

PUBLIC LAW BOARD NO. 7660
AWARD NO. 190

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) imposed upon Mr. W. Dees, by letter dated November 22, 2019, in connection with allegations that he failed to comply with Rules 1.6 Conduct - Negligent; 1.6 Conduct - Careless; 1.6 Conduct - Dishonest; Rule 1.13 Reporting and Complying with Instructions 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 due process, without the Carrier having met its burden of proof and in violation of the Agreement (System File RI-1919C-803/1731889 CNW).
2. As a consequence of the violation referred to in Part (1) above:

‘.... discipline imposed upon Claimant W. Dees shall be overturned and cleared from his record and the Claimant shall be returned to service with all rights and benefits unimpaired. This includes compensation for:

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- 1) Straight time for each regular workday lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the Claimant while wrongfully removed from service);
- 2) Any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the Claimant was out of service;
- 3) Overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any Junior employee for work the Claimant could have bid on and performed had the Claimant not been removed from service;
- 4) Health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service;
- 5) Also all months of service credit with the Railroad Retirement Board he would have accumulated had he not been unjustly removed from service;
- 6) All vacation restored and credit given for days missed had he not been unjustly removed 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 18 years and worked as an Engineering Department Track Supervisor at the relevant time. Claimant received a Notice of Investigation (NOI) dated November 4, 2019, advising him that he was charged with being negligent and careless of himself and others' safety, by failing to properly comply with instructions, rules and Company policies resulting in property damage and personal injury on October 30, 2019. On November 5, 2019 the Organization requested the use of SAP as an alternative to discipline for this first qualifying event. The NOI was revised on November 8, 2019 to add a dishonesty charge. The Investigation was held on November 12, 2019, and Claimant was served with a Notice of Discipline Assessed dated November 22, 2019, finding him guilty of the charges in violation of Rules 1.6 Conduct - Negligent, Careless and Dishonest - 1.13 Reporting and Complying with Instructions, and issuing him a dismissal based on his current record. This claim protests such action.

The joint investigation record involving Claimant and Coward (who was riding with Claimant on October 30) reveals that Claimant was instructed by his Manager to work with contractors who would be cutting brush, despite his voiced concern about the rain and track conditions. He did a job briefing with Coward after calling CY Tower to get set up to go to the Erie Plant and received track and time, and proceeded to the location where he met the contractors. According to Claimant, he called them together, was told only 1 of their 3 trucks was setting on the track, and he understood that only the two people sitting in the truck would be working on the truck, and he held a job briefing with them while the others were standing around. He explained that he had worked with their Foreman Acacio in the past, and that it was customary to give him the full job briefing and for him, in turn, to brief his employees, since some only speak Spanish. Both Claimant and Acacia confirmed that when Claimant gave his job briefing he said the he would be going down the track first, and stopping before the Division Street Bridge to get another track and time, and that they needed to make sure to maintain the 300' distance between them in order to be able to stop

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in time with the wet tracks. There were no questions, and Claimant was unaware that Acacio did not have a mobile radio, or that the other 3 employees would be getting into the back of the truck.

Claimant and Coward drove slowly and stopped less than a mile down the track, contacting the CY Tower to obtain additional clearance. They testified that before they could get their track and time, the contractor's truck collided with the back of their vehicle, causing injuries to both of them and damage to their vehicle. There were no contractor injuries nor damage to their truck. According to Coward, the driver apologized to them, and he questioned how they could not see them. Testimony from others present indicated that the driver tried to stop but was unable to stop in time. Both Claimant and Coward were questioned while they were injured, and they gave statements before and during when they are receiving medical treatment. The damage to Carrier's vehicle was less than \$6000, although it was listed as exceeding the FRA threshold for reportable incidents on their charge letters.

As noted above, Claimant was issued a Notice of Investigation on November 4, which was revised on November 8 to add the allegation of Rule 1.6 - Dishonest. The substance of the charge letters is the same, and states:

On 10/30/2019, at the location of Chicago, IL, near Milepost 1.25, Harvard Subdivision, at approximately 10:30 hours, while employed as a Track Supervisor, you allegedly were negligent, dishonest and careless of yourself and others safety by failing to properly report and comply with Instructions, rules, and company policies resulting in property damage and personal injury. This is a possible violation of the following rule(s) and/or policy:

- 1.6 Conduct - Negligent
- 1.6 Conduct - Careless
- 1.6 Conduct - Dishonest

1.13 - Reporting and Complying with Instructions

Under MAPS Policy, this violation is a Dismissal event. Property damage has been recorded in this incident that is greater than the FRA threshold and affects the MAPS Rule Category. Based on your current status, if you are found to be in violation of this alleged charge, Dismissal may result.

At the Investigation, the Organization objected to the vagueness of the charge letter, and the absence of response to its request for the use of SAP. During the testimony of Claimant's supervisor, and over the Organization's objection, Carrier added the following Rules into the record : 136.3 Job Briefings; 136.31 Job Briefing for Roadway Work Groups; 41.1 Foreman; 42.14.1 Designated Employees (Contractors); 46.6 Work by Others; 42.14.3 Headlights, Radios and Seatbelts; 136.3.3 Access to Working Radio; 42.9 Signal to Stop; 42.2.2 Other Speed Requirements; 42.1.3 Getting On and Off or Riding Track Cars; UP Safety Rule Book Statement of Policy. Claimant's supervisor testified that he understood that the alleged violations were premised on Claimant's lack of communication, supervision and protection of the contractor employees, relying on conflicting statements given by the contractor employees to support the allegation that Claimant did not have a proper job briefing, allowed the contractor's truck to put onto the rail unsupervised with 3 employees in the back without seatbelts, and without a working radio. He stated that Claimant knowingly misled management as to the facts, based on the conflicting versions of his statement and those obtained from the contractor employees. None of Carrier's supervisors were present to hear the job briefing or see the accident.

