PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance
of Way Employes Division - IBT

and

Union Pacific Railroad Company (former
Chicago and North Western Transportation Company)

Case No: 169
Award No: 169

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) imposed upon Mr. B. Warnke, by letter dated October 1, 2018, in connection with allegations that he violated Rule 1.6 Conduct – Dishonesty, Item 10-I Union Pacific Railroad Policies – Statement of Policy on Ethics and Business Conduct – Critical, Rule 1.13 Reporting and Complying with Instructions and Rule 8.2 Standards and Compliance was excessive, unduly harsh and an abuse of discretion (System File B-1819C-202/1712630 CNW).

2. As a consequence of the violation referred to in Part 1 above, Claimant B. Warnke shall now 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."

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.

Claimant Benton Warnke was employed as a Track Supervisor assigned to Gang 3547 on the date giving rise to this dispute. Claimant worked for the Carrier for approximately twenty (20) years without having suffered any prior discipline. This case concerns the determination that Claimant was dishonest in the completion of Federal Railroad Administration (FRA) Track Inspection reports for the period July 30, 2018 – August 21, 2018. Carrier's Corporate Audit group reviews the reported use of Carrier vehicles and compares the reported use against the assigned vehicle operator's reported work activities. An Audit report of Claimant's assigned vehicle noted possible discrepancies in Claimant's FRA track inspections reporting from July 30, 2018 – August 21, 2018. Corporate Audit investigated these discrepancies and determined Claimant could not have completed FRA track inspections, as reported, utilizing his assigned vehicle.

The record reflects that Corporate Audit compiled this information and presented its report to Engineering on September 12, 2018. By letter dated September 14, 2018, the Carrier directed the Claimant to report for a formal investigation alleging that, on August 21, 2018, the Claimant was allegedly dishonest in completing an FRA track inspection for the period of July 30, 2018 to August 21, 2018.

On September 21, 2018, the Carrier convened a formal investigation. By letter dated October 1, 2018, the Carrier informed Claimant that he was found guilty of violating Rule 1.6 Conduct – Dishonesty, Item 10-I Union Pacific Railroad Policies – Statement of Policy on Ethics and Business Conduct – Critical, Carrier Rule 1.13: Reporting and Complying with Instructions and Rule 8.2: Standards and Compliance. Claimant was assessed an immediate dismissal from the Carrier's service.

By letter dated October 11, 2018, the Organization presented an appeal to the Carrier and asserted that it failed to provide the Claimant with a fair and impartial hearing; failed to meet its burden of proof; and that the discipline was arbitrary and unwarranted. By letter dated December 10, 2018, the Carrier denied the Organization's appeal. Subsequently, the dispute was progressed in the ordinary and usual manner through the contractual on-property process and the matter now comes before this Board for final adjudication.

The Organization maintains, the Carrier violated Claimant's disciplinary investigation rights in several ways, which denied Claimant the fair and impartial investigation that he is required to receive before any valid discipline can be imposed. In this respect, the Carrier:

- violated the time limits under Rule 19 of the Agreement by not holding the investigation within those limits, where Rule 19, in relevant part, requires that "…[t]he hearing shall be held within ten (10) calendar days of the alleged offense or within ten (10) calendar days of the date the Carrier has

knowledge of the occurrence to be investigated…" and herein the alleged incident happened on August 21, 2018 and the Carrier's first knowledge was admittedly had by September 7, 2018 at the latest, with the hearing not being held until September 21, 2018;

- denied a request for material witnesses to testify at the investigation;

- propounded vague charges in its notice of investigation (which vague charges made it impossible for the Organization to fully prepare Claimant's defense concerning material, substantive matters);

- countenanced charging and hearing officer contact with witnesses before and during the hearing, outside of the presence of others (see, dispositively in this regard, National Railroad Adjustment Board (NRAB) Third Division 41224);

- removed Claimant from service before his investigation was even held, let alone resolved;

- retaliated against Claimant for his voiced concerns regarding a co-worker's suicide, in face of management bullying (with the Carrier never producing the merely alleged "values line" complaint that it otherwise suggested was the origin of this disciplinary action), and

- violated Rule 21 of the Agreement when it failed to respond to the Organization official due response in the midst of the on-property claims handling, instead responding to another Organizational official altogether, contrary to the rule's requirements that "*** If any such claim or grievance is disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented…."

