

PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance
of Way Employees Division - IBT

and

Union Pacific Railroad Company

Case No: 146
Award No: 146

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. H. Francis, by letter dated March 16, 2018, for alleged violation of Rule 1.6: Conduct - Careless, Rule 1.6: Conduct - Negligent and 42.2.2: Other Speed Requirements was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File T-1848U-905/1704318 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant H. Francis shall have the dismissal '... expunged from his personal record. Claimant be immediately reinstated to service and compensated for all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service excluding all outside wage earnings. Claimant be compensated for any and all losses related to the loss of fringe benefits that can result from dismissal from service, i.e., Health benefits for himself and his dependents, Dental benefits for himself and his dependents, Vision benefits for himself and his dependents, Vacation benefits, Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of the Union Pacific Railroad and a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters. Claimant to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has been taken from him. Such losses can be his house, his car, his land and any other personal items that may be garnished from him for lack of income related to this dismissal.' (Employee's Exhibit 'A-2')."

1.

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 Harry Francis, hereinafter referred to as Claimant, who at the time of the incident had been employed with the Company for thirty-eight (38) years. On February 3, 2018, Claimant was assigned and working as a machine operator on a system production gang. The Carrier determined that Claimant failed to ensure he could safely stop within the requisite distance, resulting in a collision.

Specifically, while working near Tipton, California, Claimant was the operator of a Ballast Regulator who was filling the track in (pulling rock from the shoulders into the track) behind tie gang operations. As part of the project, two (2) Engineering Department employees (assigned as laborers) were working in front of the Claimant's machine. These employees were performing quality control work and had a 4 x 4 on-track pushcart with them. Claimant struck the two (2) employees with his regulator machine. The employees were transported, via ambulance, to the hospital. They were not seriously injured. Upon being questioned, Claimant admitted that he was not watching in front of his machine while in operation mode.

By Notice of Investigation dated February 12, 2018, the Carrier directed Claimant to report for an investigation hearing in connection with the charges referenced above. After a formal investigation on February 28, 2018, Claimant was found in violation of Rule 1.6: Conduct – Careless; Rule 1.6: Conduct – Negligent; and Rule 42.2.2: Other Speed Requirements 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 and Negligent in violation of Rule 1.6. The investigation also indicates that he failed to properly comply with Rule 42.2.2: Other Speed Requirements.

The Carrier maintains that the decision to terminate was neither harsh nor capricious under the circumstances. Discipline was proper and reasonable. Claimant's actions placed his career in jeopardy and risked the safety of employees. Claimant was entirely aware of the rules and expectations. Therefore, it remains the Carrier's position that there is simply no basis to overturn the discipline imposed.

The Organization challenges the discipline on procedural grounds and the merits. Regarding the procedural grounds, the Organization contends that the Carrier failed to comply with Rule 48 and provide the Organization with a copy of the notice of discipline and hearing transcript per the terms of the Agreement as well as per the longstanding practice on the property.

On the merits, the Organization contends that the Carrier failed to establish that Claimant engaged in willful, wanton or intentional acts. The record shows that the Claimant was assigned to operate a new machine without training or help. That machine had unquestioned mechanical issues and had even been requested to be moved so as to reduce safety concerns - a request denied by the Carrier. Additionally, the punishment of dismissal was clearly excessive in light of the various circumstances in this case. First and foremost, the Claimant had thirty-eight (38) years of service with the Carrier and no prior history of discipline. Second, at all times relevant during the investigation, Claimant was forthright, open and honest about what had transpired. At no time did he attempt to hide or conceal what had taken place. Third, there is no dispute that the Claimant is a dedicated and hardworking employee. 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.

With respect to the procedural objection, the Board finds that the agreement between the parties does not require the Carrier to notify the Organization of the decision and provide a copy of the transcript by U.S. mail only. The clear language of the agreement at Article 48 (e) allows the Carrier to "transmit" the decision or "dispatch" it by U.S. Mail service. Paragraph (d) plainly states a copy of the transcript of the hearing will be promptly furnished to the employee, his representative and the General Chairman. In this case, the decision and transcript were emailed. This transmission met the requirements of the collective bargaining agreement. Accordingly, there is no procedural violation.

On the merits, the Board finds there is insufficient evidence that Claimant was careless of the safety of himself or others as defined by the Carrier's rule. Rule 1.6 states, in part, that

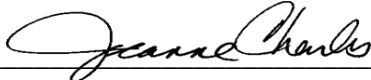
When an employee's actions or failure to take action demonstrate an inability or an unwillingness to comply with safety rules *as evidenced by repeated safety rules infractions*. When an employee commits a specific rule(s) infraction that demonstrates a *willful, flagrant, or reckless disregard* for the safety of themselves, other employees, or the public. (Emphasis added).

The record is devoid of evidence that this was a repeated violation. Nor is there any evidence that Claimant acted in a willful or flagrant manner or that he operated with a reckless disregard for himself or others. Perhaps there was some unfamiliarity with the equipment and line of sight issues that contributed to the event, as Claimant explained. While this does not excuse Claimant's actions, it does demonstrate that there were other factors that increased the possibility of an accident. These factors do not support the determination that Claimant acted willfully, flagrantly or recklessly.

