

PUBLIC LAW BOARD NO. 7660

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)		
DIVISION – IBT RAIL CONFERENCE)		
	) Case No. 245	
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. M. Rabe, by letter dated August 8, 2022, in connection with allegations that he failed to protect his employment constituting a third offense violation of the Union Pacific Railroad Attendance Policy was excessive, arbitrary, disparate, without the Carrier having met its burden of proof and in violation of the Agreement (System File MK-2248U-604/1777611 UPS).
2. As a consequence of the violations referred to in Part 1 above, Claimant M. Rabe shall now be returned to service and ‘. . . be made whole by compensating him for all wage and benefit loss suffered by them [sic] for their Level 5 terminations, and the alleged charge(s) be expunged from his personal records.’ (Employees’ Exhibit ‘A-2’).”

FINDINGS

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employer within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction of the dispute herein, and that the parties to said dispute were given due notice of hearing in the matter and participated therein.

Mike William Rabe (the Claimant), at the time of his dismissal by the Carrier, held the job of Rubber Tire Backhoe Operator with 19 years of service. By letter dated July 6, 2022, he was requested to report for a hearing on July 29, 2022, to develop the facts and determine his responsibility, if any, in connection with his alleged violation of the Union Pacific Railroad Attendance Policy. The letter continued:

While employed as a/an Sys Rub Tire Bh Ope with Union Pacific Railroad, you allegedly failed to protect your employment on a full time basis through frequent or pattern layoffs and/or failure to report for service from 07/01/2022 and 07/01/2022. If such charges are proven, you may be assessed a THIRD OFFENSE ATTENDANCE violation of the Union Pacific Railroad Attendance Policy.

At the Union's request the date of the hearing was changed to July 19, 2022.

At the hearing the Charging Officer, whose title is Manager II of Track Construction, testified as follows. The workers were supposed to show up to move trucks from Blalock to Portland, Oregon, at 6:00 a.m. on July 1. At around 6:10 an employee notified him that he was ready to go, had his truck checked out, and the Claimant was not present. The applicable Attendance Policy effective March 1, 2020, includes "tardy" as one of the violations of the policy. He showed up for work about one hour late. An employee who is going to be tardy is supposed to contact him (the employee's Manager) and let him know that he is running late. On this occasion the Charging Officer called the Claimant and left a voice mail to be called back. Approximately a minute later the Claimant called the Charging Officer and said that he was still in the Dalles, which is about 45 minutes away from Blalock. He said that he was running late because he had the wrong time set on his clock.

Through additional testimony it was brought out that the Claimant signed a waiver for his first attendance violation on August 8, 2019. He incurred a second violation within the 24-month retention period for the first violation and signed a waiver for that violation on January 12, 2021. The current alleged violation occurred on July 1, 2022, within the 24-month retention period for the second violation.

In response to questions from the hearing officer, the Claimant gave testimony as follows. On July 1, 2022, he was 45 minutes to an hour tardy for work. His Manager, the Charging Officer, called to find out where he was. He did not initiate the contact. His phone alarm has two wake-up settings, one for 4:00 a.m. and another, for 5:00 a.m. He was not wearing his glasses. He reached over to his phone on the night stand and hit the 5:00 a.m. wake-up call button instead of the 4:00 a.m. button. On this work assignment he works away from home. This would have been his fourth day away from home. The previous four days he got up at 4:00 o'clock. It's usually when he gets up. He is aware that the policy says that if you're going to be late, you need to notify your manager. The reason he did not call is that he "was completely under the assumption" that he was on time. With regard to his first violation, he bid a job. He is allowed a certain amount of time to show up on that job. He did not make it that day due to driving to get to the job site. He called up the manager of the new job and said that he would not be there on the required date, but apparently "he didn't feel that that was enough."

In response to questions from the Organization representative, the Claimant testified as follows. With regard to his second attendance violation, he was traveling from Molalla, Oregon to Portland, Oregon, to show up each day for the job. The day in question he left at the same time he normally did, which should have brought him to the job site ten or 15 minutes prior to the job starting. On this

particular day, they had inclement weather. It was raining extremely hard. He had to slow down to drive safely. He contacted his manager to notify him that he was going to be late because of the weather.

