PUBLIC LAW BOARD NO. 7633

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
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. C. Dinkins, by letter dated January 3, 2023, for an alleged violation of Rule 136.4.2: Inaccessible Track was exceedingly harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP901JC23/ 1783944 MPR).

2. As a consequence of the violation referred to in Part 1 above, Claimant C. Dinkins shall now be returned to work '… with all vacation and seniority rights unimpaired, that the charge and discipline, issued per letter of January 03, 2023 from AVP Engineering, Jason Rea, resultant investigation held December 16, 2022, 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 December 16, 2022 hearing, incurred that would have normally been covered by Carrier benefits, account the Carrier violated Rule 22, of our Agreement.' (Employes' 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.

Clayton S. Dinkins, a 20-year employee, at the time of his dismissal by the Carrier held the job of Track System Foreman . By letter dated December 12, 2022, he was requested to report for a hearing on December 16, 2022, to develop the facts and determine his responsibility, if any, in connection with the following charge:

> On 12/04/2022, at the location of Houston, TX, near Milepost 337.0, Houston Subdivision, at approximately 18:00 hours, while employed as a Trk Sys Frmn (R), you allegedly failed to properly lock, tag and spike switch in track #110-Settlegast Yard. You also allegedly failed to properly place derail (derail was on backwards) and place light on derail in accordance with UPRR Guidelines. This is a possible violation of the following rule(s) and/or policy:
>
> 136.4.2: Inaccessible Track.

The December 16 letter added, "Under the MAPS Policy, this violation is a Critical event. Based upon your current status, if you are found to be in violation of this alleged charge, Dismissal may result." It also stated, "Knowledge of this incident was learned on 12/08/2022"

Rule 136.4.2 states as follows:

136.4.2 – Inaccessible Track

Inaccessible track is a method of establishing working limits on non-controlled tracks by making the track physically inaccessible to trains, engines, railroad cars and on-track equipment. Non-controlled track consists of :

- Yard tracks.
- Industrial leads.
- Non-controlled sidings.

* * *

The EIC or lone worker establishes working limits using inaccessible track by one or more of the following methods:

- Line a switch or derail to prevent access to the working limits.
  - Apply a tag to the switch or derail in use.
  - Effectively secure the switch or derail by one or more of the following methods:
    - Place a M/W or personal lock on the switch or derail to prevent train service employees from unlocking and lining the switch/derail.
    - Properly secure a switch point clamp.
    - Use a spike driven into the switch tie against the switch point firmly enough that it cannot be removed without proper tools.

* * *

· Place portable derail(s) with red flag(s).
  ° As first means of making a track inaccessible, EICs must tag and either lock out, spike, or clamp a switch to reduce the number of derails placed.
° When track is not tagged and either locked out, spiked, or clamped:
  ▪ Derail(s) and red flag(s) must be placed 150 feet in advance, if possible, from the working limits to prevent movement into the limits.
  ▪ Place additional red flag(s) 150 feet, if possible, from all derail(s) and red flag(s) to provide advance warning to movement into working limits.
° At night, if an entire track is not completely locked out and inaccessible to equipment movement, (i.e. all switches into track are not tagged and either locked out, spiked, or clamped), a red light will be displayed in between the gauge of the track at the derail location.
° Lock, or otherwise effectively secure the derail so that it cannot be removed.
° Attach a tag to the derail.

The Charging Officer, whose position is that of Manager of Track Programs, testified as follows in response to questions by the hearing officer. He supervises or works with the Claimant. On December 4, 2022, while tying equipment up in Track 110 in the Settlegast yard, Foreman Dinkins failed to follow Inaccessible Track Rule 136.4.2 in that he left North Switch Track 110 unlocked and neither clamped or spiked. He also had the portable derail on backwards so that it was set to prevent the equipment from rolling out instead of protecting the equipment so that nothing rolled into it. He did not have a light on the derail, but there were red flags. If the derail is going to be left on overnight, "it has to have a red lamp and or . . . the switch has to be lined and locked or spiked or clamped." The photo also showed that the derail was set incorrectly so that it would derail any Maintenance of Way equipment coming out instead of protecting the men working on the track. His investigation determined that the Claimant installed the derail.