Claimant's Track ARASA testified that Claimant reported the accident to him and he was one of the first responders. He indicated that he questioned the contractor employees together and their Foreman acknowledged receiving a job briefing from Claimant including their Traveling Distance Policy, and that their protocol was for him to relay what was said to his group. ARASA Farley testified that Claimant and Coward said the same things but

that there were inconsistencies in the contractor employees' versions, which he reported to his supervisor. He indicated that he had worked with Claimant for a long period of time and that he is a good employee who will do anything that is asked of him.

The Carrier contends that it proved by substantial evidence that Claimant was negligent, careless and dishonest, and failed to comply with instructions, by not properly job briefing all contractor forces, failing to supply them with a radio, and failing to properly supervise them and permitting 3 employees to ride in the back of the truck without seat belts, resulting in their vehicle colliding with Claimant's truck. It asserts that the seriousness of the violation supports the discipline imposed. The Carrier argues that there were no procedural errors or affirmative defenses warranting voiding the discipline, noting that it is up to Engineering Department senior officials to determine Claimant's eligibility for SAP, and it is not a demand right. It maintains that the requested remedy is excessive and not grounded in the Agreement.

The Organization initially argues that Claimant was denied due process and the right to a fair and impartial hearing when Carrier failed to specify any precise charges in the Notices of Investigation, improperly amended its Notice and failed to provide 2 days to prepare for the investigation, and the Hearing Officer permitted it to pile on additional charges and Rules at the hearing which were never included in the charge letter, citing PLB 7660, Awards 16, 31 & 124; PLB 6402, Awards 2; PLB 7633, Award 147 and numerous Third Division Awards. It posits that these due process violations prejudiced Claimant's right to a fair and impartial hearing and require that the claim be sustained without reaching the merits.

With respect to the merits, the Organization contends that Carrier failed to establish that Claimant violated any of the cited Rules, or was careless, negligent or dishonest. It points out that Claimant did have a job briefing with the relevant employees, had a working

radio as required by the Rules, properly supervised the contractor employees, and that no action on his part or that of his passenger caused the contractor's vehicle to collide with Carrier's truck. The Organization also takes issue with Carrier's determination to deny Claimant the opportunity to participate in the SAP process, which was designed to address these type of circumstances, and notes that it was inappropriate for Carrier to question Claimant and Coward while they were injured, and before and during their treatment, and then rely on alleged inconsistencies contained in their statements to discipline them.

A careful review of the record convinces the Board that this case must be decided on preliminary due process grounds, rather than on the merits. In pertinent part, Rule 19 (A) states that "Prior to the hearing, the employee shall be notified in writing of the precise charge against him" . and be allowed at least 2 working days to prepare prior to the hearing. The Organization cited much precedent for the proposition that the notice of charges must contain sufficient information to enable an employee to prepare a defense, and more than subjective conclusions without reference to any facts forming the basis for such conclusions. See, e.g. PLB 7660, Award 31; Third Division Award 17592.

As set forth above, the Notice of Investigation issued to Claimant, both on November 4 and 8, 2019, contains only conclusionary allegations - you allegedly were negligent, dishonest and careless of yourself and others safety by failing to properly report and comply with instructions resulting in property damage and personal injury. The charge letter contains no specific facts concerning what actions on Claimant's part violated which Carrier Rules. Instead, Carrier chose to supplement the record at the investigation for the first time, to include 10 specific rules it alleged Claimant violated, including those involving job briefings, seat belts, radio communication, and speed and signal requirements. Additionally, the testimony from supervisors was also conclusionary as to what type of conduct each believed established Claimant's negligence, carelessness and/or dishonesty, centering around his job briefing, the fact that the contractor's employees had

no working radio and additional individuals in the bed of the truck, and based on alleged inconsistencies in statements taken after the accident during the time when Claimant and Coward were injured, and all of the contractor employees were together, some through the use of an interpreter.

There is no doubt that Claimant and the Organization were never put on notice, prior to the Investigation, that what he was being charged with was not conducting a proper job briefing, failing to remain while the contractor's vehicle set onto the track, not ensuring that all employees were complying the Carrier's seat belt and other policies including possession of a working radio, etc. In fact, a review of the Investigation transcript reveals that the Carrier officials in charge of investigating the accident and taking statements from those involved, and eventually charging Claimant, were themselves uncertain about what specific Rules were involved or how Claimant allegedly violated them. This is a case where the Carrier chose to pile on charges by supplementing the record with 10 different Rules that they thought may have been implicated in the incident, without prior notice, and then attempted to pigeonhole Claimant's actions or inactions into a violation of some of those rules. In fact, even having done so, there was still no consistency or explanation as to what the dishonesty charge involved, and what conduct on Claimant's part was being investigated for, or found to be, careless, negligent or dishonest.

In this case, the Board has no trouble concluding that the Carrier failed to comply with Rule 19(A), by not giving Claimant any indication of the precise nature of the charge(s) against him, and by not providing him with a fair and impartial Investigation, thereby violating his substantive due process rights. See, e.g. PLB 6402, Award 2; PLB 7633, Award 147; Third Division Awards 17592, 18430; 19357. Accordingly, the claim must be sustained on procedural grounds without reference to the underlying merits. However, the remedy of removing the discipline, returning Claimant to work without loss of seniority or benefits, and making him whole for monetary losses associated with his

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dismissal must encompass only the days he was fit to return to service from his injury, otherwise comply with the Agreement, and not be excessive.

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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