

PUBLIC LAW BOARD NO. 7660
AWARD NO. 184

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. J. Rogers, by letter dated August 8, 2019, in connection with allegations that he violated Rules 1.6: Conduct - Immoral 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 affording the Claimant due process, with the Carrier having met its burden of proof and in violation of the Agreement (System File JN-1948U-408/1726396 UPS).

2. As a consequence of the violation referred to in Part (1) above, Claimant J. Rogers 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 9 years and worked as a Section Foreman in Grand Junction, CO at the relevant time. Claimant received a Notice of Investigation dated July 12, 2019, advising him that he was charged with admitting to stealing company property on July 1, 2019. The Investigation was held on July 25, 2019, and Claimant was served with a Notice of Discipline Assessed dated August 8, 2019, finding him guilty of the charges in violation of Rule 1.6 Conduct - (5) Immoral. He was issued a dismissal based on the nature and seriousness of the violation. This claim protests such action.

As a result of a report from Claimant's ex-wife, Special Agent Schmitt was assigned on April 1, 2019 to investigate the allegation of wire theft by Claimant. He first met with, and obtained a statement and copies of some 2015 text messages allegedly between Claimant and another Signal employee provided by Claimant's wife, and then conducted an interview with Claimant on April 17, 2019. Schmitt testified at the investigation that when Claimant was shown the text messages, he admitted that the Signaller put scrap wire in a dumpster and he retrieved it and took it to a scrap place out of town, on only one occasion years earlier, and that he received money for this which he did not report to the Carrier. Claimant stated that there was no policy that he was aware of concerning what to do with excess wire, and he had been directed by his bosses in the past to take it to a scrapper in town. He also acknowledged that people had taken scrap wire to bins and recyclers. Claimant asserted that he was not being dishonest and was unaware of any rule or procedure that he was violating. He noted that when he worked in the Signal Department prior to 2015 it was a more common practice to do recycling of wire.

Special Agent Schmitt testified that immediately after his interview of Claimant on April 17, he contacted Claimant's supervisor, Manager of Track Maintenance Jones, and informed him of the content of the interview and Claimant's admission. He also noted that at some point during the investigation, the procedure of his office changed to only notify Corporate Audit, not the manager of the employee directly. Schmitt also testified that when he asked for a policy concerning scrap wire during the investigation, none was given to him, and that it was not until a week prior to this investigation that he was given what he was told was a current policy. He also confirmed that much of what Claimant's ex-wife alleged was found to be false, she was attempting to build a case against Claimant due to their domestic situation, and that she was doing so in violation of a court order for her not to contact Claimant's employer. No criminal referral was made. Jones testified that, based on their 5 years of working together, he found Claimant to be an excellent employee, not dishonest, loyal and of good character. He stated that he was instructed on July 1 by his Manager to remove Claimant from service and charge him with dishonesty and immorality, which he did.

The Carrier contends that Claimant's admission of dishonesty by taking scrap wire and selling it to a scrapper and keeping the proceeds satisfies its burden of proving that he violated Rule 1.6 - immoral - by substantial evidence. It asserts that Claimant was timely charged since it did not have knowledge of the investigation findings until July 1, 2019, and that he was given a fair and impartial hearing. The Carrier notes the seriousness of the infraction and avers that the dismissal is in line with the penalty set forth in the Rule, Carrier's UPGRADE policy, and precedent upholding dismissal as the appropriate penalty for dishonesty regardless of length of service. It points out that Claimant's Signalman co-conspirator was found guilty of the same charge and his dismissal was upheld in PLB 6459, Award 137.

The Organization initially argues that Carrier violated Rule 48(a) by failing to hold a hearing within 30 days from the date the Company had knowledge of the occurrence to be investigated, which, at the latest was April 17 when Jones was informed by Special Agent Schmitt of Claimant's admission. It contends that precedent establishes that the time limits must be complied with, and that failure to do so results in dismissing the charges, citing e.g. Third Division Award 37451. The Organization also maintains that Claimant's due process rights were violated by the Carrier failing to present Claimant's ex-wife at the investigation to be cross-examined, making all of the allegations upon which the charges were based hearsay.

The Organization asserts that the Carrier failed to meet its burden of proving that Claimant was guilty of the charge of immorality, since it provided no evidence of such and did not charge Claimant with dishonesty or a violation of any known or cited policy prohibiting removing scrap wire from a dumpster. It contends that the discipline assessed was arbitrary and unwarranted, since without charging Claimant with dishonesty, it relied upon such conduct as proof of immorality. The Organization argues that this is not a classic dishonesty case which has been found to merit dismissal, but, rather, a long ago incident where Claimant took wire from a dumpster and brought it to a scrap dealer, which he had done previously at his supervisor's instruction. It alleges that the discipline was excessively harsh and arbitrary, especially considering that Claimant's own supervisor thought there was nothing to act on between his knowledge of what had occurred on April 17 and when he was directed by higher management to charge Claimant and remove him from service on July 1. The Organization believes that Claimant should be returned to work and made whole.

Initially we will address the Organization's assertion that the Carrier violated Claimant's due process rights by failing to hold a timely investigation as required by Rule 48(a). While Carrier claims not to have had knowledge of the specifics of the incident

until July 1, Special Agent Schmitt testified, and his written notes confirm, that he contacted Claimant's supervisor, Manager of Track Maintenance Jones, on April 17, 2019 shortly after questioning Claimant, and informed him of the allegations as well as Claimant's admission that he took wire from a dumpster and sold it to a scrap dealer for his own profit. Jones neither saw fit to question or charge Claimant, or to pass on this information to his superiors at the time. He made clear that he only charged and removed Claimant from service at his Manager's instruction. There is no explanation for the delay in charging Claimant. Even if it had to do with the subsequent investigation of the Signalman, which resulted in notice to Corporate Audit on June 11, the fact remains that Claimant was not charged until July 12, and the hearing was not held until July 25, 2019. Rule 48(a) requires that the hearing be held within 30 calendar days from the date the Company has knowledge of the occurrence to be investigated. The precedent in this industry establishes that clearly specified time limits within an agreement must be strictly enforced, and that failure to do so will result in the disciplinary action being set aside. See, e.g. Third Division Awards 23553, 24623, 37451.

In this case the conclusion is inescapable that a Manager of Track Maintenance had knowledge of the occurrence under investigation by the Special Agent on April 17, and made a conscious decision that the conduct did not merit further pursuit. The Carrier has not shown that in order for the time limits of Rule 48(a) to commence, knowledge must be brought to the attention of a particular level of supervisor. MTM Jones was the Charging Officer in this case, and he certainly had the authority to act on behalf of the Carrier after receipt of information concerning an allegation of dishonesty. Under these circumstances, the Board is of the opinion that the Carrier violated the strict time limits for holding the hearing contained in Rule 48(a), and that the claim must be sustained without reaching the merits. Claimant's record shall not contain any MAPS status pertaining to this matter.

AWARD:

The claim is sustained. 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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