Maintenance of Way Rule 41.1 states:

41.1 – Foremen

Foremen must:

- Supervise and engage in all work performed by their gang.
- Make reasonable efforts to perform work that does not:
  – Result in an unstable or unsafe track condition.
  – Create an unreasonable hazard to employees working on or near the track.
  – Result in a negative environmental impact, including damage from fires.
- Make required reports.
- Call on other foremen for assistance, if necessary.

Note: The foreman in whose territory the work is being performed is in charge.

Foremen must not exceed their allowance of men or overtime unless authorized, or there is an emergency.

The Claimant, the Charging Officer testified, at the time the present incident occurred was in Training 2 status under the Carrier's MAPS Policy. Rule 136.4.2, which is an On-Track Safety Rule, is a critical rule, he explained, which escalated the Claimant from Training 2 status to dismissal status. The Charging Officer introduced a photo of the switch in question, which showed that it was unlocked and without a clamp or spike. The photo also showed that the derail was incorrectly installed to protect the equipment on track 110.

In response to questions from the Organization representative, the Charging Officer testified as follows. The Claimant was removed from service at the end of the shift on December 4, 2022. There was not a tie gang working in the Settlegast yard at the same time as the unloading gang was working there on December 4th. There was a switch gang that had been there that was also working a 7:00 to 7:00 schedule, but to his knowledge they were tied up and gone. Asked whether they were tied up on the 4th or the 5th, the Charging Officer stated, "I believe they tied up on the 5th and left." Directing the Charging Officer's attention to the photo of track 110 with no lock on the switch, the Organization representative asked him, "Do we know if anybody at any point in time tried to get into that track?" He answered, "No. I do not." He further stated that he did not know what was in the rail car that was being unloaded. Nor, he stated, did he know who worked in the Settlegast yard.

The hearing officer then resumed questioning of the Charging Officer and asked him, "When did you actually find out that these derails were placed wrong?" He stated December 8th. Asked what date they were placed wrong according to his investigation, the Charging Officer testified that he was notified that on December 4th they were placed that way. During the investigation, he stated, he was informed that the Claimant placed the derails that way. The hearing officer directed the Charging Officer's attention to one of the photos that had some track equipment on a track next to track 110. The Charging Officer responded, "I believe there is a switch gang working in that vicinity, but no tie gang." The hearing officer then stated, "There's also a picture of a . . . portable derail with a derail sign and a light protecting that equipment. Is that derail placed correctly?" The Charging Officer testified that it was placed correctly and that to his understanding that it was done by the EIC of the switch gang.

The Claimant was asked by the hearing officer if he had any questions for the Charging Officer. Rather than ask questions, he stated that that the unloading gang and the switch gang all worked together and that the EIC of the switch gang "provided all the on-track safety and stuff for us and them as well." The derail placed by the switch gang, the Claimant asserted, was put there so that they could get material out of the cars behind the derail. He explained that the derail protected the switch gang members from having Brandt truck cars coming onto their material cars while they were loading and unloading. When he put the derail on track 110, he stated, there was a plow on the north end on which a mechanic was working. According to the Claimant he placed the derail on track 110 to protect the mechanic working on the plow from the cars on track 110 rolling into his area. The Claimant stated

that he did not know what was done by the EIC of the switch gang with the switch on the north end but that he (the Claimant) only handled the south end of the switch.