The Carrier argues Claimant's conduct regarding his track inspections and reporting violated the rules and policy, as charged. Claimant received a fair and impartial hearing with no procedural violations. His dismissal was proper in light of the seriousness of the offenses and is consistent with the treatment of all other employees engaged in similar conduct. Claimant's conduct destroyed his employment relationship as well as Carrier's confidence and trust in him. It remains Carrier's position that there is no basis to overturn the discipline imposed.

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. The Board's role is an appellate function. It must be determined whether substantial evidence to sustain a finding of guilt exists. If such evidence is in the record, the Board may not disturb the discipline imposed unless it can be said that the penalty was arbitrary, capricious or an abuse of the Carrier's discretion. A careful review of the record convinces the Board that the Carrier provided sufficient evidence to prove the charges and there are no procedural deficiencies that warrant overturning the discipline.

Specifically, there is no Rule 19 violation. Rule 19 (Discipline) Section A. states, in relevant part, that "[a]ny employee who has been in service in excess of sixty (60) calendar days shall not be disciplined nor dismissed without a fair and impartial hearing. *He may, however, be held out of service pending such hearing*." (Emphasis added). Claimant was removed from service pending the investigation as was the Carrier's right. There is no evidence in the record that he was treated differently than any other employee in this regard.

Next, the investigation hearing was held within the requisite timeframe. Rule 19 requires that a hearing "be held within ten (10) calendar days of the alleged offense or within ten (10) calendar days of the date the Carrier has knowledge of the occurrence to be investigated." In this case, Claimant testified that he had a discussion with the charging manager about the audit concerns during the first week of September 2018 but could not recall the exact date. The Organization recognizes that the conversation between Claimant and the charging manager occurred September 7, 2018, at the latest. Without competent evidence of the exact date the conversation took place, it is reasonable to use September 7 as the point in time that the audit review was under way. However, the Carrier contends that the actual full analysis of the audit was not completed until September 12. The period between September 7 and 12 included a weekend. It was reasonable that it took three (3) business days to complete the analysis and arrive at the conclusion of a work rule violation. The notice of investigation was issued two (2) days later and the investigation was held nine (9) days later on September 21. Thus, the investigation was held in a timely manner.

With respect to the notice of the charges, the Board finds no violation. The charges were clear and apprised Claimant of the allegation that he had been "dishonest in completing Federal Railroad Administration Track Inspection for the period of July 30, 2018 to August 21, 2018." Thereafter, the Carrier rules at issue were cited. The notice reflects that Claimant was provided with the nature of the offense; specific dates of occurrences; the relevant rules; and the alleged misconduct of dishonesty in completing reports. The notice was clear.

There is no evidence that Claimant was denied the right to have witnesses at the hearing. Claimant was specifically given an opportunity during the investigation to bring in witnesses to corroborate his testimony about what had occurred on the dates in question. After testifying that he was traveling with co-workers, the Conducting Manager afforded Claimant the chance to contact witnesses that had relevant testimony to offer. Claimant chose not to take this opportunity to contact any witnesses that could support his testimony. Additionally, previous boards have held that there is no right to pre-investigation discovery. (PLB 6470, Award No. 5; PLB 7529, Award No. 1). Claimant was given an opportunity to review documents along with his representative during the hearing. Thus, no due process violations were established concerning Claimant's right to witnesses or information.

