

PUBLIC LAW BOARD NO. 7660
AWARD NO. 201

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY
(FORMER SOUTHERN PACIFIC TRANSPORTATION
COMPANY (WESTERN LINES))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) imposed upon Mr. S. Aguiar, Jr. by letter dated May 12, 2020, in connection with allegations that he failed to comply with Rules 1.6: Conduct - Careless; 1.13 Reporting and Complying with Instructions; 74.5 Seat Belts 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 M-2045S-503/1738522 SPW).

2. As a consequence of the violation referred to in Part (1) above, Claimant Aguiar, Jr. shall have his:

‘...Dismissal is (sic) expunged from his personal record. Claimant be immediately reinstated to serve 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 bargained 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 be reimbursed for all losses related to personal property that he has now which may be taken from him and this family because his income has been taken from him. Such losses can be his house, his car, and his land and any other personal items that may be garnished from him for lack of income related to his 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. Kindly investigate this claim and advise us as to your decision.’ (Employee’s 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 20 years, the last 16 of which he worked as a Track Inspector. Claimant received a Notice of Investigation dated April 6, 2020, advising him that he was being charged with allegedly speeding in a Company vehicle on March 26, 2020 and being careless of safety. He was removed from service pending investigation. The Investigation was held on April 23, 2020, and Claimant was served with a Notice of Discipline Assessed dated May 12, 2020, finding him guilty of the charges in violation of Rules 1.6 Conduct - Careless of Safety, 1.13 Reporting and Complying with Instructions, and 74.5 Seat Belts, and dismissing him from service. This claim protests such action.

The record establishes that the drive cam video of Claimant in his truck on March 26, 2020 recorded the speed as 71 mph in a 55 mph area, which is a coachable incident. It was brought to the attention of his supervisor, who removed him from service. He testified that Claimant had received 5 prior speeding incidents in the COMMIT system, for which he was verbally coached or counselled in 2020 - January 2 (77 in a 65), 17 (72 in a 55), 29 (77 in a 65), February 7 (47 in a 35) and 23 (76 in a 55). Supervisor Casas also noted that Claimant had a conference with his prior Manager on August 23, 2019 about not wearing his seat belt, and signed waiver notices on December 26, 2019 and February 24, 2020 regarding not wearing his seat belt, which placed him at MAPS Level 2 status.

Supervisor Casas testified that the March 26 incident was a triggering event, but admitted that the photo taken that day from the drive cam showed that Claimant was wearing his seat belt at the time. When he initially testified, Casas stated that he recalled Claimant telling him about the problems he was having with the transmission on his truck, he acknowledged that Claimant properly filled out Maintenance Logs indicating both transmission and the inaccurate speedometer issues and brought his vehicle into the shop as instructed, but indicated that he did not read the reports thoroughly and was not aware specifically of these issues. Casas did admit that the truck in issue was the one Claimant was driving during his prior speeding and seat belt incidents, and that, had he reviewed the logs at the time, the prior speeding violations may not have been assessed. The written maintenance report on Claimant's vehicle during the period from November, 2019 to March, 2020, which was submitted by Allcal Equipment Services on April 10, 2020, indicates that the transmission was slipping and the speed sensor signal was jumping to 80, 90 or 120 mph while road tested on the freeway driving at 55 mph.

Claimant admitted that he was familiar with the rules and regulations concerning operating a Company vehicle, which he has been doing since 2000, including the requirement to drive within the speed limits. He stated that he had not received any discipline concerning the proper operation of a vehicle prior to the incidents brought forward in the Investigation. While admitting that he was the driver depicted in the March 26 video cam photo, and that the speed of 71 was notated, he did not admit that he was actually speeding on this, or prior occasions. After the completion of all of the testimony, but prior to closing statements, and after an *ex parte* discussion with the Hearing Officer outside the hearing room, Casas returned to state that Claimant was driving a different vehicle on March 26, 2020, which Claimant admitted.