The hearing officer recalled the Charging Officer and requested him to read aloud the following portion of the Attendance Policy:

It is your responsibility to notify your manager in advance of layoffs and to retain documentation related to your absence from work. However, notification and documentation alone do not excuse your responsibility to protect your job. You may be considered in violation of this policy regardless of the explanation offered if you are unable to work full time and protect all employment obligations.

After reading the foregoing he was asked, "So if [the Claimant] had called you prior to you calling him, would that have excused his tardiness? He answered, "No, not necessarily." He was then asked by the Organization Representative, "[I]f [the Claimant] called you that he was gonna be late because he had a flat tire, would that be excused or unexcused?" He answered, "After the start time, unexcused." The Organization representative followed up, "If [the Claimant] was stuck on a freeway. He was gonna be late for work. Would that be excused or unexcused." He stated, "Depends on when the notification, once again, arrives. If it's after the start time, that's unexcused." Asked then, "But if he called before?," he answered, "Possibly excu8sed." He added, "It would also depend on . . . the distance away."

It is the position of the Carrier that Claimant had multiple attendance issues and was given ample opportunity to change his behavior but did not. He was given an attendance alert (warning) on March 9, 2016, it asserts, for failing to report for work as scheduled on March 8, 2016. He received a second alert (warning), according to the Carrier, on August 8, 2019, following attendance issues noted on July 8 through 10, 2019. He received an attendance violation on August 9, 2019, the Carrier asserts, for unauthorized attendance issues on July 23, 2019. He was issued a second violation, according to the Carrier, on January 12, 2021, after failing to protect his assignment from January 7 through 12, 2021. Thereafter, the Carrier argues, there is no dispute that the Claimant failed to protect his assignment on July 1, 2022, after reporting over an hour late to work without first notifying his supervisor. This subjected the Claimant to dismissal under the Attendance Policy, the Carrier contends, and no procedural issues were present that would overturn the Claimant's dismissal. Based on the evidence, the Carrier contends, "the Claimant was properly assessed a 'Third Offense' violation of the Carrier's Attendance Policy; though, he was afforded more than just the three strikes outlined in the policy." The Carrier requests the Board to deny the claim.

The Organization notes that the charge letter asserted that Claimant had failed to protect his employment through frequent or pattern layoffs or a failure to report for service on July 1, 2022. Claimant, the Organization contends, missed work on only three occasions since July, 2019, in a 19-year career. Further, the Organization asserts, the Claimant did protect his employment and did not fail

to report on July 1, 2022. The Organization attached documentation to its submission showing that the Carrier's own records show that the Claimant was compensated for working on July 1, 2022, contrary to any allegation that he laid off or failed to report. The Organization argues that the Carrier did not charge the Claimant with violating any rule relating to being tardy. Therefore, the Organization maintains, whether or not Claimant was tardy on July 1, 2022, is immaterial to the disposition of this dispute.

The Organization argues that, in past correspondence, labor relations officials of the Carrier, contrary to the testimony of the Charging Officer in this case, "unequivocally state that Points one (1) through eight (8) of the Carrier's Attendance Policy are not applicable to the Claimant as he is a full time employee subject to the forty (40) hour work week rule." In addition, the Organization contends, the Attendance Policy is not evenly enforced, but is arbitrarily applied, resulting in the Claimant being dismissed without just cause. In the present case, the Organization asserts, the evidence established that the Claimant has 19 years of service and never had any issues reporting to work outside new incidents in 2019 and 2021. In the absence of any consistent enforcement of the Carrier's Attendance Policy or understanding by the Claimant that he would be dismissed in these circumstances, the Organization contends, his discipline was without just cause.

The Organization asserts that General Director of Labor Relations B. Hanquist in a letter dated November 30, 2021, to the Organization, in correspondence unrelated to the present case, stated that "Sections 1 through 8 of the Policy have no impact on these employees," referring to BMWED members who work for the Engineering Department. That same letter, in the Organization's understanding, indicated that the eight paragraphs enumerated in the March 1, 2020, Attendance Policy "only apply to employees who do not work full time. Your members work for the Engineering Department and they are subject to the 40-hour work week rule (full-time)." (emphasis in original).

