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 136.7.1: Operating Roadway Machines Safely was exceedingly harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP902JC23/1783973 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 8, 2022, he was requested to report for a hearing

on December 15, 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 337.8, of the Houston East Belt Subdivision, at approximately 17.23 hours, while employed as a Trk Sys Frmn (R), you allegedly failed to operate the machine in a safe manner, by ensuring the machine was fully squatted prior to traveling, resulting in the machine striking the 610-overpass bridge. This is a possible violation of the following rule(s) and/or policy:
>
> 136.7.1: Operating Roadway Machines Safely

The December 8 letter added, "Under the MAPS Policy, this violation is a Critical event. Property damage has been recorded in this incident that is greater than the FRA threshold and affects the MAPS Rule Category. Based upon your current status, if you are found to be in violation of this alleged charge, Dismissal may result."

The Charging Officer whose position is that of Manager of Track Programs and who supervises the Claimant, testified as follows in answer to questions of the hearing officer. On December 4, 2022, at approximately 17:23 hours the Claimant failed to ensure that his gang followed the Tracker Travel Policy. This resulted in tracker 7785 striking the 610 overpass on the Houston East Belt at approximately milepost 337.8, causing damage in excess of $30,000 to the cab of the tracker. When he questioned the Claimant why the tracker was not squatted while traveling, he replied that they had been under the overpass several times and squatted, including that morning, with no issues. He asked him what the Tracker Travel Policy stated. He said that we have to be fully squatted when traveling. He then asked, if they had been squatted, would they have hit the underpass. He said no. The Claimant was charged with violation of critical rule 136.7.1 Operating Roadway Machinery Safely in violation of the Tracker Travel Policy. He was also removed from service because he was on MAPS 2 status at the time.

It is the position of the Carrier that the Claimant was aware of the Tracker Travel Policy, which mandates that tracker machines must be fully squatted when being moved on tall cars to avoid overhead obstructions. Despite his awareness, the Carrier argues, he permitted his gang to proceed to move the tracker unsquatted under an overpass while situated on a tall car, with the result that it struck the overpass and damaged it in an amount in excess of $30,000. The Carrier contends that the Claimant inadequately supervised his gang in that he had knowledge that they were not squatting the tracker earlier in the shift while passing under overheads despite his instructions that they do so, but that he did not act adequately to correct that situation. Nor, the Carrier maintains, did the Claimant make sure that the gang understood when he asked them if they were "ready to go" or "ready to move", that this included ascertaining that the tracker was squatted. The Carrier further asserts that a pre-trip inspection was not completed and that the Claimant failed to complete or provide the required Unloading Overhead Obstruction Form. It states, "Management found the Claimant violated several safety rules, including Rule 136.7.1 (Operating Roadway Machines Safely), Rule 41.1 (Supervision of Work), and Rule 43.2 (Observing Safety Precautions).

The Carrier asserts, "Claimant admitted the machine was not squatted during the incident and that he had instructed his gang to squat the machine in previous instances He acknowledged that the machine was operated unsafely but argued that he was not directly operating the machine at the time of the incident (Tr. pg. 38, lines 23- 36). Based on the Claimant's admission, specifically line 38 on Tr. pg. 38, the case should be dismissed." The Carrier contends that it has produced substantial evidence of the Claimant's guilt; that the seriousness of the Claimant's violation supports the discipline assessed; and that Claimant was accorded all of the due process rights required under the collective bargaining agreement.

The Organization argues that the Carrier has not shown how Claimant violated Rule 136.7.1. Instead, the Organization contends, the Carrier improperly expanded the notice of charge to include rules and policies that the Claimant was not charged with in an effort to find some basis to establish his culpability. The facts of record show, the Organization asserts, that Claimant complied with and clearly communicated Carrier travel policies to his gang relating to squatting equipment while traveling on a high car. In fact, according to the Organization, the record shows that Claimant's gang did squat the tracker in the morning when it was moved on a tall car but, thereafter, when being moved on a short car, did not squat the machine. On the incident in question, when the collision with the overpass occurred, the Organization argues, the operator of the tracker machine warranted that he was ready to proceed, meaning that the tracker was in squatted position. The Claimant, the Organization asserts, was not the machine operator, was not near the machine, and cannot be held accountable for another employee's misrepresentation of the condition of the tracker. The Organization notes that the tracker operator was disqualified, but not disciplined, for the incident and argues that even if the Claimant were in violation of the charged rule, which it denies, "the discipline imposed was obviously arbitrary, disparate and excessive."

With regard to the specific rule violated alleged in the Notice of Investigation, the Organization points out that the charge against the Claimant is that on December 4, 2004, he "failed to operate the machine in a safe manner . . . ." in violation of Rule 136.7.1. It is not disputed, however, the Organization asserts, that the Claimant did not operate any machine on that date and that it is therefore obvious that he did not cause the tracker machine to strike the overpass bridge. It surmises that the Carrier may be arguing for the Claimant's guilt by association but asserts that any such attempt must fail. As for the other rules the Carrier contends the Claimant has violated, namely, 41.1: Foreman, 43. 2: Employee Safety, and the Track Programs Tie South Policy, the Organization maintains that they are outside the scope of the Notice of Investigation and may therefore not serve as a basis for discipline in the present proceeding. The Organization also calls attention to the fact that the hearing officer explicitly noted at the hearing that the charge against the Claimant was confined to an alleged violation of Rule 136.7.1.

