

PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance  
of Way Employees Division - IBT

and

Union Pacific Railroad Company

Case No: 143

Award No: 143

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) imposed on Mr. J. Adison, by letter dated December 19, 2017, in connection with allegations that he refused an FRA Random Test on November 27, 2017 was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File T-1848U-909/1699341 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Adison 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. Parties to said dispute were given due notice of hearing thereon.

The Organization argues that there is a procedural flaw that prohibits the Board from upholding the dismissal. The Organization asserts that Rule 1.5 which is the rule that formed the basis of the Carrier’s decision, was never introduced at the investigation hearing. While a physical copy of the rule was not introduced, Rule 1.5 was incorporated into the record by reference in the Notice of Investigation. The Organization cites no awards in support of the contention that an actual copy of the rule must be submitted during the investigation hearing. Claimant and his representatives were fully informed of the alleged Rule 1.5 violation and were able to advance a defense for Claimant at the

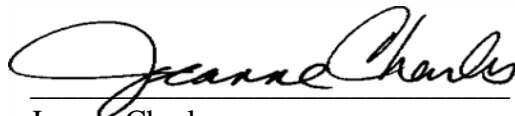
**Page 2**

hearing in connection with this allegation. Accordingly, there is no procedural violation that precludes a review of the merits of this case by the Board.

On the merits, the Organization contends that Claimant did not know that it was a rule violation if he left the testing site to retrieve his identification. Upon review of the transcript, it appears that Claimant was unaware of the impact leaving the testing site would have. Just cause requires that employees are on clear notice of rules and the associated consequences for violating them. Here, there is insufficient evidence that Claimant was on notice that leaving the testing site would be deemed a refusal and result in his dismissal. Additionally, Claimant returned within a relatively short time period and presented himself for the test. Given Claimant's lengthy employment record of 25 years; his submission to several drug tests without incident and the fact that Claimant was unclear about the severity of leaving the testing site, the record evidence falls in favor of overturning the dismissal. Rule 1.5 states that an employee may be subject to discipline up to and including dismissal. While Claimant technically violated the rule by not remaining at the testing site until the testing process was complete as dictated by Section 16.1 of the Drug and Alcohol Policy, the factors referenced above justify mitigation of the penalty in this case. However, no back pay is awarded. Accordingly, the relief sought by the Organization is sustained, in part. The dismissal shall not remain on Claimant's personal record. Claimant shall be reinstated at a MAP 1 status. The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.

**AWARD**

Claim sustained in accordance with the findings.

A handwritten signature in black ink, appearing to read "Jeanne Charles", is written over a horizontal line.

Jeanne Charles  
Neutral Member

**Page 3**

*William C. Ince*

William C. Ince  
Carrier Member  
Dated: April 24, 2020

*David M. Pascerella*

David M. Pascerella  
Labor Member  
Dated: 4-24-2020

Carrier Member's Dissent to  
Award 143 of Public Law Board No. 7660  
(Referee Jeanne Charles)

Federal Regulations (49 CFR Sections 40.191 and 40.261) clearly state failure to remain at the testing site until the testing process is complete will be considered a refusal. Claimant in this case admitted to leaving the testing site without being released or notifying his Manager which the Board acknowledged is a violation of the Rule.

This Award implies Carrier must explicitly inform Claimant that leaving the test site would be considered a refusal; however, this is not required under either the Federal Regulations or the UP Drug & Alcohol Policy. To the extent this Award is interpreted to impose this notice requirement Carrier respectfully dissents.

Respectfully submitted,

*William C. Ince*

William C. Ince  
Carrier Member  
Dated: April 24, 2020

LABOR MEMBER'S CONCURRENCE  
TO  
AWARD 143 OF PLB NO. 7660  
(Referee Charles)

I write to register my concurrence with the majority's finding that the Carrier's discipline herein was inapt, at least with respect to being heavy-handed and excessive, under the circumstances.

