

PUBLIC LAW BOARD NO. 7660

Brotherhood of Maintenance
of Way Employees Division - IBT

and

Union Pacific Railroad Company

Case No: 171
Award No: 171

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) confirmed upon Mr. H. Toledo, by letter dated February 6, 2019, in connection with allegations that he violated Rule 48L of the Agreement was excessive, unduly harsh and an abuse of discretion (System File A-1948U-001/1719639 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant H. Toledo 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 as a result; and, the alleged charge(s) be expunged from his personal record. Claimant must be made whole for any and all loss of Railroad 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.

Harris Toledo (Claimant) was a 35-year employee at the time of his termination. On December 20, 2018, Claimant was employed as a System Jackson 6700 Tamper Operator assigned to Gang 8840 in Messex, Colorado. The record reflects no disciplinary history prior to the incident in question. On the day in question, Claimant was scheduled to work a 10-hour day from 6:00 a.m. until 4:30 p.m. The Carrier alleged that Claimant voluntarily left Carrier property, without proper authority, at 2:00 p.m.

By letter dated January 11, 2019, the Carrier informed Claimant that due to leaving work early without permission, his actions resulted in a forfeiture of seniority in accordance with Rule 48(l) of the Agreement. The Claimant submitted a timely request for a hearing on the matter in accordance with the Agreement.

A show cause hearing was convened on January 17, 2019. By letter dated February 6, 2019, the Carrier informed Claimant that he was found guilty of voluntarily leaving his work site without proper authority. Consequently, termination of employment was upheld under the provisions of Rule 48.

By letter dated March 18, 2019, the Organization filed a claim. 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. The parties were unable to resolve the dispute on property. The matter now comes before this Board for final adjudication.

The Carrier maintains that it met its burden of proof and no procedural errors justify overturning the decision to dismiss the Claimant. Rule 48(l) is a self-executing rule that applies when an employee voluntarily leaves his work site without proper authority. Additionally, Claimant's defense that he needed to get to his daughter who was a new mother during inclement weather was "noble" but unacceptable. The Organization's allegation that Claimant was told by his foreman that he could leave work early on December 20, 2018 is unsupported by the testimony and is irrelevant. Claimant's foreman did not have proper authority to permit Claimant to leave the work site before the completion of the work shift. Claimant and the other members of Gang 8840 claimed a full ten hours pay for December 20, 2018. Further, the dismissal was not unreasonably harsh. Claimant voluntarily forfeited his seniority rights and employment relationship. Dismissal is the prescribed discipline for voluntarily leaving the work site without proper authority.

The Organization argues that the evidentiary record simply does not establish that Claimant violated the charged rules. The burden of proof in this case still resides with the Carrier through an investigation that must be fair and impartial. Rule 48(l) of the Agreement allows the Carrier to declare an employee dismissed and imposes the obligation on the Claimant/Organization to request an investigation, but otherwise does not change the Carrier's obligation to conduct that investigation fairly and impartially and to find adequate evidence of guilt to sustain any action against an employee. Even under Rule 48(l), the Carrier is still required to meet the same just cause standard for non-Rule 48(l) cases. The Carrier has failed to carry essential elements of its burden of proof. The Carrier did not refute Claimant's contention that the foreman gave him permission to leave early and did not establish that a foreman cannot give such permission. Finally, the discipline imposed by the Carrier was arbitrary and unwarranted. It is a well-settled notion that discipline is to be progressive rather than punitive in nature. It is undisputed

that the Claimant has worked for the Carrier for some 35 years without any prior disciplinary problem involving this sort of issue. The penalty was extremely harsh and is inconsistent with Award 119 issued by this Board. Based on these violations, the discipline must be overturned, and the requested remedy afforded.

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, there is insufficient evidence to support Claimant's permanent dismissal. While Rule 48(1) is a self-executing rule, it is a procedural rule that requires the employee to request an investigation hearing instead of a hearing being initiated by the Carrier. It is the employee's burden during the investigation hearing to establish that he or she did not voluntarily leave or was authorized to leave the work site. If the Carrier concludes the employee's defense is not justified, the Agreement still requires just cause to terminate employment. As noted in Award 102 of this Board, "the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion." (PLB 7660 Award No. 102). Rule 48(1) states:

Employees need not to be granted a hearing prior to dismissal in instances where they refused to work, voluntarily leaving the worksite without proper authority or involuntarily leave their jobs as a result of apprehension by civil authorities, willfully engage in violence or deliberately destroy Company property. Such employees may, however, make request for a hearing relative to their dismissal, and request therefore must be made within (14) calendar days from the date of removal from service.

In this case, the Carrier proved that Claimant committed the offense of leaving work without authorization. However, under the circumstances presented, the Carrier failed to prove that dismissal was for just cause. Claimant admitted that he left the worksite about two (2) hours early without permission. He was also paid for a full day which he did not work. Thus, proof of the offense has been established. Next, the question becomes whether dismissal was the appropriate penalty. Based on the record before this Board, we are convinced that while the Carrier has the right to expect employees to work a full day for a full day's pay, the penalty of dismissal was too severe.

The purpose of discipline is to correct an employee's conduct. The penalty of dismissal is reserved for those circumstances where it is clear that an employee cannot be rehabilitated or that the offense is so serious in the first instance the employment relationship must be severed. Here, Claimant admitted to his offense. He was motivated by a desire to help with a family emergency. Significantly, he was a 35-year employee with an unblemished record. He was remorseful and there is no indication that Claimant

cannot learn from this experience and be compliant with the work rules going forward. It was unreasonable to terminate Claimant's employment under these circumstances. However, Claimant must be held accountable for his violation of the rules. Accordingly, the Organization's claim is sustained, in part. Claimant shall be reinstated with time served and placed at MAPS 1 with a 24-month review period. The discharge shall not remain on Claimant's personal record. No back pay shall be awarded pursuant to this claim.

AWARD:

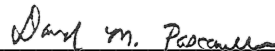
1. Claim sustained, in part and in accordance with the Findings above.
2. Claimant shall be reinstated with time served and placed at MAPS 1 with a 24-month review period.
3. The discharge shall not remain on Claimant's personal record.
4. No back pay shall be awarded pursuant to this claim.
5. The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.



Jeanne Charles
Neutral Member



William Ince
Carrier Member
Dated: March 30, 2021



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