

PUBLIC LAW BOARD NO. 7660
AWARD NO. 198

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES 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. P. Malone, by letter dated May 21, 2020, in connection with allegations that he failed to comply with Rule 1.6: Conduct - Insubordinate; 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-2019C-803/1739266 CNW).

2. As a consequence of the violation referred to in Part (1) above, Claimant P. Malone’s discipline imposed shall:

‘be overturned and cleared from his record and the Claimant shall be returned to service with all right and benefits unimpaired. This includes compensation for:

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 [sic] 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 (sic) 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 restores and credits 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 about 5 years and worked as a Machine Operator on Gang 3543 at the relevant time. Claimant received a Notice of Investigation dated March 26, 2020, advising him that he was being charged with allegedly failing to respond to multiple show cause letters in which medical information

was requested. The Investigation was held on May 13, 2020, and Claimant was served with a Notice of Discipline Assessed dated May 21, 2020, finding him guilty of the charges in violation of Rules 1.6 Conduct - Insubordinate (and the final sentence) and Rule 1.13 Reporting and Complying with Instructions, and dismissing him from service. This claim protests such action.

The record establishes that Claimant was granted a Medical Leave of Absence (MLOA) around June 1, 2019 for an on-duty personal injury, which was set to expire on November 19. Claimant provided documentation to support a continued leave, and his MLOA was extended through February 1, 2020. The record contains a number of show cause letters sent to Claimant during this period of time, which were sent by certified mail, and also reveals that the procedure was for a Carrier officer to contact the Organization prior to scheduling an investigation to inform it of the status and Claimant's outstanding failure to provide requested medical information. None of these letters were receipted, and no proof of receipt was returned to Carrier's office. When this was done during this period, the Organization contacted Claimant, who spoke with the Carrier and provided the requested documentation to extend his LOA. Claimant testified that he did not recall ever having gotten the show cause letters, or being aware of when his MLOA expired, but explained that he provided medical documentation when told to do so in conversations with Organization and Carrier officials. Claimant's position was abolished effective October 2, 2019 while he was out on approved leave.

With respect to the period subsequent to February 1, 2020, when Claimant's extended MLOA expired, the record reflects that two show cause letters dated February 5 and 28, 2020 were sent to Claimant at his admitted address, but were not sent certified mail, and there was no proof in Carrier's system that the letters were received. Claimant denied receiving the letters. Additionally, Carrier's Director of Track Maintenance testified that her process of calling the Organization prior to sending out an investigation

notice was changed by HR, and no such contact was made concerning the requested documentation. It was not until the investigation notice was sent to Claimant and copied to the Organization, that the Organization intervened and contacted Claimant, who attempted to get medical documentation to Carrier, but was having an issue with getting what was needed from his doctor's office due to the stay-at-home order in place as a result of COVID 19. Medical documentation was submitted after Claimant was issued the subject dismissal.

The Carrier contends that it proved by substantial evidence that Claimant violated Rules 1.6 and 1.13 by being insubordinate by not complying with his superior's request that he submit documentation to extend his LOA or report to work. It notes that Claimant admitted that he was absent without leave for over 30 days, triggering Rule 54, and that Claimant was given an ample opportunity to provide dockets to support an extension of leave but failed to do so, making dismissal appropriate, relying on SBA 279, Award 932; PLB 6302, Award 58. The Carrier maintains that Claimant was given his due process rights and a fair and impartial hearing. It asserts that the remedy requested by the Organization is excessive and improper under Rule 19(d) which provides only for the net loss off compensation without any overtime, citing PLB 7660, Award 82; PLB 3012, Award 1.

The Organization argues that Carrier failed to meet its burden of proving that Claimant was insubordinate or failed to follow his supervisor's instructions since it did not prove that Claimant received the letters requesting documents or setting forth the procedure for extending his MLOA, and Claimant denied having received the show cause letters. It notes that, since Claimant's position was abolished effective October 2, while he was on MLOA, Carrier disregarded the agreed procedure established in Rule 13 (Displacement Rights), which entitled him to go out of service under Rule 52(B) rather than exercise displacement rights. It asserts that since Claimant was on furlough status,

Carrier was required to recall him to an open position under Rule 14 and failed to do so. The Organization contends that the discipline was arbitrary since Claimant was unaware his MLOA expired on February 1, 2020 or that additional documentation was required, and requests that he be reinstated and made whole, pointing out that Claimant's doctor did submit medical documentation supporting his leave through March 23, 2020.

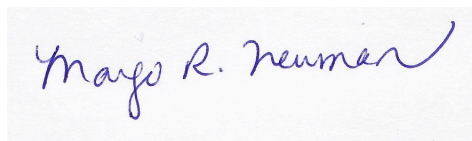
A careful review of the record convinces the Board that Carrier has failed to meet its burden of proving that Claimant violated Rule 1.6 Conduct - Insubordination - or Rule 1.13 Reporting and Complying with Instructions since it did not establish that the February show cause letters were received by Claimant, or that he had knowledge that his MLOA expired on February 1, 2020, requiring production of additional medical documentation. It appears that this was the case during the period when his initial MLOA was extended, but Carrier's official notified the Organization who got in touch with Claimant and informed him that documentation was required to extend his leave. When the prior show cause letters were sent to Claimant by certified mail, none of the receipts were returned to the Carrier, so it could not assume that the February, 2020 show cause letters, which were not sent by certified mail, were received. Carrier's change of policy in not notifying the Organization before scheduling an investigation contributed, at least in part, to the absence of submission of timely medical information. Since the Rule violations relied upon to dismiss Claimant were based upon his receipt of supervisor's instructions, and his failure to comply with them, the instant discipline cannot be upheld.

That being said, there is merit to the Carrier's contention that the Organization's requested relief is excessive. This Board held in Award 82 that Rule 19(D) provides that an employee whose charges are not sustained shall be reinstated and provided back pay at the straight time rate for assigned working hours actually lost, less interim earnings, and that lost overtime is not encompassed within that clear language. Thus, the Board directs that Claimant be recalled to a vacant position for which he is qualified, after proof that he

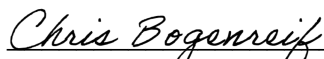
is fit to return to work, without loss of seniority or benefits, and that he be paid for actual loss of earnings from the date when he was fit to return to work and Carrier had a vacant position for him to be recalled to until he is restored to service, less any interim earnings.

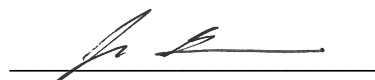
AWARD:

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
Neutral Chairperson


Chris Bogenreif
Carrier Member


John Schlismann
Employee Member

Dated: January 18, 2023

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