Officer) performed Work Code 13008 on 03/15/2023 for a total of 24 straight time hours, which included 3 permit hours under permit No.1 at mileposts 326.02 to 324.02 and that the gang's total production was 2.00. In reply to the assistant hearing officer's questions, the Charging Officer testified as follows. The permit relates to the gang's protection while they are on track. In the two exhibits that he presented, exhibits 23 and 24, neither the Claimant nor any employee on gang 1128 has foul time or track time at that location. Exhibit 18 reports that gang 1128 performed worked at both locations and that he used one permit for three hours. "Our job briefing was to shoot welds between 400 and 401 or repair defects." The Claimant was supposed to be at milepost 400 in Laredo. Later that day he spoke to Claimant and asked him if he got any welds shot. His answer was, no, we ground on the two frogs at Leona. The Charging Officer decided to check if what the Claimant said about grinding frogs in Leona was true since the Claimant's previous statement that it was raining in Laredo was not true. When he examined the switches at Leona, he did not see any indication that any grinding was performed. This caused the Charging Officer to believe that the Claimant had lied to him when he said he ground frogs at Leona. If you grind as opposed to only putting in cotter pins, you get additional points, which he believes is two more points.

In reply to questions from an Organization representative the Charging Officer testified that you can grind on a frog under a lookout and that a lookout would be a permit.

In response to questions from the hearing officer, the Claimant testified as follows. On March 15, 2023, he started work in Pearsall, Texas, and drove to Laredo that morning. During the day he

worked CPJ 324 and CPJ 326. He went to Laredo in the morning to shoot some welds. It was really foggy. There was a mist if you stand outside, and it was hitting your hair and your face. And by company rules they cannot weld if there is any type of moisture in the air. He waited until about 11:00 o'clock, and he made the decision that instead of just a lost day, maybe they could grind some frogs. He stopped at 3:30 and called his Manager (the Charging Officer) and told him "that this frog probably needs to be worked on by tomorrow or Friday, because it looked like it was fixing to go." This was on a Wednesday. He went to Leona, to the south end switch first. He backed in, filled out a lookout book, and went out there. He looked at the frog. It wasn't bad enough for him to grind. "So we had a TMP [Track Maintenance Planner] there to tighten bolts, cotter keys, knocking on anchors. So, that's what we did." Somebody had already tightened bolts, but they found some that were lose. All of the cotter keys were in there, but they were put in and not flared out. One of the other Welders on the gang noticed that, and he sat there and bent every one out. When they got to the north switch, it was the same thing. It wasn't bad enough for him to grind yet. In his experience if you grind when the switches are in the condition they were on March 15, "it might start popping out faster." You do not want to put heat on the frog because the more heat you put on the frog, the more damaged it becomes.

The Claimant acknowledged that he "did probably say rain" and testified that he "should have just put 'moisture in the air.'" He reiterated that it "it was a heavy fog. It was like a mist." He stated that he is familiar with the rule about dishonest conduct, the MAPS Policy, and the Statement of Policy on Ethics and Business Conduct. The references j324 and j326 in his text message to his Manager were to the north and the south ends of Leona. His intentions, he testified, were to grind when he got to Leona, but, when he got there, he repeated, they didn't need to be ground. His text indicated that he ground the frog. He left Laredo at 11 o'clock. When he left it was still misty. While driving to Leona it was real foggy, and he had to use windshield wipers until he got there.

He worked under lookout protection. Another member of the gang filled out the form for lookout protection. You have to have so many feet of distance to see on both sides to get in the clear. There are three people in gang 1128. All three of them were at both locations. One of their three was the lookout. A form is filled out for the permit. The book of forms is in their truck. He never called his Manager back to tell him that they did not end up doing grinding after all. He reported the work he did as grinding a frog, "but I don't know where to go into to report it the right way." He has never been trained in the points. The Welders have been told that if they don't maintain so many points, they'll get rid of the Welders in Pearsall.