The Organization further argues that, in correspondence involving the present claim, Labor Relations Officer Armstrong confirmed General Director Hanquist's interpretation when he asserted that "[t]he decision to dismiss Claimant from service after the unexcused absence of July 1, 2022 was in line with Carrier's policy and practice and was not a violation of the Agreement." It bases this conclusion on the fact that Labor Relations Officer Armstrong proceeded to quote from the portion of the Attendance Policy that precedes the eight numbered paragraphs and did not quote from any part of those paragraphs. The Organization argues that the foregoing attempt by the Carrier to support the Claimant's dismissal based on the Attendance Policy will not hold up because with the removal of the eight paragraphs from the Attendance Policy, as inapplicable to full-time employees, there is no progression in the policy to support the dismissal action against the Claimant.

The Organization next argues that the Attendance Policy violated Rule 48 (k) of the collective bargaining agreement which states in pertinent part as follows:

- (k) Employees absenting themselves from their assignments for five (5) consecutive working days without proper authority will be considered as voluntarily forfeiting their seniority rights

and employment relationship, unless justifiable reason is shown as to why proper authority was not obtained.

* * *

Finally, the Organization argues that the discipline was arbitrary, excessive, and unwarranted for a 19 year employee with no prior discipline outside of two prior attendance violations in 2019 and 2021 and who was thereafter late one hour. The Organization requests that the claim be allowed with its requested remedy.

Mr. Hanquist's letter of November 30, 2021, did not pertain to the present case, and the Board will not address it. Mr. Armstrong's letter of September 9, 2022, was superseded by the Carrier's letter dated November 30, 2022, by its Manager – Labor Relations which stated, "With this letter Carrier respectfully reiterates in greater detail its original denial of the claim, which is incorporated by reference." The letter proceeded to summarize the Carrier's position with regard to the present claim. The summary included the statement, "Historical past practice shows Carrier's attendance policy (including bullet points 1-8) has been consistently applied to all employees (including Claimant) historically without question from the Organization." Clearly, the position of the Carrier in this case before the Board is that numbered paragraphs 1 through 8 of the Attendance Policy are part of the March 1, 2020, Attendance Policy under which Claimant was dismissed. The Board finds nothing inconsistent with this position of the Carrier and its action in dismissing the Claimant following an investigative hearing held on July 19, 2022. The question remains nevertheless whether the dismissal is supported by substantial evidence in the record.

An intelligent discussion of the Attendance Policy requires that it be set forth herein:

As a Union Pacific employee, you were hired for and are expected to protect your job assignment on a full-time basis. "Full-time" means being available to work as required by your assignment.

Unanticipated absence from work, particularly a missed call, refused call, no show or tardiness, can negatively impact operations, commitments to our shippers, and your co-workers' ability to plan on and off-duty activities. In addition, absences that are conditional, pending Family Medical Leave Act (FMLA) certification, can revert to unexcused absences. Such absences are taken into account for purposed of managing attendance.

It is your responsibility to notify your manager in advance of layoffs and to retain documentation related to your absence from work. However, notification and documentation alone do not excuse your responsibility to protect your job. You may be considered in violation of this policy regardless of the explanation offered if you are unable to work full time and protect all employment obligations.

In cases where an employee does not work full-time, the following applies:

1. Employees who do not work full time, will be identified using one or more of the following criteria:

- Missed call(s), no show, tardy, or refusal
- Frequent or pattern of weekend layoffs
- Frequent or pattern of holiday layoffs. Note: For the purposes of this policy, the following holidays are included: . . .
- Frequent personal layoffs.
- Frequent sick/sickness in family layoffs without authorized leave.

2. An employee's full-time work opportunities compared with the employee's opportunities for time off are taken into account in attendance evaluations. Opportunities for time off include, but are not limited to, assigned rest days, layover days, vacation, time off between duty periods, as well as authorized personal layoffs that may be granted by management as the needs of service permit. If the employee's attendance record warrants, an investigation will be held; and, if appropriate, discipline will be issued based on the investigative results.

3. Retention periods under this policy are independent of and separate from retention periods computed under the Managing Agreement Professionals for Success (MAPS) policy.

4. Discipline assessed for first and second policy violations will consist of a Notice of Discipline advising the employee he/she has been found guilty of "First Offense" or "Second Offense." Employees are expected to be available for service immediately and to work full time following the first and second investigations.

5. A "first offense" policy violation will remain on the employee's record for thirty-six (36) months of active service starting with the date of the Notice of Discipline. If no further policy violation occurs during this time, the employee's attendance record will be considered clear.