The hearing officer asked the Claimant if he had a question for the Charging Officer. The Claimant responded that his question was why, when the EIC of the switch gang "took his plow out, why this was not corrected at that time?" The Charging Officer replied that he had no knowledge of the EIC "taking a plow out of that track at all. But it is a Foreman's responsibility before he leaves that equipment unattended, to make sure that that track is inaccessible and nobody can get in there, and that was failed to be done when you tied up the night of the 4th." The Claimant responded, "The night of the 4th the north switch was locked." The Charging Officer replied, "No, sir." The Claimant, in answer, insisted that the north switch had a 3212 lock on it, the EIC's lock.

The Carrier's next witness, a Manager of Track Programs, who stated that he supervised or worked with the Claimant, testified as follows. "[I]t was found that a derail was put on . . . behind a cut of cars that we were working with. It was put on backwards and there was no derail light on that end. And the other end there was a switch that was . . . not spiked or clamped out." The hearing officer asked the Manager of Track if that was first noticed on or about December 8. He answered, "Yes, sir." The hearing officer then asked, "But those derails, . . . were they placed on December 4th?" He answered, "Yes, They was to protect the equipment ties up for the day on December 4th."

In response to questions from the Organization representative the Manager of Track Programs gave testimony as follows. The Claimant was removed from service on December 4th. He knows for a fact that between December 4th and whenever the Carrier proceeded with its investigations there were no Maintenance of Way employees working in that area. He moved a gang there himself on December 5th to take pictures of a tracker machine involved in another investigation. He told the Foreman of that gang that the equipment on track 110 was out of service. The switch gang did not use any of the equipment shown in the photos. That equipment was not moved because it was out of service. He had the Foreman of the gang he moved there climb up on a car and take pictures of the equipment.

In response to additional questions from the hearing officer, the Manager of Track Programs testified that the derails and the switch as shown in the photos are exactly as the Claimant left them on December 4th. He interviewed all of the employees that were around there on the Brandt gang and the switch gang, and nobody moved anything.

The Claimant testified in response to questions from the hearing officer as follows. He has been employed by Union Pacific for 20 years and two months. His assignment on December 4th was that of Restricted Brandt Foreman. He started his day at Settlegast yard on December 4th at 0600 hours. He ended his day 9:00 o'clock the night of the 4th. Since he has been employed by the Carrier he has been required to take and pass examinations on the rules and regulations, the most recent time being less than a year ago. At the time of the alleged incident he had a copy of Union Pacific's General Code of Operating Rules. He takes exception to the testimony that the derails were on backward and that the switch was not lined and locked. He is familiar with Rule 136.4.2 Inaccessible Track. He locked and

tagged the switch on track 110 shown in the photo. With regard to the derail, he placed it so as to protect a plow sitting there to be worked on from his cars rolling into it. His placement of the derail did not prevent something from rolling into his equipment. The two pictures show the same derail, one facing south and the other facing north. His men and equipment were protected by lining and locking the switch, which is the way it was when he left the yard on December 4th. The hearing officer then asked the Claimant, "Okay, but . . . we've had the Charging Manager and a witness say that . . . this is how everyone on the gang told them that they found the switch . . . when they showed up on December 5th, that's how the switch looked to them?", referring to the picture of the switch on track 110 introduced into evidence at the hearing. The Claimant reiterated that when he left work on December 4th, "there was a plow sitting in there." He repeated that he installed the derail to prevent his cars from rolling into the plow while someone was working on it. The hearing officer asked the Claimant if his crew was working on equipment on the track shown in one of the pictures introduced into evidence, which was track 110, was it not true that the derail would not have protected his crew. He answered, "No. We was not working in 110, we was working in Track 107." Asked by the hearing officer if he had any equipment in track 110, he stated, "I just had cars setting in there. No equipment." He further testified that there were no people working on those cars or climbing up and down the cars, looking into them.

The Claimant was asked by the Organization representative in what area of the pictures introduced into evidence was the plow that he referred to located. He stated that it was between the green cars and the 110 north switch in picture 3 of exhibit 6. The Organization representative asked the Claimant, "When you left . . . on . . . December the 4th when you were pulled out of service, you stated that you put a lock there, is that correct?" He answered, "Not that day." He explained that "the lock was already there from the day before, from the 3rd." He added, "It has been locked since we've been there." He clarified, "Because Track 110 has been my tie up track the whole time we've been in that yard . . . and we've used the south end. We don't use the north end."

