

PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance  
of Way Employees Division - IBT

and

Union Pacific Railroad

Case No: 137  
Award No: 137

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. C. Carter, by letter dated October 6, 2017, for alleged violation of Rule 1.6: Conduct - Dishonest was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File MK-1748U-607/1696266 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant C. Carter shall now ‘... be made whole by compensating him for all wage and benefit loss suffered by him for his Level 5 termination, and the alleged charge(s) be expunged from his personal record.’ (Employees’ 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, 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 Track Inspector and had approximately 3 years of service with the Carrier. By letter dated September 13, 2017, the Claimant was advised to report for a formal investigation regarding a violation of Rule 1.6: Conduct – Dishonest, for allegedly falsifying track inspection reports. The formal investigation was conducted on September 22, 2017. By letter dated October 6, 2017, the Carrier advised the Claimant the charge against him was sustained and he was dismissed from employment. In relevant part, the October 6, 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 08/21/2017, while employed as a Track Inspector, you falsified FRA Track Inspection Reports. This is a violation of the following rule(s) and/or policy:  
1.6: Conduct – Dishonest

Additionally, Rule 1.6: Conduct stipulates that any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.

Based on your current record, you are hereby dismissed from all service with the Union Pacific Railroad...”

The matter progressed in the normal fashion and is now before the Board for final resolution.

In summary, the Carrier argues a) the Carrier provided substantial evidence to prove and demonstrate Claimant acted in violation of the charged rules, b) the seriousness of the Claimant’s violation fully supports the discipline imposed, and c) the Claimant was accorded all due process rights required under the Agreement, and there were no procedural defects serious enough to void the assessed discipline. The Carrier maintains the Claimant never traversed or inspected the tracks in question. To support its position, the Carrier argues the Claimant failed to obtain the proper permits to traverse and inspect the tracks.

In summary, the Organization argues a) the Claimant was denied his contractual right to a fair and impartial hearing as required by the Agreement, b) the Carrier failed to meet its burden of proof, and c) the discipline was arbitrary and unwarranted. The Organization argues the Claimant walked the tracks using ITD (Individual Train Detection) as well as staying outside foul, and therefore did not require the permits alleged by the Carrier.

The Organization initially argues the Claimant was denied a fair and impartial hearing based upon the behavior of the Hearing Officer during the formal investigation. Under Rule 48, the Carrier is required to provide a fair and impartial hearing.

Boards of Arbitration have stressed the important role of the Hearing Officer as it relates to a fair and impartial hearing. In Award 31 of this Board, Referee Newman states:

“...the Hearing Officer, as a Carrier official, must avoid even the appearance of partiality or the perception of unfairness, which occurs when *ex parte* meetings

are held in secrecy and behind closed doors prior to, or during, an investigation...”

Likewise, in Third Division Award No. 41224, Referee Knapp wrote:

“...Because the Hearing Officer is a Carrier official, it is especially important for the investigative Hearing to be conducted as fairly as possible. For the Hearing Officer, this includes avoiding not just the reality of partiality, but also the appearance of bias, either for or against any party or witness... Given that the Hearing Officer is a carrier official, it is critical to the dispute resolution process that the investigative Hearing not only be conducted fairly, but also that it is perceived to be a fair process...In this case, the Hearing Officer conducted an extended private meeting with the Carrier's witnesses immediately before the Hearing. The meeting led to concerns on the part of the Organization and the Claimant that the witnesses were being coached or, alternatively, they were explaining what they would testify to without the knowledge of the opposing side or an opportunity for cross examination. In either case, it appeared that "the fix was in," so to speak. Even before the investigative Hearing started, if the witnesses were being coached by the Hearing Officer or in his presence, his ability to conduct a "fair and impartial" Hearing would be seriously open to question. The witnesses' privately explaining their testimony could also compromise his ability to conduct a fair and impartial Hearing, as his perceptions of events and of the Claimant's guilt or innocence would be compromised before the Hearing began. Even if such influence did not actually occur, the opposing side was reasonably left with the impression that it did, and the damage to the Hearing process is the same...”

The Board agrees with the reasoned logic of Referees' Knapp and Newman and find the fact pattern here to be similar. In the instant case, there is no dispute that during the investigation, the Hearing Officer left the investigation room with hearing documents and a notebook, made a private phone call to the Harriman Dispatch Center, had a private conversation with Assistant Corridor Manager Brannen, and then, after returning to the hearing room, eventually called Assistant Manager Brannen to testify by telephone as a Carrier witness. These actions by the Hearing Officer were strongly objected to by the Organization.

Although the Board would prefer rendering an award based upon the merits, the facts here constitute a significant procedural flaw and we find the Organization's objections on this matter to be both reasonable and justified. Based upon the behavior of the Hearing Officer noted above, the Board finds the Claimant was not afforded a fair and impartial hearing under Rule 48 of the Agreement. Based upon this procedural flaw, the Board does not find it necessary to have a discussion regarding the merits of the case.

The Claimant is to be returned to service with his seniority and benefits unimpaired. 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 October 6, 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:

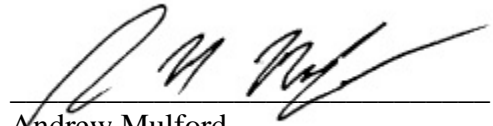
The claim is sustained in accordance with the findings.



Paul Betts  
Neutral Member  
Dated: 08/01/2019



Chris Bogenreif  
Carrier Member  
Dated: 08/01/2019



Andrew Mulford  
Labor Member  
Dated: 08/01/2019