The production report prepared by the Claimant for March 15, 2023, was introduced into evidence. It consists of five pages, each of which was given a separate exhibit number, exhibits 15 through 19. The top of exhibit 15 shows that it pertains to gang 1128 for 03/15/2023. The first section of the exhibit is headed Track Authority (Track that is being worked on). It includes a list of different types of track protection available, including Track & Time, Foul Time, Track Warrant, and Lookout, among others. There is a box to be checked to indicate the kind of Track Authority used. Neither Lookout nor any other kind of track protection is checked. The next section is headed Gang Production Delays. The entries in that section show that there were three men in the gang, that each person worked

8 hours, that one permit was obtained, and that there were 3 on-track hours. The report lists 3 hours, 30 minutes delay for travel and 1 hour, 30 minutes train delay. Exhibit 17 shows that gang 1128 consisting of 3 men worked a total of 24 straight time hours on 03/15/2023 “grinding on frogs.”

Referring to the fact that “Lookout” was not checked on exhibit 15, the Claimant stated that the exhibit “is confusing me, because I always put a mark right here for lookout.” His testimony continued: “I know . . . I clicked on lookout.” The reason he did not get foul time that day is because he was having trouble with his laptop. He could not hook up to VPN which permits him to talk to the dispatcher. After that day he got on line, and they sent him a replacement. For a lookout you do not need to communicate with the dispatcher to get a permit. They were on track three hours that day, an hour and a half at each location. He made the entry that the rail temperature was 87 degrees. He submitted that the gang delay time was three hours and 30 minutes. He made the entry of an hour and a half train delay. That was for the time they were in Laredo waiting on the weather. He guesses that he should have just put weather. He submitted his production report at the end of the day before he went home.

After the foregoing testimony in response to questions from the hearing officer, the Claimant gave the following testimony in response to questioning by the assistant hearing officer. With regard to exhibit 16, where it says that he performed miscellaneous grinding at milepost 324, he did not actually perform grinding. As he said, it was not bad enough. But he does not know how to turn in time for work such as inspecting frogs. He had worked on the frog at milepost 326 earlier, “like in February,” so he knows that it is going to have a lot of overflow until it gets hardened. Gang 1128 does not have a foreman. He is the senior welder. But it is “not like one man in charge.” He might say something like, “hey, how about let’s go do this?” They all “kind of take care of each other.” They all report to the Manager (the Charging Officer). The Manager will either communicate with him or one of the other two welders. The Manager knows that he (the Claimant) drives the truck.

In response to questions by the assistant hearing officer regarding the pages of the production report, the Claimant testified as follows. On exhibit 15, in the section for comments, he typed in “grinding on frogs.” He did not write in “inspected frog” or “maintenance of frog” or “checked frog” because he was using a 13008 code. He does not know what other code he could have used for the tasks he performed. He cannot put maintenance of frog and then show the code for grinding on frog. He has been told in the past to show some kind of production report with not having even looked at the frog. You can put anything you want in the comment section. Regarding exhibit 19, there is an entry showing replacement of nine anchors. Their gang put anchors back on. They were knocked off. This was at both locations. They put in four anchors at one location, and five, at the other. The exhibit also shows installation of 11 keys. You have to enter each key individually because if you enter 11, you get only one point. They have been told that they must maintain 15 points a day and that if they did not maintain 15 points, the Welders’ jobs would be cut off at Pearsall. The drive from Laredo to Pearsall is a drive of about two and a half hours.

In answer to questions from an Organization representative the Claimant testified that he has never received training in a classroom setting or any other setting that is not a large town hall on how to enter production in the new production system. They are told all the time, he stated, that "if we don't maintain so many points, that they would do away with the Welders in Pearsall." His Manager has told him to input production grinding and maintenance welding that he didn't do to keep his points up.

In response to additional questions by the hearing officer, the Claimant testified that when he is submitting the production reports his two coworkers on the gang are locking up the truck or getting it ready for the next assignment. The other Welder has access to the reports. The third employee is a Welder Helper. He does not know if the Welder Helper has access for reporting. He does CBT online on his computer. He has passed all the training that was provided to him. He does not know if the training included how to report production.

The assistant hearing officer asked the Claimant if being told that you are going to be cut off if you don't get a certain amount of points means that you're supposed to lie about those points that you get. He stated, "Well, I mean, everybody wants work, don't we?" The assistant hearing officer persisted, "Well, is that a good reason to lie." The Claimant answered, "I was told to do it before. So, I mean, . . . what does it matter for one time again." The Claimant testified that he was not told to lie on the 15th. The Claimant was then asked by an Organization representative, "Have you ever been told to put something in production regardless if you done it or not?" He answered, "Yes, I have."