The Carrier contends that Claimant was provided a fair and impartial hearing, and that it proved the charges by substantial evidence that Claimant was speeding on March 26, 2020, and that he had signed waivers for two prior seat belt violations which placed him at MAPS 2 Level, and justified the imposition of dismissal for continuing unsafe and careless conduct.

The Organization initially argues that Claimant was denied a fair and impartial investigation when the Hearing Officer had *ex parte* communication with the Charging Officer after the completion of all testimony and evidence, leading to his returning to the hearing room and introducing new evidence concerning the vehicle being driven by Claimant on March 26, relying on PLB 7660, Award 31; Third Division Awards 41224, 42618, 42699, 44614. It maintains that Carrier failed to meet its burden of proving the charges by substantial evidence, since it presented no evidence to show that Claimant was careless, in violation of the seat belt rule (for which he was charged and found guilty) or failed to report and comply with his supervisor's instructions. The Organization notes that Carrier's own witness admitted that Claimant was wearing his seat belt in the drive cam photo on March 26, 2020, and that its reliance on his prior two seat belt infractions to

advance the discipline to dismissal was arbitrary and abuse of discretion. It argues that Carrier's reliance on unrelated seat belt discipline to advance a speeding incident, when it was shown that all prior speeding incidents were the result of driving a vehicle with proven speedometer issues, was improper since it was unrelated to the nature of the infraction underlying the March 26 incident. The Organization asserts that the record supports the conclusion that there were multiple mitigating circumstances which undermine the severity of the discipline imposed, citing PLB 7660, Awards 20 & 21.

A careful review of the record convinces the Board that, although the manner in which the Charging Officer returned to testify after consulting with the Hearing Officer is problematic, no prejudice resulted to Claimant, as he admitted that he was driving a different vehicle than the one with noted problems with the speedometer when questioned after the inclusion of this evidence. However, we are unable to conclude that Carrier met its burden of proving all of the charges against Claimant. While the record shows a video cam photo indicating a speed of 71 mph on March 26, 2020 while Claimant was driving, the only evidence of the relevant speed limit came in the notice of charges and the fact that the video cam kicked in, which supposedly is triggered by excess speed. However, even assuming that Claimant was speeding on March 26, as alleged, Carrier failed to establish that Claimant violated Rule 74.5 regarding seat belts, as he was admittedly wearing his seat belt on this occasion. Carrier did not show how Claimant failed to follow his supervisor's instructions, other than by speeding, when he was told to report his truck and take it in for servicing, which he did.

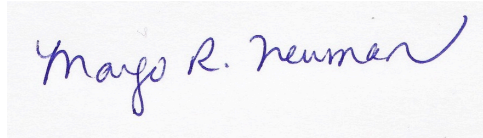
There is no doubt that the charge of speeding, standing alone, was only a coachable incident. Since the other 5 cited speeding incidents occurred in a vehicle found to have a speedometer issue, which Claimant noted and reported, they cannot be considered a valid basis for progressing this charge to discipline. Carrier clearly relied upon Claimant's MAPS Level 2 status in determining the appropriate penalty. However,

the two prior events for which Claimant took a waiver involved seat belts, which is an unrelated charge to speeding. As noted above, there is no evidence that Claimant was not wearing his seat belt on March 26, which was part of the charge sustained by Carrier and obviously relied upon in terminating his employment.

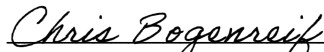
As was the case in Awards 20 and 21 of this Board, we find that the penalty assessed was excessive under the circumstances, and that there are factors present that militate against the dismissal penalty in this case, including the fact that there is no foundation upon which Carrier can rightfully conclude that Claimant showed a clear pattern of unsafe and careless conduct, especially considering his 20 years of service with no safety-related discipline prior to 2019. Accordingly, we conclude that a lesser penalty should be substituted under the facts of this case. Claimant shall be returned to work with full seniority and benefits at MAPS Level 2, and shall have a coaching incident substituted for the dismissal. Claimant shall be made whole for lost straight time wages and benefits for the period he was out of work as a result of this dismissal, less interim earnings.


AWARD:

The claim is sustained, in part, 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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