Further, the Board finds no impropriety with respect to the conduct of Carrier witnesses prior to or during the hearing. The record reflects that there was discussion about the reports to be submitted during the investigation between witness J.L. Pospisil who prepared the audit reports and the charging manager, J.A. Cheney. Both individuals were Carrier witnesses. There is nothing unusual about witnesses preparing for an investigation hearing especially where, as in this case, the information Cheney relied upon in formulating the charges was provided by Pospisil. Similarly, the Board finds the Organization's claim that witness B.R. Hamilton and hearing Conducting Manager M.R. Albrecht engaged in *ex parte* communication during the hearing is unfounded. The Organization's claim is speculative that Albrecht was communicating with Hamilton because Albrecht was on his phone and Hamilton began running reports during the hearing. The implication is that Albrecht was texting with Hamilton. There is no evidence of such communication in the record and any conclusion that there was communication between them is entirely speculative. In sum, the Board finds no violation of Rule 19.

The Organization also contends that the Carrier violated Rule 21(Time Limit on Claims) of the Agreement when, in responding to the claim, the Carrier sent the letter to the General Chairman instead of the Vice Chairman who had filed the claim. Rule 21, Section A. states, in relevant part, that "[i]f any such claim or grievance is disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (*the employee or his representative*) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented…." (Emphasis added).

In this case, the Organization submitted the claim on the letterhead of the General Chairman under the Vice Chairman's signature. That aside, the rule contains the agreed upon options the Carrier has when responding to a claim. The response shall go to the employee, if he or she filed the claim, or it should go to the employee's representative if the representative filed the claim. In this case, the claim was filed by the representative (the Organization) and the response was sent to the representative. To interpret Rule 21 to mean the exact person that filed the claim within the Organization needed to receive the

response is a hyper-technical interpretation of the rule. The Organization was on notice of the response. It defies logic to conclude that the parties intended what amounts to, at the most, a clerical error to be fatal to the Carrier's ability to impose discipline. Claimant was not prejudiced in any way as a result of the response being addressed to the General Chairman. Accordingly, the Board finds no violation of Rule 21.

On the merits, dishonesty, especially in connection with the completion of track inspections, is a very serious safety-related offense. Claimant entered multiple occurrences of false information over a 3-week period. Given these facts, it cannot be stated that the penalty was arbitrary, capricious or an abuse of the Carrier's discretion. On Claimant's defense of retaliation, the Board finds insufficient evidence to support this claim.

AWARD

Claim denied.

Jeanne Charles
Neutral Member

William Ince
Carrier Member
Dated: March 30, 2021

David M. Pascarella
Labor Member
Dated: March 30, 2021
DISSENT ATTACHED

EMPLOYE MEMBER'S DISSENT

TO

AWARD 169 OF PUBLIC LAW BOARD NO. 7660

(Referee Jeanne Charles)

I write to respectfully register my dissent to the above-referenced award. A dissent is required because the Majority erred in ignoring a clear Carrier Agreement violation that would have been an absolute bar to the investigation and then discipline of the employe involved, who was dismissed from service after a twenty (20) year career that had been discipline-free up to this point.

In this respect, I note that the Carrier violated the clear time limits in this case, which should have voided the investigation and thus the discipline from the first. The Carrier only argued that because its auditors were involved before the formal investigation was scheduled and had, this somehow tolled the Agreement time limits regarding the holding of the formal investigation. This, however, is not and should not be the case, 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 facet of the Carrier's policy to refer such matters to its auditors. 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 arbitral process of enforcing such agreements under the Railway Labor Act (RLA). When trust in RLA arbitral processes is lost on such a whole scale basis, industrial peace - the whole reason for being of the RLA - cannot long be maintained.

Rule 19, in relevant part, requires that "*** The hearing shall be held within ten (10) calendar days of the alleged offense or within ten (10) calendar days of the date the Carrier has knowledge of the occurrence to be investigated. ***" Herein, the alleged incident happened on August 21, 2018 and the Carrier's first knowledge was admittedly had by September 7, 2018 at the latest, with the hearing not being held until September 21, 2018. The Carrier is free to conduct whatever internal processes it deems advisable, of course, but it is not free to have those processes excuse its non-compliance with Agreement requirements, including time limits. In this case, the allegation is that the Carrier's auditors were not concluded with their review until September 12, 2018 and, thus, using this date as the basis for Carrier "knowledge" triggering the running of the time limits under Rule 19, a September 21, 2018 hearing was within the ten (10) calendar day limit. Rule 19, however, only requires "*** knowledge of the occurrence to be investigated. ***" In other words, the Carrier's "knowledge" does not only ripen when they have finished with their internal fact-checking to their own satisfaction that there is enough evidence to go forward with an investigation on charges; rather, the Rule 19 time limits begin running as soon as the Carrier has "knowledge" of a mere "occurrence" to be further "investigated".