The Charging Officer was recalled to testify and in response to questions by the assistant hearing officer and then the hearing officer stated as follows. On March 15 he did not ever ask the Claimant to report that he ground frogs to get points to keep from getting cut off. He has said, "We need to get points" in an effort to get work done. That is the point of the point system. "What I say is claim everything that you do." He has never asked his employees to lie about their production reporting. In his opinion there was grinding that needed to be done on the frogs at mileposts j324 and j326. The frogs have visible defects that were not worked on. He would say that welding may not be done in mist. He has supervised the Claimant for less than a year. There has always been production reporting, but the style has changed. The Claimant is not the only one capable of submitting production reports on the gang. On occasion the Claimant approached him and said that he did not know how to enter a production report. On such occasion he would refer him to another person familiar with the reporting system. He does not know if there is CBT online training on production reports.

The Charging Officer's testimony continued in response to Union representative questions as follows. A point system is used to measure the productivity of a gang. Certain things are weighted with a higher point value. The monthly goal is .7 of a point per man hour. He asks his gangs to report everything they do. A lot of gangs don't report it all. They close a task without getting the points. You can grind a frog without pre-heating it. You can go directly and grind out what you need and then weld or gouge it. You just have to keep it cool. You don't overheat your frog.

It is the position of the Carrier that the Claimant submitted a production report claiming that he completed work on frogs that he did not perform. In addition, the Carrier asserts, in a text message to his Manager, after being asked if any welds were completed, he replied, “Two frogs ground it was raining in Laredo stayed until 11 didn’t look like it was going to clear up soon so decided to grind frogs did j324 and j326.” The Carrier points out that in his testimony at the investigative hearing, the Claimant testified that he did not do the work he entered on his production report and stated he had completed in his text message to his Manager. The Carrier maintains that the hearing was conducted in accordance with the requirements of Rule 22 of the collective bargaining agreement. It contends that the record establishes by more than substantial evidence that Claimant violated Rule 1.6 Conduct: - Dishonest and that he was properly dismissed from service in accordance with the Carrier’s MAPS Policy. This is evident, the Carrier argues, from the documentary evidence in the record showing that the Claimant falsified his production report and the Claimant’s admission that he did not do the work that his production report stated he performed.

The Carrier contends that honesty, integrity, and ethical behavior are tenets of any employer-employee relationship; that Claimant’s dishonest conduct breached this standard and permanently damaged that relationship. Claimant’s conduct in violation of Rule 1.6, the Carrier asserts, was an extreme breach of trust, and the MAPS discipline and subsequent dismissal were warranted. It cites PLB No. 7633. Award 16, upholding the dismissal of an employee for failure to be honest in payroll reporting, in which the Board stated, “No employer should be required to live with a dishonest employee.” It also cites PLB No. 7633 Awards 9 and 38 upholding dismissals for dishonesty based on false pay claims.

It is the position of the Organization that the Claimant was not intentionally dishonest. It contends that he was not dishonest in completing his production reports and that he completed his work on the date in question “and there was simply no evidence of any attempt to conceal information.” The Carrier, the Organization maintains, failed to meet its burden of proof, and the discipline imposed was arbitrary, disparate, excessive, and must be overturned.

The Organization first addresses what it contends are procedural violations. It argues that Rule 22(c)(1) provides that an employee charged with an offense shall be advised in writing of the precise charge against him and that this was not done in the present case in that “the Carrier introduced a plethora of additional rules at the Claimant’s investigation which it argued was the basis for the Claimant’s discipline.” The Claimant was charged and found guilty of violation of a single rule, namely, Rule 1.6: Conduct – Dishonest. No other rule or policy served as a basis for the Claimant’s discipline.

A second procedural violation of Rule 22, the Organization argues, is that Transcript Exhibit 1 was admitted into evidence over the objection of the Organization although it was never served on the Claimant or the Organization, was incomplete, missing critical language contained in the revised notice that stated the consequence that would follow if the charges were sustained.

