

PUBLIC LAW BOARD NO. 7660
AWARD NO. 180

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. G. Zink, by letter dated April 16, 2019, in connection with allegations that he failed to comply with Rule 7.8.6 which contributed to the derailment of twenty-two (22) cars was a violation of Rule 1.6: Conduct - Negligent and the part that reads ‘.. 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.’ (Employees’ Exhibit ‘A-1’), was excessive, arbitrary, disparate, imposed without due process; without the Carrier having met its burden of proof; and in violation of the Agreement (System File A-1748U-008/1721763 UPS).

2. As a consequence of the violation referred to in Part (1) above, Claimant G. Zink shall now be ‘....made whole by compensating him for all wages and benefit losses suffered by him for his employment termination; and all expenses incurred or lost as a result, and the alleged charge(s) be expunged from his personal record. Claimant must also be made whole for any and all loss of Railroad Retirement credit month and any other loss.’ (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 15 years and was working as a Track Inspector on the South Morrill Subdivision on the date in issue. Claimant received a Notice of Investigation dated March 12, 2019, advising him that he was charged with failing to comply with Track Maintenance Field Handbook 7.8.6 contributing to the derailment of 22 cars on March 6, 2019. He was removed from service pending the results of the Investigation, which was held on March 28, 2019. Therein it was agreed that the date in issue was March 5, not March 6 as cited in the Notice of Investigation. Claimant was served with a Notice of Discipline Assessed dated April 16, 2019, finding him guilty of the charges in violation of Rules 1.6 Conduct - Negligent. He was issued a dismissal based on the nature and seriousness of the violation and his "current record." This claim protests such action.

The record reveals that there was a derailment near MP 76.45 on March 4, which was worked on by a crew and completed prior to the time that Claimant came on duty as the Track Inspector/EIC on March 5. Charging Officer Schweitzer testified that he left the first derailment site at around 6:30 a.m., and was not present for the second derailment occurring at the same location around 1:30 p.m. on March 5. He agreed that a F1 slow / compaction order should have been put out by the person in charge of the first derailment, and that Claimant should have been made aware of the situation in a job briefing. Schweitzer admitted that neither of those things occurred. He noted that the

person Claimant relieved told the Director of Track Maintenance that he knew of a track condition (loose ties) which was not relayed to Claimant.

Claimant testified that when he reported to work and took over the Form B (flagging), used to protect men and equipment from passing trains on adjacent tracks, he assumed a compaction order would have been issued, if needed. He stated that since it did not come up on the bulletins, he proceeded to issue the Form A in compliance with Rule 7.8.8, Restrictions for Track Panel Installations, which places a 25 m.p.h. speed limit through the area, but does not require reduced speeds a quarter of a mile in each direction of the area, which falls under Rule 7.8.6, Speed Restriction Length for Disturbed Track. Claimant allowed 4-5 westbound trains to pass through the limits, and at around 1:30 p.m. called the first eastbound train through at 25 m.p.h. He stated that as the train got half way through the area it started to sway, resulting in another derailment. Claimant opined that it was probably caused by the change in temperature of the rail between when it was placed (very cold), and when it warmed up and expanded, resulting in it buckling under the load. Claimant testified that he fulfilled his Form B responsibilities, and that what should have occurred before he got to work and did not is not his fault.

The Carrier contends that Claimant received a fair and impartial hearing. It argues that the negligence charge against Claimant was proven by substantial evidence, as his actions resulted in a derailment, and could have caused other serious safety issues. The Carrier asserts that the egregious nature of the conduct supports the penalty, noting that Rule 1.6 indicates that any act of negligence is a valid basis for dismissal.

The Organization initially argues that Claimant was denied his due process right to a fair and impartial hearing, since the Carrier improperly expanded the charges and the decision was made by someone other than the Hearing Officer. It contends that the

Carrier failed to meet its burden of proving that Claimant was either negligent or violated Rule 7.8.6, which was not relevant under the circumstances that Claimant found himself in. Finally, the Organization contends that no basis for discipline was established, and that the penalty of dismissal was arbitrary, excessive and unwarranted considering the multiple mitigating factors reducing Claimant's culpability in this case.

On the basis of the entire record, the Board concludes that Claimant received a fair and impartial hearing, but that the Carrier failed to meet its burden of proving the charges against him. It is clear that the Charging Officer, who was not present during the second derailment incident to ascertain Claimant's responsibility for it, made certain assumptions about what Claimant should have known and done based upon the Charging Officer's experience with the first derailment. He was the only witness testifying on behalf of the charges, and he was forced to admit that Claimant was not the individual who would have been responsible for placing a compaction order on the newly constructed track, or for knowing of the track disturbance which had not been communicated to him by the prior EIC, since there was no written information Claimant could have seen about this when he took over the Form B on March 5, 2019. Thus, any violation of Rule 7.8.6, which provides for speed limitations approaching the track in situations of disturbed track, was not properly attributable to Claimant. Neither was the resulting derailment. Since the basis for Claimant's negligence charge under Rule 1.6, which is the justification for his dismissal, stems from this cited Rule violation, the conclusion of negligence on Claimant's part cannot stand.

Therefore, the claim for a make whole remedy is granted, including reinstatement and back pay at Claimant's regular straight time wage rate, less interim earnings, and appropriate Railroad Retirement credit. Claimant shall be returned to work at whatever status in the MAPS program he was when he was dismissed, with credit given for the time he has been out of work. The discipline shall be expunged from Claimant's record.

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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