

PUBLIC LAW BOARD NO. 7660

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)		
DIVISION – IBT RAIL CONFERENCE)		
	) Case No. 246	
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. S. Niziol by letter dated August 15, 2022, for his alleged violation of Rule 1.6: Conduct – Insubordinate; Rule 1.13: Reporting and Complying with Instructions; 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 and indifference to duty or the performance of duty will not be tolerated. was imposed without the Carrier having met its burden of proof; was excessive, arbitrary, disparate; and in violation of the Agreement (System File JN-2248U-405/1778104 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant S. Niziol shall now ‘. . . be made whole by returning Claimant to his former status and compensate him for all wage and benefit loss suffered by him for this termination. We also request the alleged charges be expunged from his personal record.’ (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.

Steven A. Niziol (the Claimant), at the time of his dismissal by the Carrier, held the job of Ballast Regulator Operator with 24 years of service and no record of prior discipline. By letter dated July 8, 2022, he was requested to report for a hearing on July 26, 2022, to develop the facts and determine his responsibility, if any, in connection with the following charge:

On 07/07/2022, during a phone call, while employed as a Bal Reg Oper, you allegedly were insubordinate when refusing multiple times to comply with instructions to obtain a track warrant to go surface track. This is a possible violation of the following rule(s) and/or policy:

1.6 Conduct – Insubordinate

1.13 : Reporting and Complying with Instructions

The July 8 letter added, “Under the MAPS Policy, this violation is a Dismissal event. Based upon your current status, if you are found to be in violation of this alleged charge, Dismissal may result.”

An investigative hearing was held in this matter on July 26, 2022, as scheduled. The Charging Officer, whose title is Manager of Track Maintenance, testified as follows. On July 7, 2022, he had a job briefing with a group consisting of the Claimant, the Director of Track Maintenance, and a Machine Operator. He told them that as a surface gang they would have to get their own time that day, being that they were short of people and didn’t have anybody to help. When he asked if there were any questions, there were none. At 7:35 he got a call from the Claimant and the Machine Operator telling him that they weren’t going to get time and that they didn’t want to get time.

He told them [the Charging Officer’s testimony continued] that he would be back to them. He called the Director of Track Maintenance, and together they called the Claimant and the Machine Operator back at 7:38. They were asked multiple times to get their track warrant, and they would not agree to do so. They were then removed from service. He feels that the Claimant was insubordinate and that he (the Claimant) did not report and comply with instructions. The MAPS Policy provides that someone who is insubordinate in accordance with Rule 1.6 is subject to dismissal. The Charging Officer identified an exhibit which showed that Claimant qualified as a 213A – FRA 213.7 A,B,C, and D on November 21, 2014. He identified a second exhibit which listed Claimant as a Track Foreman – Group 8 Class B Assistant Foreman.

In response to questions from the Organization Representative, the Charging Officer testified as follows. Asked whether the Claimant gave him a reason why he was refusing to get on-track authority that day, the Charging Officer testified that the Claimant told him that “you are so stressed out just running a ballast regulator that you don’t think you should get track warrant.” Questioned, “His concern was directed toward safety. Is that correct?”, he answered, “I think so, yes. He never really said 100 percent, but he did say that he had a concern because he was stressed out, yes.” Asked whether the Carrier attempted to provide a solution for the Claimant’s concerns, the Charging Officer stated that they talked about having the other operator get the time.” The Claimant, he testified, was respectful as he was on the phone.

In response to questions from the hearing officer, the Director of Track Maintenance (the Director) testified as follows. Prior to the conference call on July 7, 2022, with the Claimant and the Machine Operator, he had been notified over a period of a couple of weeks about ongoing issues with the team not wanting to get time to protect themselves. On July 7, the Manager of Track Maintenance (the Charging Officer) called him and said that the surface gang was refusing to get time. The Director

asked the Charging Officer to set up a three-way conference call with himself, the Charging Officer, and the surf team. The conversation started off with the surf team saying that they were being punished because the company was short-handed. He (the Director) explained that they were trying to hire other people. The Claimant said that he did not feel comfortable getting the time. He and the machine Operator also said that they shouldn't have to get time because they didn't have a Foreman. After it was explained that management was short-handed and was trying to get people to work with the Foreman, the Claimant said that he had to run the regulator, that a lot was going on, that he didn't want the extra workload on him, and that the Track Inspector should get time to protect them. This is what management had been doing. The Director explained that that was not going to be possible that day. Then he asked why the Track Inspector's safety was less important than theirs, why should the Track Inspector do the Claimant's job? What was the difference between him (the Track Inspector) doing his job and having to take all that extra responsibility to protect them, the Director testified, where everybody was trained and qualified on what we were asking?