The Claimant was denied a fair hearing, the Organization contends, because the Carrier failed to call the other two members of the Claimant's gang as witnesses. The Board agrees that it would have been desirable to have them testify. However, there is an indication in the record that they were also charged with a violation in connection with the same incident. (Tr. 160, lines 3-19). If so, it would have been unfair to them to require that they appear as witnesses in the present hearing. In addition, the other members of the Claimant's gang were equally available to be called as witnesses by the Claimant and the Organization. The fact that they neither called the remaining gang members as witnesses or requested the Carrier to do so puts them in a poor position to complain that the Carrier did not call them as its own witnesses. This is especially true where, as here, the two individuals in question are members of the same gang as the Claimant and would ordinarily be expected to favor him. Under these circumstances and in the absence of a request by the Organization or the Claimant that one or both of the other gang members be called as a witness and the Carrier's refusal to do so, this Board will not not find a procedural violation based on the Carrier's failure to call one or both of the other gang members to testify in this proceeding. *Cf.* Third Division Award (Parker) 37322.

The Organization argues that the Claimant was denied a fair hearing in that the Carrier assigned two hearing officers to preside over the hearing instead of the standard one, thereby creating an unfair and prejudicial environment. In addition, the Organization contends, instead of serving as neutral fact finders, both officers actively led questioning in a manner that advanced the Carrier's case and supported the Charging Manager's narrative. On the issue of two hearing officers, designated respectively Conducting Manager and Assistant Conducting Manager in the transcript, there is nothing in the collective bargaining agreement that prohibits the Carrier from designating a second company official to assist the principal hearing officer in conducting the hearing. In addition, the Claimant was represented at the hearing by three Organization representatives. In light of the foregoing, this Board finds no basis for ruling that the hearing was not fair based on the number of hearing officers designated by the Carrier to conduct the investigative hearing. With respect to the Organization's objection that both hearing officers led questioning in a manner that favored the Carrier's case instead of in a neutral and unbiased manner, the Board has carefully reviewed the record and is of the opinion that the hearing officer conducted a fair hearing. The same may not be said of the questioning conducted by the assistant hearing officer. This will be addressed below.

On the merits the Organization contends that the Carrier failed to meet its burden of proof. First and foremost, the Organization argues, no witnesses with direct knowledge of the events that occurred during the Claimant's shift testified although there were at least two other employees on the gang with the Claimant that day. The allegedly falsified reports, the Organization asserts, do not contain the Claimant's name, and there is no evidence establishing who completed them. "Ultimately," the Organization asserts, "there is no question whatsoever that the Carrier did NOT meet its burden of proof to demonstrate that the Claimant was intentionally dishonest."

The Organization argues that because of the stigma attached to having been found to have acted dishonestly, and the harsh economic and social consequences for the accused, arbitration boards have consistently held that a high standard of proof is required to sustain such a charge. In addition, the

Organization asserts, a finding of dishonesty requires proof of an intent to defraud or game the system. In this case, the Organization contends, the Carrier has presented no evidence to indicate there was an intent by the Claimant to be dishonest or deceive the Carrier. Claimant, the Organization maintains, fully intended to complete the work as documented, and filled out the paperwork accordingly. However, the Organization asserts, it became clear that the work did not need to be completed. Consistent with the existing practice and management's instruction to maintain production numbers, the Claimant did not revise his paperwork, the Organization argues. Rather than an attempt to deceive, the Organization asserts, this was "a continuation of accepted reporting practices, understood to be permissible and even encouraged by supervisors."

Finally the Organization argues that the discipline was arbitrary and unwarranted. The Organization cites decisions of this Board which it states affirm the Board's ability "to review, reduce and overturn discipline imposed by a Carrier." It notes that the Claimant is a 27-year employee of the Carrier and directs the Board's attention to railroad awards which it asserts have held "that although an employee may have made a false report, such a mistake in light of an otherwise good disciplinary record may be offset to a long-term suspension." The Organization concludes that the discipline must be overturned and the remedy requested in its appeal of Claimant's dismissal be afforded.

