

PUBLIC LAW BOARD 7660

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**UNION PACIFIC RAILROAD COMPANY [FORMER
SOUTHERN PACIFIC TRANSPORTATION COMPANY
(WESTERN LINES)]**

VS.

**BROTHERHOOD OF MAINTENANCE
OF WAYEMPLOYES DIVISION –
IBT RAIL CONFERENCE**

Public Law Board 7660 consisted of the regular members and, in addition, Referee Meeta A. Bass when the award was rendered.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) imposed upon Mr. E. Avelar, by letter dated September 14, 2020, in connection with allegations that he failed to comply with Rule 1.6: Conduct – Careless; and additionally 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-509/1746827 SPW).

2. As a consequence of the violation referred to in Part 1 above, Claimant E. Avelar shall have the discipline of dismissal expunged from his personal record, 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 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 is 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.' (Employees' Exhibit 'A-2')."

FINDINGS:

The Board, upon the whole record and all the evidence, finds that:

The Carrier or Carriers and the Employee or Employees involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934. The Board has jurisdiction over the dispute involved herein. Parties to said dispute were given due notice of hearing thereon.

The Carrier hired the Claimant on April 8, 1988. On July 29, 2020, the Claimant was working and assigned as an Assistant Foreman. The Claimant was operating his company vehicle with a weight over 10,000 pounds when the DriveCam was triggered. The DriveCam is a tool the company uses to identify and correct behavior. The DriveCam shows the Claimant traveling 84 MPH in a 55 MPH zone, the Claimant swerving into the other lane and then correcting, using a handheld cell phone while operating the vehicle, and with no hands on the steering wheel operating the vehicle with his knees while texting. On July 30, 2020, the Carrier Manager reviewed the drive cam footage. After review of the incident, the manager notified the leadership team, who collectively decided to discipline rather than coach or train for the carelessness of safety. The Carrier manager charged the Claimant with a violation of the rules. The Claimant admitted to the actions.

At the time of the incident, Claimant had twenty-two (22) years of service, five and a half (5.5) of which was in a supervisory role. In his supervisory role, the Claimant regularly reviewed DriveCam video footage. The Claimant had never known the Carrier to dismiss an employee outside of the progressive discipline policy for a DriveCam violation.

The Carrier issued a Notice of Investigation letter dated August 5, 2020, which stated: "...to develop the facts and to determine your responsibility, if any, in connection with the below charge ...On July 29, 2020, at the location of I-15 in the vicinity of ZIP Code 92336, at approximately 13:34 hours, while employed as Assistant Foreman- it says Reg/System, you allegedly were careless of safety while

driving Vehicle 44647 when you were speeding at 83 miles per hour. You allegedly were careless of safety when you used your cell phone while driving and had no control over the vehicle. This is a possible violation of the following rules and/or policies: 1.6 Conduct. Careless. "

The Carrier held the investigation hearing on August 25, 2020. Following the investigation hearing, the Claimant received a Discipline Notice dated September 14, 2020, finding a violation of Rule 1.6 Conduct (1) Careless. The Employer dismissed the Claimant. The Organization appealed the Carrier's decision by letter dated November 12, 2020, and the Carrier denied the same on January 6, 2021. The Organization advanced the appeal by letter dated February 28, 2021, and the Carrier denied the same by letter dated April 26, 2021. A formal conference was held with no resolution of the claim on August 27, 2021. The Organization submitted a post-conference letter on December 13, 2021, requesting the Carrier re-evaluate their position or the matter would be progressed to the National Railroad Adjustment Board. There was no change in the Carrier's position. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property and considered evidence related to the following to make its determination of this claim:

- 1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?
- 2) If so, did the Carrier establish by substantial evidence the Claimant was culpable of the charged misconduct or dereliction of duty?
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?

The Carrier contends the Claimant was afforded a fair and impartial hearing. The Claimant was represented by his representative and was given the opportunity to prepare his case, to introduce evidence on his own behalf, and to confront and cross-examine witnesses. Carrier asserts the Claimant admitted to the alleged actions. The Carrier contends the Carrier presented substantial evidence to support the seriousness and the violation of the rule. Per the Carrier's MAPS Policy, violations of Rules 1.6 and the Violence and Abusive Behavior in the Workplace policy warrant a disciplinary assessment of dismissal upon the first violation. The Carrier

argues the Claimant's behaviors were egregious and outside the regular minor infractions, which are appropriate for coaching.

The Organization contends the Charging Officer's refusal to provide testimony regarding the policy and its application is a denial of the Claimant's rights to a fair and impartial hearing as provided for under Rule 45. The Organization also argues the Carrier did not demonstrate the Claimant violated Rule 1.6 Careless as defined by its own definition. The Organization points out no traffic citations were issued or accidents or property damage. The Organization argues that DriveCam violations of a similar nature did not lead to dismissal. The Claimant testified the Carrier has always coached employees for such offenses, and progressive MAPS policy is followed only after coaching fails. The Carrier's processes label this as coaching, and the disciplinary goal is achieved through escalating discipline/training levels.

The Board concludes the Claimant was granted a fair and impartial hearing. The evidence in the record, including the Claimant's own admission of his actions, confirms the Claimant indeed violated the aforementioned cited rule. The Board notes the Claimant received an email notification the incident was a coaching event, which corroborates his testimony. Thus, the Board finds the imposed penalty of termination is overly severe and not in accordance with the evidence of the application of coaching and discipline for DriveCam violations. The Board finds the Claimant should be reinstated but awards no back pay due to the severe nature of the misconduct and the danger posed to the public. Considering the combination of infractions, policy application, and the Claimant's record, the appropriate penalty is classifying this violation as a MAPS Training-1 event with a thirty-six month retention period from the award date.

AWARD

Claim sustained consistent with these findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

Meeta A. Bass

Meeta A. Bass
Neutral Chairperson
Dated: Sept. 28, 2023

Chris Bogenreif

Chris Bogenreif
Carrier Member
Dated: September 29, 2023

John Schlismann

John Schlismann
Organization Member
Dated: September 28, 2023