The Claimant was permitted to give a closing statement in which he stated as follows. He began by stating that he fully admits putting the derail on backwards in order to protect a mechanic that was working on a plow "that was in the same track that we were, and . . . the intent was to protect him from my cars rolling toward him." The derail did have a light on it, he stated, and he and the EIC talked about it, and the EIC said he needed to take the light to put on his derail. They both agreed, the Claimant continued, that it would be better for the EIC to use the light since he had equipment in his track whereas in the Claimant's track there were mainly cars. He had only one derail, the Claimant stated, that he had borrowed, and the EIC could not spare any more. Regarding the switches, the Claimant stated, "And as far as touching on the North Switch and the South Switch, to my knowledge, when I left, they was all lined and locked against us with personal locks."

It is the position of the Carrier that as a Restricted Track System Foreman, the Claimant had the responsibility to ensure that he followed the inaccessible track procedures to protect himself, his coworkers, and their machinery from the possibility of any unsecured equipment entering their work location. To accomplish this, the Carrier asserts, he was required to follow the inaccessible track

procedure that requires the lining, locking, or clamping switches against movement into the area as well as installing derails in a manner that would derail rail cars or equipment if they were inadvertently to line into the area to be protected. On December 4, 2022, the Carrier contends, Claimant left the north switch of track 110 lined for movement into the area he was supposed to render inaccessible. He failed, the Carrier argues, to properly line, lock, or spike or clamp the switch against movement into the area. In addition, the Carrier asserts, "the derail was set backwards and neither the switch nor the derail was tagged."

The Carrier notes that the Claimant insists that there was a plow on track 110. but asserts that "the charging manager and a witness said there was not a plow, and the switch was not locked." It also argues that the witness verifies there "was no other Maintenance of Way employees working in the area" and that "[i]t can only be concluded that there was no one else in the area based on the schedule in exhibit 7 and the testimonies provided by managers and the Claimant." It provided substantial evidence, the Carrier maintains. to prove the foregoing arguments and the Claimant's culpability. The Claimant, the Carrier asserts, was solely responsible for not lining the switch correctly and not locking or clamping it properly and not installing the derail properly to prevent movement into the area. No other Maintenance of Way employees, the Carrier maintains, were working in the area. The Claimant's admission that the derail was improperly installed to protect his own area and the testimony presented by the Conducting Officer and the witness, the Carrier contends, proved that the Claimant violated Rule 136.4.2 Inaccessible Track.

The assessed discipline, the Carrier argues, was reasonable and consistent with established policy and arbitral precedent. The Carrier notes that the Claimant was at Training 2 status under the MAPS disciplinary progression subject to dismissal should he commit an additional rules violation. The present violation, the Carrier contends, put him and his gang in danger and brought him to the dismissal step under the applicable rules . The Claimant, the Carrier asserts, is an experienced railroad employee who is required to know and apply the rules by which his employment is governed. His dismissal was not excessive, arbitrary, or unwarranted, the Carrier argues, and should not be overturned. Nor, the Carrier maintains, were there procedural errors that would require voiding the discipline.

The Organization asserts that on the night of December 4, 2022, the Claimant's gang parked material cars on the south end of track 110 and its unloading equipment (a Brandt truck and tracker) on track 107. The mechanic of the switch gang, it states, placed a Maintenance of Way plow between the north switch and a group of material cars on track 110. It is not disputed, the Organization notes, that the south end of the truck was properly locked out. The Organization informs us that the incident for which the Claimant was removed from service the night of December 4, 2022, was unrelated to the present matter. The Organization writes in its submission, "On December 5, 2022, the plow was moved from Track #110 in Settlegast yard. As the South end was blocked with material cars, the plow operator by necessity had to unlock and reverse the North #110 Switch for the plow to move off the track. Nonetheless, rather than the plow operator re-line and re-lock the North #110 Switch with the