The charge against the Claimant in the Notice of Investigation is precise. It states that on December 4, 2022, at a specific location in Houston, Texas, near milepost 337.8 at approximately 17:23 hours he allegedly "failed to operate the machine in a safe manner, by ensuring the machine was fully squatted prior to traveling, resulting in the machine striking the 610-overpass bridge." The Notice states that this was a possible violation of Rule 136.7.1. The Claimant was present on the date at the

time and in the location mentioned in the charge where a tracker machine struck the 610 overpass bridge. The evidence is clear, however, that the Claimant did not operate the machine that struck the bridge. In fact he was standing some 300 or 400 feet from the point of collision with his back to the scene when contact between the machine and the bridge occurred.

In addition, there is nothing in the content of Rule 136.7.1 that would support the Carrier's contention that the Claimant is culpable with regard to the incident of the tracker machine striking the overpass bridge on December 4, 2022. This is so because the rule, by its title and content, applies to operators of roadway machines, and Claimant did not operate the machine that collided with the bridge or any other machine on December 4. Based on the undisputed evidence of the nature of the work performed by Claimant for the Carrier on December 4, 2022, and the content of Rule 136.7.1 that he is accused of possibly violating, it must be held that the Carrier has failed to prove the present charge against the Claimant. The Board so concludes.

At the investigatory hearing the Carrier set about to prove something other than what the Claimant is charged with in the Notice of Investigation. It presented evidence that, according to the Carrier, shows that the Claimant, a Foreman, inadequately supervised his gang and was therefore responsible for the tracker operator not squatting his machine before proceeding under the overpass. In its submission the Carrier argues that the Claimant violated not only Rule 136.7.1 – Operating Roadway Machines Safely, but also Rule 41.1 – Foremen, which is not mentioned in the Notice of Investigation. Although Rule 43.2 – Employee Safety, is also cited by the Carrier in its submission in support of its position, that rule is specifically referenced in Rule 136.7.1 as a rule that operators of roadway machines must comply with. There is no such reference to Rule 41.1.

The argument which the Carrier now makes before the Board in support of its dismissal of the Claimant rests the alleged culpability of the Claimant for the tracker machine striking the bridge on a theory of liability distinct from the basis of alleged liability in the Notice of Investigation. There is no suggestion in the Notice of Investigation that the Claimant is being accused of failing to supervise his gang properly. Rule 22 (c) (1) of the collective bargaining agreement states, "Prior to the investigation, the employee alleged to be at fault will be apprised in writing of the precise charges sufficiently in advance of the time set for an investigation to allow reasonable opportunity to secure a representative of his choice and the presence of necessary witnesses. . . ." Based on the charge in the Notice of Investigation the Claimant would have no reason to attempt to secure any member of his gang as a witness at the investigatory hearing. He could reasonably assume that his own testimony and the testimony of the Charging Officer would be sufficient to establish that he did not operate the tracker machine that struck the bridge on December 4, 2022.

The situation is quite different, however, where the Claimant is charged with failing to supervise properly. In that circumstance it could be very helpful to the Claimant's case to have corroborative testimony from the members of his gang. For example, in response to the hearing officer's questions the Claimant testified that, prior to the tracker's striking the bridge, when he saw that the employees in his gang were not squatting the machine before proceeding under the bridge, he called an enhanced job briefing to address the problem. (Tr. 46). He also testified that in job briefings he had told the gang

members that "we make it a understanding that if they're ready to travel or make a move, then they are squatted." (Tr. 47-48). Corroborative testimony on the foregoing factual issues would be very important in the Claimant's defense to a charge of failure to properly supervise. The Board is of the opinion, therefore, that failure to inform the Claimant in sufficiently precise language to place him on notice that he was being charged with improper supervision of his gang was prejudicial to him and deprived him of a fair hearing in violation of Rule 22 (c) (1) of the collective bargaining agreement.

In sum, based on the content of the Notice of Investigation served upon the Claimant in this case, the Carrier has not proved by substantial evidence that the Claimant violated Rule 136.7.1 – Operating Roadway Machines Safely, and his claim must therefore be sustained. In addition, the expanded theory of liability on which the Carrier proceeded before this Board, namely, that the Claimant failed to supervise his gang properly, was prejudicial to the Claimant because it was not compatible with the precise wording of the Notice of Investigation and thereby deprived him of the ability to secure appropriate witnesses to address the expanded nature of the charges against him. The claim is sustained.

With regard to the remedy in this case, the Claimant is entitled to back pay only for the period of time that he would have been at work for the Carrier but for the present charge. The fact that the Claimant was not awarded back pay for his time off work due to his discipline in PLB No. 7633, Award No. 218 means that he would not have been working for the Carrier during the relevant period, or otherwise be entitled to pay for that period of time, even if he had not been charged in PLB No. 7633, Award No. 219.

A W A R D

Claim sustained.

/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