The Director identified a document from Human Resources that showed the positions the Claimant has held and his training history. This included training for on-track safety under the ESFMT program since 2019 and other programs prior thereto going back to 1998. He also identified an exhibit (Exhibit 14) that contained a training course in on-track safety in the form of a slide presentation. The Director testified that Machine Operators take this course. A good portion of the course deals with track warrants. Slide 26, for example, makes clear that track warrants are applicable not only to trains but to maintenance workers also:

Men or equipment may receive a track warrant in the same manner as trains to occupy or perform maintenance on the main track without other protection. A track warrant must not be issued to protect men or equipment within the same or overlapping limits with a train unless:

- All trains are authorized to proceed in one direction only, and the track warrant specifies that men or equipment do not foul limits ahead of these trains (Box 6)
- All trains authorized are notified of the men or equipment and have been instructed to move at restricted speed.
- A track warrant must inform the employee in charge of men or equipment about trains
- If the track is not safe for trains to move at restricted speed, the employee must protect the track with red flags according to Rule 5.4.7 (Display of Red Flag)

Exhibit 15, also identified by the Director, is another slide course on on-track safety. Slide 4 of the course states, "Upon completion of this 3 part course, you will be able to follow on-track safety procedures to protect yourself and others when working on or near tracks 100% of the time." The slide then lists eight different requirements that the employee must complete, including the following:

Identify the On-Track Safety requirements for a Lone Worker

Identify the On-Track Safety requirements for a Machine Operator, Operators of Roadway Machines & Machines equipped with a Crane.

Identify the On-Track Safety requirements for an Employee-in-Charge

Slide 7 states:

Training

- On-Track Safety training must be conducted annually for all roadway workers
- Lookouts, flagmen, lone workers, and machine operators must be qualified on the On-track Safety procedures specific to their position and demonstrate proficiency for their specific position
- Employees in charge (EIC) must be qualified in all categories

Slide 32 contains a list of items that must be covered in the job briefing between a lone worker and their supervisor. This includes “The procedures that the lone worker intends to use to establish On-Track Safety”. Slide 34 states, “If communication cannot be established with the supervisor or designated employee, a lone worker must verify OTS with the contact person in the following table:” The table provides for ALL lone workers where the COMMUNICATION NEED is “Communication with the dispatcher/control operator is necessary to establish On Track Safety: Track and Time, Track permit, Track Warrant, Work and time, Foul time, Track removed from service,” the contact is to be with the Train Dispatcher.

In response to questions from the Organization representative, the Director testified as follows. The Claimant did say that he was uncomfortable. The Foreman of the Claimant’s gang bid off on a gang that is currently working in Sioux City. The Carrier is trying to fill his position. Some attempts to fill it fell through because of background checks and such. He is an advocate of having three people on a surf gang because he knows that it helps them out. But they are also qualified to be able to do that job if the Foreman is not there. Exhibits 21 and 22 are certificates of the Engineering Services Remote Track Authority Certification and the Remote Track Authority Restriction Certification. They are the Carrier’s new way to get track and time and to put out speed restrictions. This is the certification where you go through with the dispatcher. The dispatcher gets you different types of warrants. They will put on there whether you are joint with someone else. They will walk you through the steps if there is a train. And then they will put something in there that will modify it just to make sure you’re clear on what you’re doing. You also end up releasing it once it’s done. The employees who do this training do it on a computer, but you don’t have to have a personal computer. The “remote” signifies that it is with a computer. To his knowledge the Claimant has not been issued a computer, nor does he think that he has asked for one. But you are able to get a track warrant or track time without a computer as well.

In response to questions from the hearing officer, the Claimant testified as follows. In the July 7 conversation with the Director and the Charging Officer, it started out with the question why they wouldn’t get their own track and time, their own track authority. They (the Claimant and the Machine Operator) said that they weren’t comfortable doing it, they weren’t safe. They were not insubordinate

in violation of Rule 1.6. Nor were they in violation of Rule 1.13, Reporting and Complying with Instructions. According to company records he is qualified as an Assistant Foreman. He does not remember taking the tests to be 213.7 A, B, C, and D qualified. He remembers taking the ESFMT Engineering federal mandated training for all Union Pacific employees. He qualified in the Hy-Rail exam, Exhibit 18. That was a lot of years ago. He is familiar with Exhibit 20, the JSA, Prior to Operation.

The Organization representative read into the record Maintenance of Way Rule 41.2 Operators. It begins “Operators of roadway machines and work equipment are responsible for the efficient operation and proper care of equipment.” It then proceeds to list some of the responsibilities that operators have toward the equipment they use, such as lubrication, inspection, servicing, etc. He also read into the record, Rule 6, Foremen and Rule 41.2.1, Good Faith Challenge. In addition, he read into the record a statement dated July 22, 2022, by a Jackson Tamper Operator concerning an incident where he agreed to cover for his gang’s foreman in the latter’s absence, although he expressed reluctance to do so. The statement included the following paragraphs:

As the day progressed, I surfaced multiple locations within my track authority and began to get overwhelmed. My mind was on many things including but not limited to keeping track of footage, applying and/or removing slow orders, how much time I had left to work, keeping in contact with other work groups in my authority, and marking out a curve. That curve needed to be tamped prior to us clearing up where [it?] had been installed that day.