3212 M/W lock, the operator presumably took the 3212 M/W lock leaving the North end of Track #110 unprotected."

The Organization argues that the Claimant's dismissal must be overturned on both procedural and substantive grounds. Procedure-wise, the Organization contends, in violation of Rule 22 of the collective bargaining agreement, the Carrier had already determined the Claimant's guilt when it sent him the December 12, 2022, Notice of Investigation. It also denied the Claimant a fair hearing, the Organization asserts, by assigning a hearing officer to the case who is the Charging Officer's direct superior who presumably acquiesced in the filing of the charges and had prior knowledge of the facts of the case so that the results of the hearing were a foregone conclusion. Further, the Organization asserts, removing an employee from service and withholding their compensation for a non-major rule violation is indicative of pre-judgment.

On the merits, the Organization asserts that the Carrier based its charge on the condition of track 110 on December 8, 2022, although Claimant performed no work after December 4, 2022, and both the Charging Officer and the Manager of Track Programs who testified as a witness confirmed that a switch gang was working in the vicinity of track 110 in Settlegast yard through December 5, 2022. The Organization maintains that the only logical explanation to reconcile the parties' conflicting explanations of the events is that laid out in a letter dated August 24, 2023, from the General Chairman to the Carrier. In that letter the General Chairman proposes that the Claimant did, in fact, as he testified, lock the north switch with a M/W 3212 lock that was in place when he left work on December 4, 2022.

Locking the switch, the General Chairman asserted in his letter, is the first of several means listed in Rule 136.4.2 for making track inaccessible. The derail was correctly placed, the General Chairman asserted, for its intended purpose at the time of protecting a mechanic and the plow on which he was working situated on track 110 and had nothing to do with protecting the rail cars on that track, which were inaccessible because of the locked north switch. The General Chairman states in his letter that the Manager of Track Programs who testified as a witness confirmed that a switch gang was in the area on December 5, 2022. The General Chairman surmises in his letter that sometime after the Claimant left work on December 4, 2022, the operator of the plow moved it off track 110 by opening and lining the north switch for the plow's movement. "However," the Chairman asserts, "rather than re-lining and re-locking the North switch once the plow left Track #110, the operator presumably re-lined the switch for normal movement and took the M/W lock with him/her, thereby leaving Track #110 accessible." The Organization argues that the operator could not have exited track 110 through the south switch because his way was blocked by the rail cars situated on the track between the plow and the south switch.

With the regard to the allegation that the Claimant failed to place a light on the derail, the Organization argues that a light is only required in the event that the entire track is not locked. Here, the Organization asserts, "the entire track was locked out and the derail was properly placed to protect the plow from rolling stock, the light was not required under the rule, which regardless, the Claimant

was never equipped with." The Organization emphasizes that "the Claimant . . . was the only employe at his investigation of December 16, 2022, with first hand knowledge of the events of December 4, 2022. . . ." (emphasis in original). The Organization further argues that the discipline was arbitrary, capricious, and overly harsh and should be overturned. It requests that the claim be allowed and its requested remedy be ordered.

Addressing first the Organization's procedural arguments, the evidence does not show that the Carrier predetermined the Claimant's guilt. Nor does the fact that the hearing officer was the Charging Officer's direct supervisor mean that the Claimant was denied a fair hearing. Neither the hearing officer or the Charging Officer was the deciding official for the Carrier in this case. Nor does the record show that the hearing officer exercised improper influence over the Charging Officer in the course of the hearing or caused him to give testimony not of his own free will. With regard to the Organization's final procedural argument, the Board does not agree with the Organization's characterization of the rule at issue in this case as a non-major rule if, by "non-major" the Organization means not important.