6. A violation during the thirty-six (36) months of active service following a "first offense" will result in a "second offense," and a new thirty-six (36) month period of active service will begin, starting with the date of the second Notice of Discipline. If no further violation of this policy occurs during this time, the employee's attendance record will be considered clear.

7. A violation during the thirty-six months of active service following the Notice of Discipline assessing "second offense" will result in the employee being withheld from

service pending an investigation. If the charge is substantiated, the employee will be dismissed from service.

8. Employees may discuss whether to waive a formal hearing with their Union Representatives for a first or second offense prior to proceeding with a formal hearing. The thirty-six (36) month retention period outlined above will be reduced from thirty-six (36) months to twenty-four (24) months should an employee choose to waive his/her investigation.

The Board rejects the Organization's interpretation. It makes no sense that the Carrier would promulgate an attendance policy for full-time employees that contained no disciplinary scheme for employees with poor attendance. The Board understands the Attendance Policy document as an effort by the Carrier to convey a message to employees about the importance of regular attendance at the same time that it is setting forth a disciplinary plan for those who miss time from work. Thus the introductory paragraph of the policy tells employees that "'Full-time' means being available to work as required by your assignment." This is followed immediately by examples of what is considered not to be available to work as required by one's assignment. The Carrier continues to develop the idea of equating being absent from work with not working full-time in the concluding eight paragraphs that contain a list of violations of the attendance policy (missed calls, no show, tardy, refusal, pattern of weekend or holiday layoffs, etc.) and the disciplinary scheme. The entire Attendance Policy, including the eight numbered paragraphs, applies to the Claimant and all members of the bargaining unit, which is comprised to the Board's understanding solely of full-time employees.

The Carrier has the right to expect its employees to protect their job assignments on a full-time basis. The Attendance Policy correctly notes that when employees are absent, tardy, or miss or refuse calls the company's operations can be negatively affected with resultant disruption of freight service and increased demands on coworkers to cover for reduced manpower. The foregoing being said, it is clear from the record that exceptions are made by management in appropriate circumstances to excuse violations of the Attendance Policy that would otherwise be a first, second, or third offense. The examples in the record include instances of tardiness on the part of employees who have a good excuse for being late.

In the present case the Claimant signed a waiver for his first offense on August 8, 2019, and another waiver for a second offense on January 12, 2021. Neither offense involved tardiness. His third offense – the first involving tardiness - occurred on July 1, 2022, almost three years after his first offense. Plainly the Claimant does not have a tardiness problem. In addition he provided a reasonable explanation both for being tardy and failing to provide prior notification to his manager that he would be late to work. He explained that he has two alarm settings on his cell phone, one for 4:00 a.m. and the other, 5:00 a.m. He mistakenly pushed the button for a 5:00 a.m. alarm, instead of 4:00 a.m. The reason he did not call his manager to report that he would be late was that at all times he believed that he was on time. Given his past record of being on time to work, the Claimant is entitled to the benefit of the doubt.

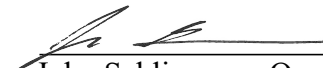
It is the Board's determination that the Claimant's dismissal must be set aside as excessive punishment on the evidence in this case. With regard to back pay, however, the Board cannot ignore some aspects of the Claimant's non-attendance disciplinary record. No back pay will be awarded. However, reinstatement shall be without loss of seniority for time off work and with all health insurance and other benefits restored retroactively. Based on the facts of this case it is the Board's decision that the Carrier shall restore the Claimant to service at the level of a second offense with regard to the Attendance Policy with a shortened retention period equivalent to the amount of retention time remaining for Claimant under the policy as of July 1, 2022. The Board believes that this should be in the neighborhood of six months and 11 days.

A W A R D

Claim sustained in part. The Carrier is directed to comply with this Award within 30 days of the date that any two members of the Board affix their signature to the Award.

<u>/s/ Sinclair Kossoff</u>	<u>9/15/2025</u>
Sinclair Kossoff, Neutral Member	Date

<u>Jennifer McNeil</u>	<u>October 6, 2025</u>
Jennifer McNeil, Carrier Member	Date

<u></u>	<u>October 6, 2025</u>
John Schlismann, Organization Member	Date