By the same token, the record also reflects that Claimant was fully aware of the need to be on the lookout for workers on the track. Claimant was not paying close enough attention to the track in front of him and failed to operate the equipment in a manner that would prevent him from stopping in half the distance from the workers on the track. This conduct was negligent in violation of Rule 1.6 and a failure to properly operate the equipment in violation of Rule 42.2.2. Therefore, discipline was warranted. However, given Claimant's lengthy employment record of thirty-eight years, unblemished disciplinary record and his acceptance of responsibility, summary dismissal was punitive and unreasonable. The record does not demonstrate that Claimant's conduct cannot be corrected. 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 to his former position and paid for all time lost, less a 12-month disciplinary suspension. Claimant shall be placed 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 above.



Jeanne Charles
Neutral Member

William C. Ince

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

David M. Pascarella

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

Carrier Member's Dissent to
Award 146 of Public Law Board No. 7660
(Referee Jeanne Charles)

The Award finds Claimant was not paying close enough attention to the track in front of him and failed to operate the equipment in a manner that would prevent him from stopping in half the distance from the workers on the track. This conduct was negligent in violation of Rule 1.6 and a failure to properly operate the equipment in violation of Rule 42.2.2. Despite this finding the Board determined to return Claimant to service because of mitigating factors.

When returning an employee to service under similar circumstances, past Awards of this Board have adjusted the Claimant's record to reflect a suspension without pay. The Award ordering Claimant be paid for all time lost less a 12 month disciplinary suspension is not consistent with past practice of this Board. Claimant should not be treated differently than other Claimants have been under similar circumstances.

Respectfully submitted,

William C. Ince

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

LABOR MEMBER'S CONCURRENCE
TO
AWARD 146 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.

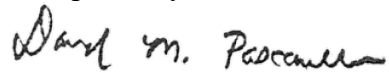
The Carrier dissents in this case on the theory that this Board has an alleged practice of doling out "relief" to employees who have received too harsh a discipline simply by reinstating them if they have been dismissed, but invariably avoiding the payment of any back pay in that process. No such alleged practice exists, as a perusal of this Board's precedents will show, but the larger and more important point is that boards of arbitration do not have "practices" which can be enforced in further arbitration; rather, parties to disputes have "practices" which can be enforced against each other in interpreting their collectively bargained agreements.

When it comes to employee discipline, boards of arbitration have only one proper focus and that is "just cause". An accused employee must have been accorded the process fairness due him, he must have been proven guilty of the charged offense and he must have been disciplined proportionately, for a carrier's chosen discipline to be fully upheld. The Board herein obviously undertook just such an examination of the Carrier's chosen discipline and found it significantly wanting with respect to the quantum of discipline that the Carrier imposed, in light of the factual circumstances involved in the case and Claimant's employment record. The Board has broad discretion, consistent with the parties' Agreement, to order a remedy for such Carrier overreach which resets any discipline yet due at a level more appropriate to the circumstances. The Board is in no ways bound by an either/or choice, as the Carrier seems to imply, in either overturning a discipline as wholly unwarranted or leaving it almost completely or completely in place if warranted in the least or some half-way degree. The Board is in no ways bound by how its members might have resolved different, earlier cases, on the basis of those different facts, in their totality. Rather, the Board sits to ensure that proportionate justice is done each accused employee before it, even if they have been accorded their due process rights and been proven guilty of an infraction but punished too severely. Were it otherwise, the Carrier would be effectively free to impose suspensions and dismissals in draconian fashion, for minor or in significantly mitigated circumstances, so long as an employee bore some even technical or *de minimis* guilt. That does not accord with established notions of "just cause" and would significantly defeat the purpose of having "adjustment" boards, to literally "adjust" disputes as neutrals see fit, so long as the collective bargaining agreement between the parties is not obviously offended in the process. It is not herein, as the "adjustment" of discipline to bring it into line with what an employee more properly deserves is not against the Agreement's provisions and, in fact, is fully contemplated by

Labor Member's Concurrence
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them, as they set out disciplinary matters within the context of a labor arbitration world everywhere awash in the solvent of "just cause" and its insistence on discipline proportionality.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David M. Pascarella". The signature is written in a cursive, slightly slanted style.

David M. Pascarella
Employee Member

PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance
of Way Employees Division - IBT

and

Union Pacific Railroad

Case No: 196
Award No: 196

STATEMENT OF CLAIM:

This claim concerns an interpretation dispute regarding Award 146 of Public Law Board (PLB) No. 7660 which reduced Mr. H. Francis' discipline from dismissal to a twelve (12) month disciplinary suspension. The question before the Board is if the Claimant's retirement waives the Claimant's right to compensatory remedy of all time lost, less a 12-month disciplinary suspension? 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:

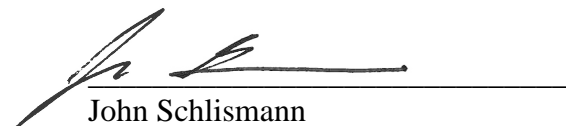
Claim dismissed.



Jeanne Charles
Neutral Member



Chris Bogenreif
Carrier Member
Dated: April 6, 2022



John Schlismann
Labor Member
Dated: April 6, 2022