In the process of traveling to the curve, I have left my work heads down and unpinned running through a crossing. This ended up causing substantial damage to the machine and could have resulted in possible human injury/fatality. This error was the reason for my machine disqualification.

This situation could have been prevented if my mind has not been going in several directions, and I was able to specifically concentrate on my job as a machine operator. This is a dangerous practice to enforce and puts the railroad, as well as the safety of employees at substantial risk.

In response to questions from the Organization representative, the Claimant gave testimony as follows. It is ten years or a little longer since he personally has gotten some form of on-track safety, track and time, track authority, or track warrant. He qualified for Assistant Foreman in 2011. It is not a position he wants. He was a Foreman for a short time. He was a little overwhelmed by it. He did not feel confident in his ability to be Foreman. He gave up the job as soon as it was possible. He was asked why on July 7th, he felt “uncomfortable performing both the duties of a Machine Operator and a Foreman on that day.” He stated, “. . . there’s too much other things going on . . . to be worried about other things that the Foremen have to do.” Asked if there was a specific incident that made him feel that way, he cited the incident described in the Tamper Operator’s statement above, commenting that that operator “was doing both jobs and forgot to pin up his machine correctly and . . . basically almost destroyed a machine.” He does not feel that he was insubordinate on July 7 because it was about safety. He does not feel comfortable being Foreman on top of being a Machine Operator.”

The Claimant was asked by the hearing officer if he specifically told the Charging Officer or the Director that he wanted to make a Good Faith Challenge. He stated, “Yes.” The hearing officer then recalled the Charging Officer and asked him if the conversation in which, according to the Claimant, the latter said that he was uncomfortable and did not feel safe was with him. He stated, “I didn’t hear the ‘I don’t feel safe’ part, but I did hear that he was stressed out running the regulator. . . .” According to the Charging Officer, he then asked the Machine Operator who was together with the Claimant, “Will you get time?”, and was told no.

The hearing officer then recalled the Director and asked if in the July 7 conversation the statement was made to him by the Claimant that he was uncomfortable and did not feel safe. He answered, “That is correct. The statement was made, and this is where we tried to explain to him as a Manager or Director, our job is to help train them, because if we . . . allowed . . . somebody to come up and say, ‘Hey, I don’t feel comfortable with that,’ then that would open up the door to where anybody could come in and just say, ‘Hey, . . . basically no[t] going to do this.’ Now that’s the reason we go through the training. And I tried showing today that we have, even since [the Claimant’s] been hired in ‘98, . . . we’ve provided the training and basically set that expectation. So we try to make sure that they – give them what they need to be successful”

The Director testified that in the July 7 conversation, Rule 41.2.1 Good Faith Challenge was not brought up. According to the Director, the Claimant and the other employee “said that they were told by the groups that they didn’t need to do that” and they weren’t going to get time. At the very end, he testified, he said, “You guys are telling me you’re not going to do what you’re asked” to which they responded “That’s correct. You can abolish us if you need to.” He then told them, he stated, “Gentlemen, you’re putting me in a situation that I don’t want to be in but understand that there’s consequences for what we’re doing here.”

The Machine Operator who was on the same surface gang as the Claimant and participated with him in the July 7, 2022, phone conversation with the Director and the Charging Officer, testified in response to questions from the Organization representative as follows. He and the Claimant refused the directive to go out and get track and time that day because they felt it wasn’t safe. “We felt like it was a safety stand-down to where we didn’t feel comfortable. We weren’t qualified. We didn’t want . . . to do an unsafe act.” They made their concerns clear to the Director and the Charging Officer two or three times. They were not following any kind of appeals process. It was going on for two or three months where, in a roundabout way, they (management) said, “Well, you’re gonna have to get time . . . sooner or later.” They responded that they didn’t feel safe, that they weren’t qualified, they weren’t comfortable doing it; they had never done it on their crews.

In response to questions from the hearing officer the Machine Operator testified that in the July 7 conference call with the Director and the Charging Officer they stressed to them many times that it was not safe, that they were not qualified, that they didn’t feel comfortable doing the job. They would talk about it a little bit, and then the Director and the Charging Officer would ask him if he refused to get a track warrant. They did that two or three times, and he felt that they were baiting him to say, “No,

I will not get my own track authority.” He did not use the words “good faith challenge,” but from the points that were brought up, it covered that.