On the merits, the Organization's assertion that that the Claimant was the only employee at the investigatory hearing with firsthand knowledge of the events of December 4 is another way of stating that the Carrier's entire case against the Claimant consists of hearsay testimony. The Charging Officer testified about alleged events and provided descriptions of things based on what others had told him and not from what he had personally witnessed. The Manager of Track Programs, who was the Carrier's next witness, testified that the Carrier learned that the derail was put on backward and that the north switch was not locked, spiked, or clamped on December 8, 2022. He stated that "[i]t was found" that a derail was put on backwards and that there was a switch that was not spiked or clamped down. The person who actually found these alleged violations was not presented as a witness subject to cross-examination. Photos were entered into evidence of the derail and the switch without any testimony of who took the photos or when they were taken.

With regard to the claim that the derail was put on backwards, the Claimant is adamant that there was a plow on track 110 on December 4th before he left work that night and that he installed the derail to prevent the rail cars on that track from rolling into the mechanic and the plow on which he was working. The Carrier did not present any witness to deny that there was a plow on track 110 when the Claimant left work the night of December 4th. The only Carrier witness who testified about the plow was the Charging Officer. In reply to a question from the Claimant as to why when the EIC of the switch gang "took his plow out, why this was not corrected at that time?", the Charging Officer replied that he had no knowledge of the EIC "taking a plow out of that track at all. But it is a Foreman's responsibility before he leaves that equipment unattended, to make sure that that track is inaccessible and nobody can get in there, and that was failed to be done when you tied up the night of the 4th."

Plainly the Charging Officer did not deny that there was a plow on track 110 when the Claimant left work on December 4th. His response rather was that he had no knowledge that the EIC had taken a plow out of that track. Lack of knowledge of an event is not the same as a denial that the event

occurred. If, in fact, there had been no plow on track 110 at the end of the day on December 4th, it would have been very easy for the Carrier to prove that. It could have called the EIC of the switch gang as a witness and questioned him on that point. Not only did the Carrier not call the EIC as a witness, but, so far as the record shows, it did not even interview him on that point prior to the investigative hearing and address the factual issue at the hearing with hearsay evidence as it did with other factual issues in the case such as, for example, whether the north switch on track 110 was locked at the end of the workday on December 4th and whether what was depicted in the photos introduced into evidence was in the same condition on December 4, 2022, as shown in the photos that were taken at the earliest on December 8, 2022.

In this Board's opinion there is not substantial evidence in the record to disprove the Claimant's undenied testimony that there was a plow on track 110 when the Claimant finished work on December 4, 2022, and that he installed the derail as he did in order to protect the mechanic and the plow on which the mechanic was working from the rail cars on that track rolling into them. Nor did the Carrier present any testimony that if, in fact, there was a plow on the track that had to be worked on by a mechanic, it nevertheless would have been improper for the Claimant to install the derail in the way that he did. The Claimant maintains that the north switch on track 110 was locked out, and the Organization contends and that this was sufficient to render the track inaccessible without the necessity of a derail for that purpose. The Carrier presented no testimony or other evidence that a locked switch would not have been sufficient by itself to render track 110 inaccessible.

The Board is satisfied, however, that the Carrier has established by substantial evidence that the Claimant failed to lock the north switch at the end of his workday on December 4, 2022. Although the evidence presented on the issue by the Carrier was hearsay, arbitration tribunals are much more liberal than courts of law in admitting hearsay into evidence. In addition, the hearsay was not objected to at the hearing. The applicable rule of law states that "when hearsay evidence, which would have been excluded if objected to, is let in without objection, it may be taken into consideration if it appears to be reliable in the particular case, as sufficient to sustain a verdict or finding of the fact thus proved." *McCormick's Handbook of the Law of* Evidence (Edward W. Cleary, General Editor, Second Ed. 1972) 584. Manager of Track Programs, based on his interviews of the members of both the Claimant's and the switch gang, testified that the switch as shown in the photo, in an open position, was exactly as the Claimant left it on December 4th.

