PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance
of Way Employes Division - IBT

and

Union Pacific Railroad

Case No: 158
Award No: 158

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) imposed upon Mr. T. Begay, by letter dated May 23, 2018, in connection with allegations that he violated Rules 1.6: Conduct - Dishonest, Item 10-I: Union Pacific Railroad Policies - Statement of Policy on Ethics and Business Conduct - Critical and 1.13: Reporting and Complying with Instructions was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File T-1848U-916/1707807 UPS).

2. As a consequence of the violation referred to in Part 1 above, Claimant T. Begay's record shall be cleared and he shall '*** 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 Employes 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.' (Employes' 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.

By notice dated 4/27/18, the Claimant was directed to attend a formal investigation on a charge the Claimant was allegedly dishonest when he had another person take his computer-based training (CBT); claimed payment for the CBT he did not take; was allegedly dishonest to Carrier officers; and failed to comply with policies by sharing his user ID and password with another person. The formal investigation was held on 5/3/18. By letter dated 5/23/18, the Claimant was notified that as a result of the formal investigation, the Carrier found substantial evidence to support the charges against him and the Claimant was dismissed. In relevant part, the 5/23/18 letter advising the Claimant of his dismissal 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 02/16/2018, while employed as a Sys Bal Reg Oper, you Were dishonest when you allegedly had another person take your computer based training. Secondly, you were allegedly dishonest when you claimed payment for training you did not take. Additionally, you were allegedly dishonest to Carrier officers during discussions held on April 16, 2018. Lastly, you allegedly failed to comply with policies when you shared your user ID and password with another person. This is a violation of the following rule(s) and/or policy:
>
> 1.6: Conduct - Dishonest
> Item 10-1: Union Pacific Railroad Policies - Statement of Policy on Ethics and Business Conduct - Critical
> 1.13: Reporting and Complying with Instructions
>
> 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..."

Per Carrier policy and government regulations (such as Federal Railroad Administration, Occupational Safety and Health Administration, etc.), employees are required to complete and pass CBT courses to demonstrate knowledge and proficiency for their job. The Carrier then pays employees an established block of hours at their straight time rate for completion of their CBT.

The Board reviewed the procedural arguments raised by the Organization and found them lacking. A thorough review of the record convinced the Board that the Carrier provided substantial evidence to prove the Claimant's actions were a violation of the cited rules. The record shows the Claimant provided his user ID and password to another individual for the purpose of having his CBT completed for him. The on-property record speaks for itself.

Dishonesty is a serious matter. Given the Claimant's behavior and notwithstanding the Claimant's longevity, the Board cannot find the Carrier acted in an unreasonable, arbitrary, or capricious manner in its dismissal of the Claimant. Therefore, the claim must be denied.

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:

William C. Ince
Carrier Member
Dated: January 27, 2020

David M. Pascarella
Labor Member
Dated: 1-27-2020

LABOR MEMBER'S DISSENT
TO
AWARDS 150, 151, 152, 153, 154, 155, 156, 157, 158,
159 AND 160 OF PUBLIC LAW BOARD NO. 7660
(Referee Paul Betts)

I write to respectfully register my dissent to the awards issued in these nearly identical eleven (11) cases that the Board decided at the same time, as a part of a common docket. A dissent is required because the Majority ignored clear signs that the significantly-tenured and largely discipline-free employes involved in these cases were encouraged, enabled and even required to take the actions that they did, by members of Carrier management, with the Carrier thereafter attempting to bury the truth of matters with respect to government-mandated testing of its employes.

In this respect, the evidence of record was clear that the Carrier's relatively new computerized training modules were not working in many cases, leading to employes not being able to tender their tests in as timely a manner as the Carrier was demanding. So, too, evidence of record substantiated that many Carrier employes were not computer savvy or did not have a very strong command of English. In the face of this, the Carrier's managers did not fix the computer issues or make alternative avenues to testing available to the employes; rather, management issued edicts that the testing had to be done, via the computerized modules, on schedule, by any means necessary. To this end, Carrier management even arranged for a timekeeper employe to take tests on behalf of the employes, at work. In the instant cases, the Carrier then sought to impose the ultimate punishment of dismissal on employes who otherwise arranged for their test results to be obtained in a timely fashion, no matter how this was accomplished, in order that all employes might be kept in service and operations running without interference from government agencies over employe non-tendering of the required tests. Such actions on the part of the Carrier, which then scapegoated its employes when these matters came to light, are indefensible and properly should have exonerated or heavily mitigated any discipline given the employes.

The timekeeper employe involved with the surrogate testing of record was not made available to testify at the disciplinary investigations, nor was a transcript of his corporate audit interview made available for the record, as it was with respect to the other employes involved and charged in these allied cases. Obviously, his testimony or even that interview transcript would have been material, in terms of either confirming or denying what was otherwise being testified to regarding his role herein. The fact that he was under complete Carrier control and not made available to testify (and that the Carrier possessed his interview transcript and would not so much as provide that in lieu of his testimony) shows that the Carrier had reason to fear or to hide what he would (or did already) say in a recorded forum. Instead of coming clean, the Carrier made sure that this information was hidden from public view to the maximal extent that it could arrange and put all of the blame on its employes, who were simply responding to devil-may-care Carrier mandates in an effort to keep Carrier operations from grinding to a halt over testing issues that the Carrier itself obviously did not take seriously, beyond the threat that if the paperwork was not in order then operations would be threatened.

