

PUBLIC LAW BOARD NO. 7660
AWARD NO. 186

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

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. C. Palone, by letter dated September 9, 2019, in connection with allegations that he failed to comply with Rules 1.6: Conduct - Discourteous; Policy to address Violence & Abusive behavior in the Workplace; Social Media Rules Policy; Policy on Ethics and Business Conduct for Agreement Professionals 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.’ (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 JN-1948U-409/1727784 UPS).

2. As a consequence of the violation referred to in Part (1) above, Claimant C. Palone shall now have the dismissal:

‘expunged from his personal record. Claimant be immediately reinstated to service and compensated for all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service excluding all outside wage earnings. Claimant be compensated for any and all losses related to the loss of fringe benefits that can result from dismissal from service, i.e. Health benefits for himself and his dependents, Dental benefits for

himself and his dependents, Vision benefits for himself and his dependents, Vacation benefits, Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargaining for him as an employee of the Union Pacific Railroad and a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters. Claimant to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has been taken from him. Such losses can be his house, his car, his land and any other personal items that may be garnished from him for lack of income related to this dismissal.

In short, we herein make the demand that the Claimant be made 'whole' for any and all losses related to his dismissal from service.' (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 6 years and worked as a System Ballast Regulator Operator on Gang 7811 at the relevant time. Claimant received a Notice of Investigation dated August 13, 2019, advising him that he was charged with posting discourteous and threatening material on social media on July 28, 2019 which negatively affects the interest of the railroad, and citing 6 different possible Rule violations. The Investigation was held on August 20, 2019, and Claimant was served with a Notice of Discipline Assessed dated September 9, 2019, finding him guilty of the charges in violation of Rule 1.6 Conduct - Discourteous (and the final sentence of Rule 1.6), the Policy to Address Violence & Abusive Behavior in the Workplace, Social Media

Rules Policy and the Policy on Ethics and Business Conduct for Agreement Professionals. He was issued a dismissal based on the nature and seriousness of the violation. This claim protests such action.

There is no dispute that Claimant posted a 3 minute 50 second music video and a number of posts on his Facebook page on July 28 that were open to the public to view. Since the content contained information linking him with Carrier and expressing his discontent with its change of scheduling policy, using derogatory language, symbols and comments, it was brought to the attention of the Director of Track Programs, who investigated and instituted the charges. During the investigation he testified that he assumed that it was Claimant who had taken the pictures displayed in the video, which contained unsafe practices and use of his cell phone while at work, and that he interpreted the posts as showing disrespect for Carrier, and threatening and harassing co-workers. He admitted not investigating or reading any of the over 300 comments made to Claimant's post.

During his testimony at the investigation, Claimant explained the context of the posts, as relating to the new Precision Railroad Schedule of 8 days on and 6 days off (as opposed to the old 8 on/7 off schedule) that had been instituted with agreement of the Organization, and that was very unpopular with his co-workers since it resulted in more work time and less time at home for the same wages. Claimant noted that most of his negative comments were directed to officials of the Organization that abstained from voting, resulting in the adoption of the new schedule, and that 90-95% of the comments understood the posts to be directed at the Organization rather than the Carrier. He testified that he put together the video with pictures and information he found on line, did not use his cell phone at work or actually take the pictures himself, and found and exhibited more content involving Carrier (including UP logo and shield) than the Organization for familiarity. Claimant admitted that he placed a red circle with a slash through the UP

logo, and stated “fuck you UP” in his posts, and indicated that he was keeping track of his co-workers and what side of the issue they were on. He testified that he never intended to cause harm to Carrier, was not expressing anger or discourteousness against Carrier (even when flipping the bird at the UP shield), and was merely voicing his disappointment with both Carrier and the Organization for not taking into account the views of its employees. Claimant denied threatening anyone or showing anything proprietary to Carrier or vulgar, indicating that he was just “acting out” in his normal artistic way. He acknowledged that others could have interpreted his posts the way the Director did.

The Carrier notes that at the conclusion of the Investigation, it did not charge Claimant with either improper cell phone use or carelessness based on his explanation of how he obtained the content in his video. It contends that Claimant’s admission to gathering and posting the video and other derogatory statements on his public Facebook page satisfies its burden of proving that he violated the cited Rules by substantial evidence. Carrier points out that, despite Claimant’s testimony that most of what he posted was directed at the Organization, it was the UP logo and disparaging references to Carrier alone that appeared throughout, and showed clear disrespect for Carrier, directly impacting its public image and business interests. It argues that the serious nature of the offense fully supports the discipline assessed, since a violation of Rule 1.6, by its own language, permits dismissal for a first offense, citing PLB 6459, Award 79. Carrier asserts that Claimant was afforded all due process rights, there were no procedural defects serious enough to void the discipline, and the requested remedy was excessive, relying on PLB 6778, Award 124.

The Organization argues that Claimant compiled the music video to express the prevailing dissatisfaction of employees to the change in schedule which was agreed to by the Organization, with some board members abstaining from the vote, and that the

comments to the post reveals that most people understood Claimant's comments to be directed against the Organization, not the Carrier. It contends that Carrier failed to meet its burden of proving that Claimant violated the cited Rules, as it did not show he was discourteous, engaged in hate speech, disparaged Carrier or caused any adverse impact on its business, performed any improper action while on duty, or threatened anyone with violence. The Organization asserts that the discipline assessed was arbitrary, excessive and unwarranted, citing PLB 7054, Award 17; PLB 6459, Awards 66 & 69.

A careful review of the record convinces the Board that the Carrier sustained its burden of proving that Claimant posted discourteous images and content involving Union Pacific on his public Facebook page on July 28, 2019, in violation of Rule 1.6 Conduct - Discourteous. We are also of the opinion that Claimant's actions arguably violate Carrier's Social Media Rules concerning using photos of UP without obtaining consent and ethically posting material. However, the Board cannot find that Carrier sustained its burden of proving that Claimant violated its Policy against Violence in the Workplace or its Policy on Ethics. The content of Claimant's posts, while unfortunately depicting UP in a negative light and directing anger at its new scheduling policy, and using offensive language and references to Carrier, rather than the Organization which Claimant asserts was his intended target, do not directly threaten any employee with violence or harass co-workers or managers.

The issue presented in this case is whether, under the circumstances, Carrier's decision to issue a Level 5 dismissal for the proven violations is excessive and unwarranted. While it is true that Rule 1.6 - Conduct permits dismissal for any act of hostility, misconduct or willful disregard or negligence affecting the interest of the company or its employees, the Board is of the opinion that Carrier's justification for the imposition of the Level 5 discipline included its interpretation of some of Claimant's comments as being threatening to other employees, and unethical, neither of which we

found to have been substantiated by the evidence presented. Under the specific facts of this case, the Board is of the opinion that the dismissal was excessive, and that Claimant should be permitted to return to work without loss of seniority, but without any compensation. The reason for not reducing the penalty to a lesser form of discipline under the MAPS policy is that, unlike the situations in PLB 7054, Award 17 and PLB 6459, Awards 66 & 69, while Claimant took responsibility for putting together the video and posting it and other content, he did not appear to see anything wrong with having done so in this case. Claimant must understand that, while he is being given the opportunity to continue his career with Carrier, he is responsible for anything he chooses to post on his social media platforms that bear on his relationship with Union Pacific, and that such posts may, in fact, be interpreted by others to be disparaging to his employer or co-workers.

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
Chris Bogenreif
Carrier Member

John Schlismann
John Schlismann
Employee Member

Dated: August 25, 2022

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