

PUBLIC LAW BOARD NO. 7660
AWARD NO. 174

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) imposed upon Mr. Z. Davidson, by letter dated March 20, 2019, in connection with allegations that he violated Rules 1.6: Conduct – Dishonest; Rule 74.2 Driver Requirements and 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. Was excessive, arbitrary, disparate, imposed without affording the Claimant due process, without the Carrier having met its burden of proof and in violation of the Agreement (System File JN-1948U-403/1719765 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant Z. Davidson shall ‘... now be made whole by compensating him for all wage and benefit loss suffered by him for his termination. We also request the alleged charges be expunged from his personal record.’ (Employees’ 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.

Claimant has been employed by the Carrier for 7 years and worked as a Division Truck Driver in Spokane Valley, WA at the time of the incident in question. Claimant received a Notice of Investigation dated February 12, 2019, advising him that he was

charged with tampering with safety devices in two trucks by removing or disabling the fuses for the drive cams. The Investigation was held on February 28, 2019, and Claimant was served with a Notice of Discipline Assessed dated March 20, 2019, finding him guilty of the charges in violation of Rules 1.6 (4) (Dishonest), and 74.2(C) Driver Requirements. Claimant was dismissed from service. This claim protests such action.

The record reveals that Director Rubino received an anonymous text indicating that Claimant had tampered with the drive cams in 2 vehicles - trucks 48663 and 46521. He asked Claimant's supervisor, Keyes, to investigate. Keyes checked both vehicles and found the cameras were not working. He testified that you need to unscrew and remove the kick plate panel to get to the fusable link, and that force is needed to pull out the fuse, which would not fall out itself. The vehicles were brought to the shop for diagnosis and repairs. Keyes pointed out that the mechanics notes for truck 48663 say that the fuse links in the camera system appeared to have been tampered with, the main power fuse had been removed and the screws that held the panels were left on the floor, and that the fuse for the main ground to unit 46521 appeared to be installed faulty, and looked to be tampered with. Keyes confirmed that he spoke with the mechanic about his findings. Keyes checked the paperwork and found that each truck had last been driven by Claimant. He questioned employees who drove the trucks and one indicated that Claimant told him that he had removed the fuses from the cameras.

At the investigation, driver King testified that he bumped onto the backhoe (transported by 48663) on January 18 and that Claimant told him on January 19 that he had messed with the fuses on the drive camera so it didn't work anymore. Claimant denied saying this, noting that January 19 was a Saturday and he does not work weekends. King replied that he meant Monday, January 21. Driver Watkins testified that the camera on truck 46521 was working when he was bumped by Claimant on January 21. Claimant

denied tampering with the camera on either truck, indicating that he did not know where the fuse box was located before speaking with the mechanics. He stated that he was not familiar with the operation of the camera or which fuse to pull to disarm it. He and King acknowledged that employees did not want cameras installed, and at that time, some joked around about blocking or covering them. Keyes acknowledged that there was no specific training on the use of the camera, which operates automatically when the truck is running.

There were no witnesses to Claimant tampering with the fuses. The record reveals that the keys for the vehicles are kept in the MOW office, which is accessible to all employees, and that the compound where the trucks are kept is not secure, and that there had been some vandalism and theft in the area at that time. When viewing the photos of the fuse box areas on these trucks, Claimant indicated that he believed there was evidence of some vandalism with what he believed to be an edge of the plastic housing being broken off. Keyes shared the findings of his investigation with Rubino, who decided to remove Claimant from service pending the results of the investigation. Keyes explained that the Rule 1.6(4) dishonesty charge is based solely on Claimant's denial of tampering with the fuses/cameras during his questioning in the investigation.

The Carrier argues that Claimant received a fair and impartial hearing, and that the charges against him were proven by substantial evidence. It asserts that the discipline issued was warranted and in line with the seriousness of the safety-related offenses. The Organization contends that the Carrier failed to meet its burden of proving the charges against Claimant by substantial evidence, noting that there was no direct evidence that Claimant tampered with the cameras, and only an anonymous text message (which is admittedly rare) to be weighed against Claimant's consistent denials. It notes that the environment where the trucks were kept was not secure, the keys were easily accessible to all, and that there had been vandalism and theft in that area at that time. The Organization

points out that the dishonesty charge, used to support the dismissal penalty, was based totally upon Claimant's denial of wrongdoing when he was questioned during the investigation, which is insufficient to support such a serious allegation in light of the absence of any direct evidence of fault on his part. It relies on the fact that the one witness who came to testify about what Claimant allegedly told him, and wrote a statement to that effect at the time, attributed a comment to Claimant when he was not even on the property or at work. The Organization argues that the penalty assessed was arbitrary and unwarranted, unduly harsh and excessive.

On the basis of the entire record, the Board concludes that the Carrier has failed to meet its burden of proving a violation of either cited charge by substantial evidence, which, as Carrier points out, has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. See, e.g. Third Division Award 28330. While the record supports the conclusion that the drive cams on both cited vehicles, which Claimant had driven proximate to the discovery, were not functioning, and may well have been tampered with, it falls far short of proving, by substantial evidence, that it was Claimant that actually tampered with them.

No one witnessed him doing so, and he consistently denied not only tampering with the cameras, but knowing where they were actually located and which fuse was necessary to remove in order to disable the camera. While King testified that Claimant told him he had messed with the fuse on truck 48663, which Claimant denied, his evidence during the investigation was that this conversation occurred on January 19, which was a Saturday when Claimant was not at work. While it is possible that he got the date wrong and meant January 21, as he clarified in his testimony, his written statement was submitted shortly after the incident, when the timing was fresh in his mind. This direct evidence about a disputed conversation hardly rises to the level of substantial evidence required for the

Board to sustain the Rule 74.2(C) charge prohibiting employees from tampering with a monitoring device. This is especially true in a situation where there was no security of either the vehicles or the compound where they were located, enabling anyone to have access to the keys to the vehicles. It was admitted that vandalism and theft occurred in this area during this time period. Thus, Claimant's assignments to the two vehicles in question is an insufficient basis upon which to place the blame on him.

Having so found, the Board is also unable to find support in the record for the Rule 1.6(4) Dishonesty charge. That charge was admittedly based upon Keyes' and Rubino's belief that Claimant had tampered with the cameras, and they concluded that his denial was dishonest. Since the evidence relied upon by the Managers is found not to be sufficiently substantial to prove Claimant's guilt, his denial during the investigation similarly cannot support proof of his dishonesty. Under the circumstances of this case, the Board must conclude that the Carrier failed to sustain the charges against Claimant, and that he should be made whole for lost wages and benefits, less interim earnings. The assessed charges shall be expunged and his personal record shall not contain any MAPS status pertaining to this matter.

AWARD:

The claim is sustained in accordance with the Findings. The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.

Margo R Newman

Margo R. Newman
Neutral Chairperson

Chris Bogenreif

Christopher Bogenreif
Carrier Member

John Schlismann

John Schlismann
Employee Member

Dated: March 31, 2022

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