At the arbitration hearing, the Carrier even introduced evidence in the form of other awards from other boards, showing that these testing issues involved employes from other crafts working in locations further afield from those involved in the instant cases. To the exceedingly likely extent that what is known now does not even capture every case, it is obvious that the Carrier's entire system, spanning many different gangs, crafts and thousands of miles of territory was rife with this Carrier facilitation of compromised testing, even as the Carrier now engages in the cover up and scapegoating operations seen in these eleven (11) cases most obviously. For the Majority to ignore this essential context to these cases and simply impose all of the blame and costs on the employes, as if they operated in a vacuum, is simply beyond the pale.

In terms of these cases, it is required that the employes charged receive fair and impartial investigations before the least discipline is imposed upon them. In these cases, the harshest discipline available was imposed on all of these employes instead, despite their not receiving anything close to the open-ended, objective, all-facts-to-be-uncovered process that is required. So, too, employes can not be disciplined in accordance with "just cause" and well-established arbitral principles, wherein it is plain that they are being disparately punished vis a' vis other Carrier employes who are guilty concerning the same matters, or else when the Carrier has directed, aided and abetted its employes to break the rules rather than scrupulously upheld and maintained them. Either because the employes herein were not accorded their fundamental right to a fair and impartial investigation before the imposition of any valid discipline, or else because the Carrier imposed the ultimate discipline on these employes while completely looking away from the under-the-rock context that fully conditioned these employes to act as they did at the behest of Carrier management, the only possible outcome in arbitration remained the same - a full sustaining of the claims for relief. That the Majority has completely decided these cases the other way - with a complete denial of the claims and associated relief - makes for a very sad occasion, wherein so many long-serving employes whose relatively if not completely discipline-free tenures highlight their well-established propensity for following the rules in contexts where they are not pressured or required to break them by their employer, on pain of being taken out of service, have lost their careers and livelihoods. Clearly, these employes knew how to perform their work safely and in compliance with all applicable regulations and had done so for decades; all that changed herein was the inept implementation of computer testing modules by the Carrier and the subsequent Carrier-directed and enabled fudging of the results therein, in the Carrier's interests of keeping operations going where otherwise governmental intervention might have begun to shut them down and/or impose legal liability.

Here was the appropriate opportunity to not only rectify the wrong done to these employes in these cases, but also to send a public and perhaps somewhat costly signal to the Carrier that its managerial tactics herein will not be tolerated and will result in liability in future cases, too, where it might come to light. Instead, I fear that the Majority's decision herein not only runs

roughshod over essential protections in the Agreement and afforded by black letter labor arbitration principles, but also green lights the Carrier's continued strong-arming of its own now helpless employes, who must choose between violating the rules or being taken immediately out of service, indefinitely, over administrative matters that the Carrier will not take the time to simply fix so that the rules can be followed in the manner that they are supposed to be. As a result of these decisions, there are long-term, good employes having to explain to their families that their careers are suddenly, incomprehensibly and cruelly over, perhaps with some time yet to go to qualify for their retirement, while there are simultaneously Carrier managers that are escaping all liability and managed to put it all upon their employes. This is an entirely wrong result which will reverberate to everyone's detriment, excepting the Carrier's exceedingly narrow and short-term interests. I can only register my dissent and trust that future boards will take heed and not follow the Majority's venture down the rabbit hole leading to a viper's pit, where no employe emerges from again, even as the Carrier's public accountability and status as yet under-the-law are co-casualties.

Finally, I note that the Carrier violated the clear time limits in these cases, which should have voided these investigations and disciplines from the first, even without getting involved in all of the foregoing. The Carrier only argued that because its auditors were involved with the initial investigation, this somehow tolled the Agreement time limits. This, however, is nonsense, for not only did Carrier management yet possess knowledge during this allegedly tolled time frame that would yet be imputed to and count against the Carrier under the Agreement, but it is only a happenstance facet of the Carrier's policy that leads these matters to be referred to auditors to begin with. Certainly, the Carrier cannot endlessly ignore or frustrate its bilaterally negotiated Agreement time frames through the simple unilateral act of instituting an Audit Department that it refers matters to, for resolution on an indefinite time table. Wherein this is sanctioned, the Carrier is allowed to unilaterally arrange its own extrication from bilaterally agreed upon agreements. It is a short step from this to such agreements not only being rendered meaningless but being regularly regarded as such. This, obviously, invites complete disrespect for the agreements made and for the process of enforcing such agreements under the Railway Labor Act (RLA). When trust in RLA processes is lost on such a whole scale basis, industrial peace - the whole reason for being of the RLA - cannot long be maintained.

For all the above-mentioned reasons, it is clear that the Majority erred in rendering its decisions and that these awards are palpably erroneous. Therefore, I respectfully dissent.

Respectfully submitted,

David M. Pascarella

David M. Pascarella
Labor Member