I note that the sections of the CFR which the Carrier references require an employee to cooperate with all aspects of the testing, which quickly providing ID seems to involve. Thus, there appears some ambiguity in the regulations, inasmuch as one could leave the testing site in order to comply with the ID requirement in a timely fashion. This suggests to me that employees intent on compliance and with nothing to hide could find themselves in serious trouble, as Claimant did here, in a manner that is shocking, at least to me. A better Carrier rule or protocol/practice and, thus, basis for enforcement, would clarify this ambiguity ahead of time rather than leaving employees with such ambiguity, whereby they could be in trouble either way.

It also seems that CFR 40.61 requires a collector to contact the DER, a Carrier official, when ID can not be immediately supplied by the employee, with the DER then being charged with verifying the employee's identity. There seems no suggestion that an employee not having their ID and not immediately being aware of these great intricacies of the CFR would bear the brunt of serious discipline for collector and/or their own innocent error.

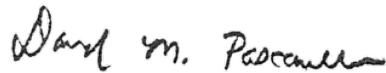
More philosophically, I do not know that an employee's even technical violation of a CFR can overcome "just cause" analysis, to the extent that they might be in conflict in a particular case. Employees can run afoul of any number of Carrier or other rules, which the Carrier might seek to discipline them for, but if they have no fair warning as to how they might be running afoul of such rules at the time, and do not thus suppose or even suspect that they are running afoul of any rules rather than earnestly seeking compliance with them, then such technical violations, if such they even be, properly amount to no grounds upon which to discipline an employee, and especially not harshly or, indeed, in ultimate fashion.

Finally, were this Board to venture into examining the finer aspects of public law in arbitration, as the Carrier argues here, it would seem that we would be in danger of going beyond our jurisdiction in seeking to adjudicate extra CBA matters. The better course seems to be had in Carrier rules and protocols explicitly spelling out to employees in unambiguous fashion what it demands of them, especially as regards circumstances that do not occur so regularly, as herein.

Labor Member's Concurrence  
Award 143 of PLB No. 7660  
Page Two

Then, employees can make a choice, based on full knowledge of what their obligations are, and so unmistakably incur or avoid disciplinary liability, without having to guess in a fleeting and ambiguous moment regarding the same. The Carrier can unilaterally adjust its rules and protocols to cure for this and should do so, if it seeks to enforce such rules and protocols. It is not "just cause" that should alternatively give, but instead remain the lodestar that it is in labor arbitration of employee discipline.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "David M. Pascarella". The signature is written in a cursive, somewhat stylized script.

David M. Pascarella  
Employee Member

PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance  
of Way Employees Division - IBT

and

Union Pacific Railroad

Case No: 195  
Award No: 195

STATEMENT OF CLAIM:

This claim concerns an interpretation dispute regarding the timely interpretation of Award 143 of Public Law Board (PLB) No. 7660 which reinstated Mr. J. Adison. The question before the Board is if the Carrier did not reinstate the Claimant to MAPS 1 status, on or before 30 days following the date of the award, is compensation due until such time as the Claimant was properly returned to service in accordance with the Award? The Organization requests this Board resolve the question at hand so as to conclude the dispute.


FINDINGS:

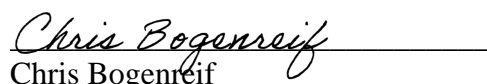
Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter. Parties to said dispute were given due notice of hearing thereon.

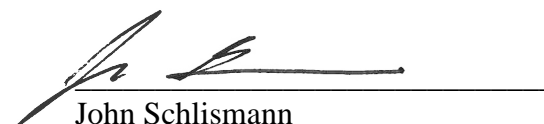
This Board has been advised that the parties have settled this case on the property and have withdrawn this dispute from the Board. Therefore, no further action is required, and the claim shall be dismissed.

AWARD:

Claim dismissed.

  
Jeanne Charles  
Neutral Member

  
Chris Bogenreif  
Carrier Member  
Dated: April 6, 2022

  
John Schlismann  
Labor Member  
Dated: April 6, 2022