

PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance  
of Way Employees Division - IBT

and

Union Pacific Railroad

Case No: 125  
Award No: 125

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. M. Starkey, by letter dated June 8, 2017, in connection with allegations that he failed to give an enhanced job briefing on April 4, 2017 was in violation of 40.15: Chapter 15 Supplements was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File T-1748U-903/1690151 UPS).
2. As a consequence of the violations referred to in Part 1 above, Claimant M. Starkey shall be returned to service, the matter removed from his record, be provided all rights and benefits unimpaired, made whole by compensating him for all wages (straight time and overtime) and benefit loss including expenses incurred and Railroad Retirement months of service credits and all 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.

At the time of incident, the Claimant was working as a Flagging Foreman and had approximately 26 years of seniority. The Carrier alleged that on April 4, 2017, the Claimant failed to utilize an enhanced job briefing to clear a train through his Form B limits, thereby violating Rule 40.5 and Chapter 15 Supplements.

By letter dated April 28, 2017, the Carrier directed the Claimant to report for a formal investigation into the matter. After postponement, the investigation was held on May 19, 2017.

By letter dated June 8, 2017, the Carrier informed the Claimant that he was found guilty and was dismissed from service. In relevant part, the June 8, 2017 letter states the following:

“...After carefully considering the evidence adduced at the hearing, I find that the evidence more than substantially supports the charges against you. The following charge has been sustained:

On 04/04/2017, while employed as a Sys Flag Fm, you cleared the UP 5412 west through the Form B (43302 Line 1 Track I) but allegedly failed to give an enhanced job briefing to the train. This is a violation of the following rule(s) and/or policy: 40.15: Chapter 15 Supplements

Based on your current record, you are hereby dismissed from all service with the Union Pacific Railroad. Immediately arrange to deliver all Company property in your possession to Nathan Walton...”

The Organization argues a) the Claimant was denied his contractual right to a fair and impartial hearing, b) the Carrier failed to meet its burden c) the discipline was arbitrary and unwarranted, and d) the proper remedy is as stated in Part 2 of the Statement of Claim.

The Carrier argues a) substantial evidence was provided to prove and demonstrate the Claimant acted in violation of the charged rules, b) the seriousness of the Claimant’s violation fully supports the discipline imposed, c) the Claimant was afforded all the elements of due process required by the Agreement and there were no procedural defects serious enough to void the Carrier’s action, and d) the Organization’s remedy is excessive, improper, and is not grounded in the Agreement.

Based upon a thorough review of the record, the Board finds the Carrier failed to meet its burden of proving the charges by substantial evidence. In the instant case, the Claimant admits he did not use the enhanced job briefing. However, the Claimant’s admission is not an admission of guilt as the Carrier suggests. The Claimant’s failure to use the enhanced job briefing was based upon direction he received from Supervisor Leibhart. [Transcript page 26, 46, 67, 81] The Claimant testified that due to confusion with the rule, he had asked Supervisor Leibhart if he was required to provide the enhanced job briefing and he was told that it was not necessary because the specific Form B limits in question did not include any crossover switches.

Although the Carrier argues the Claimant’s testimony on this point is self-serving, the Board respectfully disagrees. The instant case turns on the Claimant’s testimony regarding this singular point. By failing to produce Supervisor Leibhart at hearing and/or failing to provide a

statement from Supervisor Leibhart as part of the investigatory process, the Carrier denied itself the opportunity to consider a critical and crucial factor relevant to assessing the Claimant's veracity. Because the Carrier foreclosed consideration of a pivotal matter directly bearing on the credibility of the Claimant, the Carrier lacked crucial information necessary to assess the Claimant's credibility. Again, Supervisor Leibhart was not produced at hearing and the Claimant's repeated testimony on this point was never refuted by the Carrier, either at hearing or in the parties post-hearing correspondence.

Based upon the above, the Board finds the Carrier failed to meet its burden of proving the charges by substantial evidence. The Claimant is to be returned to service with his seniority and benefits unimpaired. Given the fact set here and the arguments presented in this specific case regarding remedy, the Claimant is to be provided back pay calculated at his regular straight time rate, excluding overtime, based upon a 40-hour work week. The Claimant is to be returned to the MAPS Process Matrix level he maintained prior to his June 8, 2017 removal. Lastly, the dismissal is to be removed from the Claimant's record.

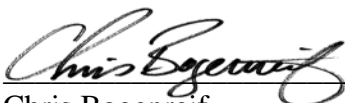
Although the Board may not have repeated every item of documentary evidence nor all the arguments presented in the record, we have considered all the relevant evidence and arguments presented in rendering this Award.

AWARD:

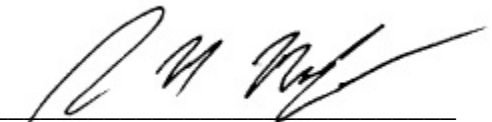
The claim is sustained in part, in accordance with the findings.



Paul Betts  
Neutral Member  
Dated: 08/01/2019



Chris Bogenreif  
Carrier Member  
Dated: 08/01/2019



Andrew Mulford  
Labor Member  
Dated: 08/01/2019