The Board is satisfied that the record contains substantial evidence sufficient to prove that the Claimant intentionally falsified his production on March 15, 2023, in violation of Rule 1.6: Conduct – Dishonest. Transcript Exhibit 17, which is headed Production Reporting Summary, states that it is for Gang 1128, Date 3/15/2023, and, in the space for the name of the employee making the report, contains the name of the Claimant, has a section for "Comments." In that space the Claimant wrote, "grinding on frogs." Transcript Exhibit 15, which the Claimant also admitted completing, is headed Production Reporting, dated 03/15/2023 for Gang 1128, and, in the space for comments, contains the entry "grinding on frogs." It also states that the gang's three men each worked 8 hours, which included 3 on-track hours.

The Organization contends that Claimant intended to complete the work as documented and filled out the paperwork accordingly, but later it turned out that the frogs did not have to be ground, and the Claimant simply did not revise the paper work. That contention is belied by the Claimant's testimony that he submitted the report at the end of the day before he went home. He did not testify that he submitted the report before going home or that he completed it before arriving at Leona and discovering that, allegedly, the frogs did not have to be ground. Further, the Charging Officer's time line for March 15, 2023, shows that he received the Claimant's text message report that he ground the frogs at milepost j324 and j326 at 15:29 hours, which would have been after the Claimant had finished any work that he performed that day. The evidence is clear that the Claimant intentionally falsified the information he provided to the Carrier regarding the work he performed on March 15, 2023, both in his production reports and in the said text message he sent his Manager (the Charging Officer) concerning the work he performed that day. He thereby violated Rule 1.6: Conduct – Dishonest as charged.

The Carrier argues that Claimant's conduct was an extreme breach of trust and justified the dismissal penalty assessed for his violation. The Organization contends that the Claimant's 27 years of service is a mitigating factor and cites cases where long-service employees have had their dismissals overturned based on their long service with spotless records or, in other cases, with relatively good disciplinary records although not unblemished. See, for example, PLB No. 6302, Award No. 45 (Referee Martin H. Malin) (found guilty of dishonesty; dismissal reduced to reinstatement without compensation based largely on 22 years of service and no record of prior discipline); PLB No. 7633, Award No. 25 (Referee I. B. Helburn; dismissal for dishonesty reduced to reinstatement without compensation based largely on 9-1/2 years of service with a clean record); PLB No. 7633, Award No. 176 (Referee Robert Grey; discharge for dishonesty reduced to reinstatement without compensation based largely on 24 years of unblemished service.) There are also cases submitted where the claimant did not have a perfectly clear record but where the applicable Board deemed it good enough to warrant mitigation of the dismissal penalty. PLB No. 7633, Award No. 14 (dismissal for safety violation reduced to reinstatement without compensation based on claimant's 33 years of service and no more than four prior disciplinary cases during his tenure).

It must be emphasized that long years of service are not a guarantee against dismissal for a rules violation. The nature and circumstances of an offense may be so serious as to require dismissal of a claimant regardless of their prior years of service or disciplinary record with the Carrier. In the present case the Claimant had 27 years of service with the Carrier prior to his dismissal and only one prior disciplinary incident, a matter which did not involve an allegation of dishonesty. In addition, the assistant hearing officer engaged in some serious departures from the standards of a fair and impartial hearing that are required to be provided to a charged employee as set forth in Rule 22(a) of the parties' collective bargaining agreement. At page 111 of the transcript the assistant hearing officer asked the Charging Officer the following question:

Q. . . . I'm just trying to make sure that Mr. Zamora's clear, because he's going to be questioned here in a minute. So you found out that he lied to you about the rain. You found out that he lied to you about grinding. And-

At this point he was interrupted by objections from all three of the Organization representatives. He replied to their objections: "I-I'm asking the question." An Organization representative answered him, "No, you're stating fact." He replied, "Okay." A second Organization representative chimed in, "You're stating a fact." A third representative added, "You're stating your-your opinion. You're looking for an answer—" The second Organization representative continued, "You're saying he's lying, Mr. (assistant hearing officer.)" The assistant hearing officer responded, "I-I'm just trying to make sure it's very clear that Mr. Zamora (the Claimant) understands why we're here." The assistant hearing officer then immediately proceeded to ask the following question of the Charging Officer:

Q. So, allegedly – you thought that allegedly he had lied, but then after you inspected it, in your opinion, you knew without a doubt he did not allegedly lie, he lied to you?

