

PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance
of Way Employees Division - IBT

and

Union Pacific Railroad

Case No: 138
Award No: 138

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) imposed up Mr. C. Schultz, by letter dated November 14, 2017, in connection with allegations that he failed to protect his employment on a full time basis through frequent or pattern layoffs and/or failure to report for service between October 31, 2017 and November 1, 2017 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File B-1719C-202/1698848 CNW).
2. As a consequence of the violation referred to in Part 1 above, Claimant C. Schultz 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 all seniority fully restored, and the alleged charge(s) be expunged from his employment record, and returned to service immediately. Claimant must also be made whole for any and all loss of retirement month credit and any other loss.’ (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 Bridge and Building Carpenter on Gang 3417 and had approximately 2.5 years of service with the Carrier. The Carrier alleged the Claimant had left work prior to the end of his shift, without authorization, on October 31, 2017, constituting a third offense under the Carrier’s Attendance Policy.

By letter dated November 3, 2017, the Claimant was directed to report for a formal investigation alleging that he failed to protect his employment on a full-time basis through frequent or pattern layoffs and/or failure to report for service between October 31, 2017 and November 1, 2017.

The investigation was conducted on November 7, 2017.

By letter dated November 14, 2017, the Claimant was notified that the charges against him were sustained and that he was dismissed from employment. In relevant part, the November 14, 2017 letter states the following:

“...After carefully considering the evidence adduced at the hearing, I find that the following charges against you have been sustained:

While employed as a/an B&B Carpenter with Union Pacific Railroad, you failed to protect your employment on a full time basis through frequent or pattern layoffs and/or failure to report for service between 10/31/2017 and 11/01/2017.

This conduct is a violation of the Union Pacific Railroad's Attendance Policy and constitutes a Third Offense violation of the Union Pacific Railroad Attendance Policy.

Therefore, effective immediately, 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 Organization argues a) the Carrier violated Rule 19 when the Hearing Officer, Charging Officer, and Carrier witnesses had a meeting prior to the investigation, b) the Carrier violated Rule 19 when it failed to notify the Claimant of the precise charges, failed to provide a copy of the Notice of the Investigation to the General Chairman, and failed to provide the Claimant sufficient time to prepare for the hearing, c) the Carrier failed to meet its burden of proof, and d) the dismissal was arbitrary and unwarranted.

In summary, the Carrier argues a) substantial evidence was provided to demonstrate the Claimant was in violation of the set forth rules, b) the seriousness of the Claimant's violation fully supports the discipline imposed, and c) the Claimant was accorded all the due process rights required under the Agreement, there were no procedural defects serious enough to void the assessed discipline, and the Claimant admitted leaving work early, thereby rendering the procedural arguments moot.

In the instant case, the Board was presented with several procedural arguments from the Organization, but after a thorough review of the record, the Board finds the Carrier met its burden of proof. Here, the Claimant admitted to leaving work early on 10/31/17. The Claimant also testified that he did not contact anyone regarding his early departure on 10/31/17, and although asked by supervision on 11/01/17 as to why he left early the prior day, the Claimant did not provide any reason for the early departure. The Board agrees with the awards cited by the Carrier, in that the Claimant's admission of guilt renders the procedural arguments presented by the Organization moot.

That being said, the Board found the procedural arguments raised by the Organization to be troubling, especially as they related to the *ex parte* communication between the Hearing Officer and Carrier witnesses that occurred immediately preceding the start of the formal investigation. On this point, the Board agrees with the rationale and logic offered by Referee Newman in Award 31 of this Board, whereby she 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..."

Unlike the instant case, Referee Newman's case did not involve an admission of guilt by the Claimant. If not for the Claimant's admission of guilt here, the resulting award may have been much different. As such, the Board cautions the Carrier regarding the fairness and impartiality required under Rule 19 as it pertains to the conduct of its Hearing Officers.

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:

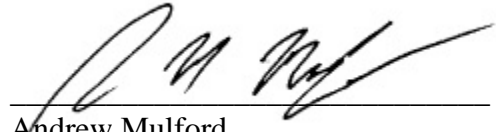
The claim is denied



Paul Betts
Neutral Member
Dated: 08/01/2019



Chris Bogenreif
Carrier Member
Dated: 08/01/2019



Andrew Mulford
Labor Member
Dated: 08/01/2019