The Claimant's testimony regarding the switch was less than convincing. In response to a question from the hearing officer, "So you did not lock or tag out that switch, is that correct?," he stated, "No, I did do that." (Tr. 37). A short while later the Organization representative asked him, "When you left on . . . December the 4th when you were pulled out of service, you stated that you put a lock there, is that correct?" He answered, "Not that day." He added that "the lock was already there from the day before, from the 3rd." He then stated, "It . . . has been locked since we've been there." He further added, "Because Track 110 has been my tie up track the whole time we've been there in that yard – and . . . we've used the south end. We don't use the north end." (Tr. 41) Thereafter in his

closing statement, the Claimant said, "And the switches, like I said, as best of my knowledge they were lined and locked against us. And that's about all I got." (Tr. 44).

The preceding paragraph summarizes all of the Claimant's testimony regarding the north switch on track 110. Although, at first, in answer to the hearing officer's question, the Claimant indicated he personally put a lock and tag on the north switch, in response to further questioning by the Organization representative, he denied doing anything at all to the switch on December 4th and maintained, as the Board understands his testimony, that the north switch was continuously locked since at least December 3, 2022. If so, one must ask, how did the plow get onto track 110 on December 4, 2022? It could not have been through the south switch since, according to the Claimant's testimony, the plow was situated between the green rail cars and the north switch. The rail cars would have blocked the plow from entering the track through the south switch. The north switch must have been open for the plow to reach the position on the track attributed to it by the Claimant. Even if the switch was thereafter locked, this would be inconsistent with the Claimant's testimony that the north switch remained locked continuously at least from December 3 through December 4, 2022, and would indicate that the Claimant really didn't know what the condition of the switch was on December 4. Even in his closing statement he could not provide any more assurance about the condition of the switch at the end of his workday on December 4 than that to the best of his knowledge it was locked against entry onto the track. He made no claim that he personally locked the switch.

The Board concludes that the Carrier has proved by substantial evidence that the Claimant failed to properly lock and tag or spike the north switch in track #110-Settlegast Yard on December 4, 2022, in violation of Rule 136.4.2: Inaccessible Track. However, it failed to prove that the derail was improperly installed for the purpose intended by the Claimant or that the Claimant's purpose in installing the decal was not valid under the circumstances present. The Carrier requests the Board to uphold the assessed penalty of dismissal for the Claimant's violation. Although the Board has found the evidence is sufficiently substantial to support the charge that the Claimant violated Rule 136.4.2, the quality of the evidence is, in this Board's estimation, not sufficiently cogent to support a dismissal penalty even under a substantial evidence standard, which is a lower standard than a preponderance of the evidence.

The Board notes in this connection that the Carrier presented no evidence of who took the photo of the switch in question, which it relied on as proof of the fact that the switch was not locked, or when the photo was taken. In addition it presented only conclusory hearsay evidence on the question of whether the switch was in the same condition on the date the photo was taken and the end of the Claimant's workday on December 4, 2022. No name of any person interviewed was given. No detailed information was supplied of what questions were asked of the persons interviewed and what their responses to the questions were. Apparently no written statements were taken from these individuals since none were offered into evidence. All that was presented into evidence at the investigatory hearing was management's conclusions from its investigation rather than the data from which it drew its conclusions. Conclusory evidence of this kind is not sufficient to support a penalty of

dismissal for an employee with 20 years of service and where the record is devoid of evidence that he has committed a similar violation in the past.

It is the Board's determination that the record does not support the dismissal penalty that was assessed against the Claimant. The dismissal shall be set aside and the Claimant offered reinstatement to his former position with the Carrier without loss of seniority for his time off work. No back pay is awarded, but reinstatement shall be with retroactive restoration of health insurance and other benefits. The Claimant's disciplinary status under the MAPS Policy shall be Training 2 with a 24 month retention period.

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

1/5/2026
John Schlismann, Organization Member Date