

PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance  
of Way Employees Division - IBT

and

Union Pacific Railroad Company

Case No: 108  
Award No: 108

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) imposed upon Mr. J. Read, by letter dated June 19, 2017, in connection with allegations that he was in violation of Rule 1.6: Conduct - Careless; Rule 136.3.1: Job Briefing for Roadway Work Groups; and Rule 40.15: Chapter 15 Supplements was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File B-1748U-205/1689934 UPS).
2. As a consequence of the violation referred to in Part 1 above, the discipline imposed upon Claimant J. Read shall '... be made whole by compensating him for all wage and benefit loss suffered by him for his employment termination, any and all expenses incurred or lost as a result, and the alleged charge(s) be expunged from his personal record. Claimant must also be made whole for any and all loss of Railroad Retirement month credit and any other loss.

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, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter. Parties to said dispute were given due notice of hearing thereon.

This is a discipline case involving Jay Read, hereinafter referred to as Claimant, who at the time of the incident had been employed with the Company for eighteen years with a hire date of November 1, 1999. Claimant was found to be in violation of Rules 1.6

(Conduct), 136.3.1 (Job Briefing for Roadway Work Groups) and 40.15 (Chapter 15 Supplements) when on May 22, 2017, Claimant was assigned to an extra gang foreman's position (Gang 5075) and gave the clear for another train to enter the Form B when it was not clear to do so, resulting in a collision.

Specifically, Claimant and his group of employees were working within the limits of a Form B being run by Employee in Charge (EIC) William "Bill" Flom. As the Subgroup coordinator, Claimant was directly responsible for notifying his employees that trains or equipment were approaching and passing their work location and notifying Mr. Flom when it was clear/safe to run trains by the work group. At 13:54 Foreman Flom, who was nearly three (3) miles away at Mile Post 14.5 with no visual of the affected machines, contacted Claimant to advise that a local train number 1135 was coming out at Mile Post 12.25 to go to Seymour. He asked if the machines were clear. Claimant advised that the train would not go by the undercutter. As a result, Mr. Flom cleared the train to run through the Form B limits. Claimant saw the train coming, attempted to get the attention of the employees but the train struck the gopher undercutter.

By Notice of Investigation dated June 2, 2017, the Carrier directed Claimant to report for an investigation hearing in connection with the charges referenced above. After a formal investigation on June 8, 2017, Claimant was found in violation of Rule 1.6: Conduct - Careless; Rule 136.3.1: Job Briefing for Roadway Work Groups; and Rule 40.15: Chapter 15 Supplements and assessed an immediate dismissal. The claim was timely and properly presented and handled by the Organization at all stages of appeal up to and including the Carrier's highest appellate officer. Because the parties were unable to resolve the matter on the property, the issue is now before this Board for final adjudication.

The Carrier argues that Claimant was provided a fair and impartial hearing with notice of charges, opportunity to defend and representation; substantial evidence of the Claimant's guilt was presented; and the discipline imposed was warranted. The investigative record shows that Claimant's conduct was Careless of Safety. He not only made dangerous assumptions about the movement of the train, but he also advised the EIC to run trains through the exact area where his machine was working. The investigation also indicates that he failed to properly comply with Rule 136.3.1 and Chapter 15 Supplement 40.15. Violations of Rule 1.6 are serious events.

Further, the Carrier maintains that the decision to terminate Claimant was neither harsh nor capricious under the circumstances. Discipline was proper and reasonable. The Carrier has addressed this case in the same manner as numerous other careless of safety cases wherein dismissal was upheld through arbitration. Claimant's actions placed his career in jeopardy and risked the safety of employees. Claimant was entirely aware of the rules and expectations. He was not remorseful of his actions. Instead, he provided self-serving and inconsistent excuses for his behavior which do not exonerate him. Therefore,

it remains the Carrier's position that there is simply no basis to overturn the discipline imposed. The Carrier has shown ample support for this action above.

The Organization challenges the discipline on procedural grounds and the merits. Regarding the procedural grounds, the Organization contends that the Carriers failed to afford the Claimant with a fair and impartial hearing when it did not call Foreman Flom to testify at the investigation. Flom was a key witness since he was the EIC of the track protection. He clearly had pertinent information to provide as is evident by the fact that the Carrier's case relies in total on his statement. A basic element of a fair and impartial hearing is that all relevant witnesses who have pertinent knowledge of the incident being investigated be present.

On the merits, the Carrier has not proven Claimant violated the charged rules. The Organization asserts that Flom's hearsay statement is not enough for the Carrier to meet its burden of proof or in any way discredit the Claimant's direct testimony. Here, the Carrier's case is based on the allegation that Claimant was told that the train was coming out at Mile Post 12.25, in which case the Claimant should have known that the train would bypass his location. However, the Claimant maintains that Foreman Flom told him that the train was coming out at Mile Post 10.25, in which case it is undisputed that the train would not have bypassed Claimant's location. Even if the Carrier could properly rely on Flom's statement without his direct testimony, which it cannot, said statement would at most create an irreconcilable dispute in fact over the Claimant's guilt. In this regard, arbitration panels have held that the Carrier cannot meet its burden of proof under such circumstances. Finally, the record confirms that Claimant was an 18-year employee and even if the Carrier did prove the Claimant violated Carrier rules, the punishment of dismissal is excessive. The Claimant did not intentionally violate any Carrier rules and, thus, the discipline imposed is unwarranted.


In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. A careful review of the record convinces the Board that, under the circumstances of this case, the Carrier has failed to meet its burden of proof that dismissal was for just cause. This is a difficult call because there is no dispute that a collision occurred, and someone should be held accountable for it. At issue is what was communicated prior to the collision.

Claimant's version is that he understood from Flom that he would be coming out at Mile Post 10.25 heading East to Seymour. Claimant testified that he did not believe that Flom would pass him at Milepost 11.7. Therefore, he advised him that it was clear. Flom did not appear as a witness at the investigation. His written statement was entered into the record. Flom's version is that he told Claimant he was "coming out" at Milepost 12.25. Here, there is a dispute about the communication—one person's word against the other. Thus, there is conflicting evidence on a material fact.

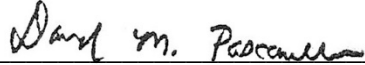
The Board finds that Flom's statement on a material fact is insufficient to meet the Carrier's burden of proof. There is no dispute that the collision occurred. However, there is no competent evidence in the record to prove Flom informed Claimant that he was coming out at Mile Post 12.25, as charged. Flom's unsworn statement and his failure to be subjected to cross examination at the investigation is a fatal flaw, in this case. That is not to say that a statement may never be used to offer proof of a certain occurrence. However, here where it involves a critical safety event resulting in dismissal, it is insufficient. Accordingly, the relief sought by the Organization is sustained. The dismissal shall not remain on Claimant's personal record.

AWARD:

Claim sustained.

  
\_\_\_\_\_  
Jeanne Charles  
Neutral Member

  
Chris Bogenreif  
Carrier Member  
Dated: 12/02/2019

  
\_\_\_\_\_  
David M. Pascarella  
Labor Member  
Dated: 12/09/2019

Carrier Member dissent to follow