The Charging Officer answered “Correct.”

A hearing officer must conduct the duties of his office impartially, without bias or the appearance of bias. The assistant hearing officer’s form of questioning took the form, not of attempting to elicit information pertinent to the charge in the case, but, because of the extremely leading nature of his questions, of, in effect, giving testimony on his own – in this instance, detrimental to the Claimant’s case. In substance what the assistant hearing officer did was to ask the Charging Officer to affirm as true that he (the Charging Officer) originally thought that perhaps the Claimant had lied about what work he had done, but after inspecting the work site he knew without a doubt that the Claimant had lied. The Charging Officer obliged by answering “correct”. This was a clear breach of the standard of impartiality required in the conduct of an investigatory hearing under Rule 22 (a) of the parties’ collective bargaining agreement.

Later in the record the assistant hearing officer, in clear violation of the Rule 22 requirement that the hearing be fair and impartial, went beyond breaching the evidentiary requirement of avoiding leading questions and actually entered facts into the record on an important factual issue. As noted above, in his defense the Claimant insisted that the only reason he did not grind frogs on March 15, 2023, as stated in his text message to his supervisor and his production reports, was that the frogs did not need to be ground and could be harmed by the heat generated in grinding. While the Claimant’s assertion, if true, would not excuse his false text message to his manager and his false production reports, it would be an important element of mitigation in that, in truth, the Carrier would not want grinding work done on the frogs that was not only unneeded but could be harmful.

At page 157 in the transcript, in the course of examining the Claimant, the assistant hearing officer announced the following on the record: “I’ve got 32 years here, and I see places that that frog needs to be ground.” This, of course, was a serious infringement of the assistant hearing officer’s duty of impartiality and could have influenced the Carrier’s decision-maker in the case on whether or not to believe the Claimant’s testimony on the factual issue.

After the Claimant finished his testimony the assistant hearing officer properly recalled the Charging Officer to testify on the disputed factual issue of whether any grinding work needed to be done on the frogs as of March 15, 2023. However, instead of asking the question of the Charging Officer in an impartial way, he showed him the photos of the two frogs and put the question to him as follows:

Q. . . . Mr. Zamora [the Claimant] said in his opinion neither one of those needed any grinding, because he thought it just might cause more damage to them. And I – in my experience, it looks like it should be ground. Is there any grinding that should have been done on these frogs, in your opinion?

It cannot be known whether the Charging Officer’s affirmative answer was influenced by the assistant hearing officer’s statement to him that it looks like the frogs should be ground. In the Board’s opinion

the assistant hearing officer's conduct compromised the integrity of the hearing so far as being able to make a fair and impartial determination of whether or not the frogs at the north and south switches at Leona needed grinding on March 15, 2003.

Although the Board has found two instances in which the Claimant's investigative hearing pertaining to his conduct on March 15, 2023, departed from the required standard of fairness and impartiality, the evidence establishing his violation of Rule 1.6: Conduct – Dishonest was clear and convincing as discussed above. The Claimant intentionally submitted false production reports that not only misstated what work was done but also credited him and the other members of their gang with production points that were not earned. There is, therefore, no fair basis for sustaining his claim. See, for example, PLB No. 7633, Award No. 48 where a dismissal was reduced to reinstatement with full seniority but without back pay and with placement in MAPS Training 1 status and a 12-month retention period based on elements of mitigation in the form of two separate violations of Rule 22 by the Carrier that infringed the standards of a fair hearing.

The Board has determined that dismissal was an excessive penalty on the facts of this case and that, as a remedy, the Claimant shall be offered reinstatement to his former position without loss of seniority for his time off work but no back pay. The Claimant shall have his health benefits and other benefits restored retroactively and shall, upon reinstatement, be placed in MAPS Training 2 status with a retention period of 12 months.

A W A R D

Claim sustained in part. 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.

/s/ Sinclair Kossoff 12/19/2025
Sinclair Kossoff, Neutral Member Date

Chris Bogenreif 1/5/2026
Chris Bogenreif, Carrier Member Date

J.S. 1/5/2026
John Schlismann, Organization Member Date