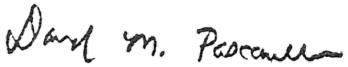
This further investigation can take place before the formal investigation would have to be had, and/or it can take place at the formal investigation, but the further investigation cannot indefinitely suspend the Agreement time limits for the formal investigation, if one is to be had. The Carrier is free to engage in bargaining with the Organization if it desires more time than ten (10) days to bring an employe to a formal investigation, or if it desires a tolling of the ten (10) day time limit in order for it to have recourse to internal auditors reviewing some or all of the disciplinary matters it might seek to issue charges and have a formal investigation upon. What the Carrier cannot properly seek is to win these concessions through arbitration in place of having bargained for these allowances, which are much more generous than Rule 19 currently provides for, with the clear text of the rule not being susceptible of the perfectly elastic manipulation employed by the Carrier in this case. The Majority in this case should not have enabled this Carrier voiding of the deal it made regarding Rule 19, without bargaining in good faith for such a sought after change. One can only imagine the response if the Organization formed its own internal audit resources to toll its currently time limited obligations under the Agreement, until it was unilaterally satisfied that it would move forward. It is easy to see how if this were also allowed, the entire Agreement could be made meaningless, simply through employing dueling audit committees to determine the meaning of matters under the Agreement in alternatively unilateral ways. The bilaterally negotiated language of the Agreement simply cannot be allowed to be given unilaterally-arrived at meanings that are nowhere reasonably suggested by the Agreement language itself.

Here, the Carrier only needed to have "knowledge" of an "occurrence" that invited possible or desired further investigation - at that point, before such possible or desired further investigation took place, the Rule 19 ten (10) calendar days to hold a formal disciplinary hearing started to run. The Carrier, by admission of its own official at the formal investigation and even as noted in this award had this "knowledge" of a mere "occurrence" which invited further possible or desired investigation by September 7, 2018 - at the very latest. Ten (10) calendar days therefrom was September 17, 2018, but hearing was not scheduled and held until September 21, 2018. This was not even a close miss, if that mattered (which it does not), and the auditors of the Carrier were not to be given an additional allowance for weekend days not being held against them (as the award gives them), for Rule 19 of the Agreement clearly counts days on a "calendar day" and not a "business day" basis. As such, the arbitral allowance given the Carrier herein, extending their Agreement time limits by forty percent (40%), was clearly only arrived at by running roughshod over the clear Agreement language of Rule 19, which explicitly did not toll time limits on weekend/non-business days but, rather, counted all "calendar" days indiscriminately, starting from mere knowledge of an occurrence inviting further investigation, rather than only starting from knowledge confirmed or certified by further, exhaustively competed investigation, to the Carrier's whimsical satisfaction.

National Railroad Adjustment Board Third Division Awards 41708 and 44312 are just a couple of the awards in this industry that soundly decline the carriers' invitations to make time limits unenforceable against them, via the mechanism of allowing them to conduct some sort of indefinitely suspended internal investigation, whether involving another of their departments or not, in defiance of their collective bargaining agreement obligations that set the time limit clock running against them, without unbargained-for hiatus or cessation, as soon as any knowledge of a possible offense is acquired.

For all of these reasons, I must dissent and consider that the award, at least regarding the Rule 19 time limit issue if not others besides, is clearly erroneous and should not be granted any deference or precedential or persuasive value, going forward.

Respectfully submitted,



David M. Pascarella
Employe Member