

## PUBLIC LAW BOARD NO. 7633

Case No.: 24/Award No. 22

System File No.:UP: 1581887/BMWED: CE100010813

Claimant: David Brown

UNION PACIFIC RAILWAY COMPANY )

-and-

BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYES DIVISION )

**Organization's Statement of Claim:**

1. The Level; 5 UPGRADE discipline and termination to Mr. D. Brown for an alleged violation of Union Pacific Rule 1.13 (Reporting and Complying with Instructions), Rule 1.15 (Duty Reporting or Absence), and Rule 1.6 (Conduct) was not justified.
2. As a consequence of the violation referred to in Part 1 above, the claimant shall be reinstated with all rights due to him under the Collective Bargaining Agreement.

**Facts:**

By letter dated December 28, 2012, the Claimant was directed to attend an investigation and hearing on January 8, 2013 “to develop the facts and place responsibility, if any, that while employed as Trackman, on Gang No. 1104, at Bloomington, Illinois, near Milepost 125.95, Joliet Subdivision, you allegedly failed to report to work from November 29 through December 10, 2012.

The letter further indicated that, if substantiated, the allegation would place the Claimant in violation of the above-noted Rules 1.13, 1.15 and 1.6 and that he could be subject to Level 5 discipline, permanent removal.

**Carrier Position:**

Substantial evidence shows the Claimant's continued inability to comply with Carrier's attendance policy despite previous coaching and discipline. This third violation within 36 months has resulted in removal. The Claimant did not even attend the investigation, despite notice sent to his address of record on file. The Claimant's violation was serious, created additional work and thus safety issues for the team and showed his lack of interest in maintaining his employment. The permanent removal should be upheld by this Board. Clearly, the Claimant

was absent without authority based on the unrefuted testimony of MTM Patten. The Claimant had the opportunity to attend the investigation and he was represented by the Organization.

**Organization Position:**

The Carrier cannot show that the Claimant was provided with a Notice of Investigation. There is strong precedent for the Board to require proof of receipt of the Notice—not simply that it was sent to the Claimant’s address of record—so that he had every opportunity to defend himself and to present witnesses on his behalf. The procedural defect notwithstanding, the Carrier has failed to meet its burden of proof, but if the burden is deemed to have been met, the dismissal was excessive and unwarranted. The timing of the earlier 10-day suspension and the dismissal deprived the Claimant of the opportunity to correct his behavior so that the dismissal was simply punitive.

**Findings:**

In **PLB 7633, Award No. 21**, involving the same Claimant, the initial Formal Notice of Investigation was delivered to the Claimant’s address of record via UPS and signed for by “Jane.” A subsequent Notice of a postponement was sent via U.S. Postal Service and returned because of an insufficient address. Because there was no indication that the Claimant, unaware of the postponement, appeared at the initially-scheduled investigation, the Board assumed that he would not have appeared at the postponed investigation and that the Carrier properly proceeded without him.

The Board distinguishes the facts of this case from the facts noted above. Here the Formal Notice of Investigation was sent over the signature of MTM Patton, as were the above-noted Notices, only by U.S. Postal Service, and again returned because of an insufficient address. Thus the Claimant never received the Notice of an investigation that concerned possible dismissal. In essence, the Carrier sent a Formal Notice of Investigation where possible dismissal was involved when it should have suspected that the Notice would never be received by the Claimant. Nor is there any indication that efforts were made to find an address that should have resulted in delivery of Notice to the Claimant.

The unique facts of this case place the Board on the horns of a dilemma. On the one hand, the Board is aware of Rule 2(g) that requires employees to have a current address on file at all times. On the other hand, the Board is also well aware of the Rule 22(a) requirement to hold a “fair and impartial” hearing. **PLB 6402, Award No. 118** upheld the dismissal of an employee who did not attend an investigation after Notice was mailed to the address of record. That award does not set forth the contentions made by the parties; thus it is impossible for this Board to know whether the Organization argued that the Notice was never received. Furthermore, the Board cannot discern whether the Claimant did not appear because he was not notified or because he was notified, but having been caught in and confessed to dishonesty, he decided that his appearance on the dismissal he assumed would be forthcoming was a waste of time. Therefore, this award does not provide the on-property guidance that this Board would have welcomed. The Organization has provided significant support for the requirement that when challenged, the Carrier must provide proof of receipt of the Notice of an investigation even when


such Notice is sent to the address of record. The Board's conclusion, based on the unique facts of this case and without intent to set precedent, is that the Claimant did not receive the required fair and impartial hearing and that the claim must be resolved on that basis.

**Award:**


Claim sustained.

**Order:**

The Board, after consideration of the dispute identified above, hereby orders that the record of the Claimant be cleared and that he be reimbursed for any net loss of compensation resulting from the imposition of the Level 5 UPGRADE discipline. However, because the Claimant failed to report to work, the case is remanded to the parties for their joint determination of how much net compensation is due. The Carrier is to make the award effective on or before the thirtieth (30<sup>th</sup>) day after the award is adopted.

  
\_\_\_\_\_  
Andrew Mulford, Organization Member

 - Dissent  
\_\_\_\_\_  
Katherine N. Novak, Carrier Member

  
\_\_\_\_\_  
I. B. Helburn, Neutral Referee

Austin, Texas  
February 26, 2015

**PUBLIC LAW BOARD NO. 7633**

Case No.: 24/Award No. 22

System File No.:UP: 1581887/BMWED: CE100010813

Claimant: David Brown

**Carrier Member's Dissent:**

The Carrier respectfully dissents to the majority's award on this matter. The Board held, though limited to the unique facts of this case and without intent to set precedent, the Claimant did not receive the required fair and impartial hearing. Thus, it sustained the claim. It appears the Board reached this finding due to the Notice of Investigation being returned to the Carrier. As was argued during the on-property handling, the Notice of Investigation was mailed to the Claimant's address of record. Additionally, the collective bargaining agreement specifically requires employees to have a current address on file at all time under Rule 2(g). The Carrier fulfilled its duty when it mailed the Notice to the address of record. The agreement does not require more. Additionally, arbitration precedent does not require more.

The Board has created a burden for which the Carrier could never fulfill. The Carrier employs over forty thousand employees. If an employee chooses not to tell the Carrier where they are located, the Carrier does not have the means to track them all down. In the alternative, if the Claimant simply chooses not to accept receipt of his mail, the Carrier would now have no means to discipline that employee due to inability of proving notice was provided.

It is the Carrier's position it fulfilled the terms of the Collective Bargaining Agreement when it sent notification to the Claimant's address of record. The Claimant, an employee who failed to report for work or contact his supervisor for months failed in his duty to provide the Carrier an updated address to receive notification. Therefore, the Carrier dissents to the findings of the Board.



Carrier Member