It is the position of the Carrier that the instructions to Claimant to obtain a track warrant were proper in that obtaining such protection is a routine and critical necessity in order to be able to work safely on a railroad. His repeated refusal to comply with this directive, the Carrier contends, constituted a clear violation of Carrier Rules 1.6: Conduct – Insubordinate and 1.13 Reporting and Complying with Instructions. The Claimant, the Carrier argues, was fully qualified to obtain track authority, having completed all required training and having held the positions of Foreman and Track Inspector that regularly required him to perform this function. Obtaining track authority, the Carrier asserts, is a common and incidental task performed by Machine Operators, particularly in the absence of a designated foreman, and is essential for safe operation. The Claimant’s refusal to obtain a track warrant, the Carrier maintains, was not a legitimate safety challenge but a willful act of insubordination. Nor, the Carrier contends, was the Claimant asked to perform a composite position or asked to do a task for which he lacked the necessary equipment. Further, the Carrier argues, the Claimant did not present a Good Faith Challenge pursuant to Rule 135.8.3. The dismissal of the Claimant is supported by substantial evidence and the seriousness of the violation, the Carrier maintains; he was provided all due process rights required under the collective agreement; and no procedural errors exist. The Carrier requests the Board to deny the claim.

The Organization asserts that the process for obtaining track authority is explained in the Carrier’s 111-page training program set forth in Exhibit 14 of the investigative hearing transcript. Based on its view of the training program, the Organization states that “it is clear that this work (the obtaining of track authority) is typically assigned to an Employee in Charge” The Organization argues that the work assigned to an EIC “is on all fours with the Foreman Classification identified within Rule 6.” The Association concludes, “Thus, there can be no serious dispute after review of Carrier training documents regarding this work of obtaining on-track authority is NOT incidental to the track machine operator position but is explicitly delegated to the EIC, and therefore, is not work customarily performed by track machine operators, but is instead performed by those employees who are assigned to the Foreman Classification.”

The Organization likens the Claimant’s situation to that of the Jackson Tamper Operator, whose statement is quoted at page 5 above. It asserts that because of that “operator’s focus being divided between the EIC role and the duties of operating his machine, he inadvertently left his work heads down prior to traveling, resulting in him running the work heads into a crossing causing significant damage to the machine.” The Organization notes that the incident occurred in the same territory as that in which the Claimant was working and argues that “[i]t was with this background, consistently reinforced daily by Carrier messaging, . . . that the Claimant believed he was empowered to stop the line and not perform work that he was otherwise uncomfortable performing based upon legitimate safety concerns relating to lack of focus and his inability to multi-task and perform the duties of two (2) jobs, one of which (the EIC, Foreman position) was in and of itself indisputably beyond his comfort level.” (emphasis in original). The Organization contends that in refusing to accept the instruction to obtain a track warrant, the Claimant was acting in accordance with Safety Rule 70.1, which it quotes as follows:

70.1 – Safety Responsibilities: Employees are empowered to work safely and must: Be responsible for personal safety and accountable for their behavior. Correct or protect any unsafe condition or practice and report to proper authority. Maintain situational awareness. Work within the limits of physical capabilities.....(emphasis in original)

The Organization asserts that from April, 2022, through July 6, 2022, the Carrier provided a Track Inspector to obtain track authority for the Claimant's gang because it could not fill a vacant Foreman position and in recognition of the fact that even though the Claimant may have been able mechanically to perform the work of running a machine and obtaining track authority, the level of stress he was already incurring in running his machine together with his general discomfort with the Foreman position precluded him from safely providing on-track safety. The Organization argues that "for the Claimant to have performed the duties of a track machine operator and foreman would have unquestionably violated the spirit of Rule 70.1 which requires that employees be responsible for their personal safety, accountable for their behavior and *work within the limits of physical capabilities.*" (italics the Organization's). The Organization contends that the situation on July 7, 2022, was the same as between the preceding April and July 6, 2022, and that "the Claimant had every right to refuse a directive to violate Safety Rule 70.1 by performing work beyond his abilities pursuant with 49 CFR 214, Subpart D, which the Carrier implicitly recognized by providing a track inspector to perform this work with no adverse consequence to the Claimant prior to July 7, 2022."

The Organization further argues that "the Claimant made a good-faith challenge to what he believed to be an imminent safety concern surrounding on-track safety, which instead of being addressed in any thoughtful manner by the Carrier, resulted in the Claimant's arbitrary removal from service and subsequent dismissal." This dismissal, the Organization asserts, was "without just cause" and in violation of the collective bargaining agreement. Rather than train or find another appropriately qualified employee who customarily performs work of providing on-track authority, the Organization asserts, "the Carrier insisted that the Claimant perform work which was not part of his job description, which [he] had not performed in ten (10) years, and which he had consistently warranted was beyond his ability and was therefore, uncomfortable with." Compliance with the Carrier's instruction, the Organization maintains, "would unquestionably have resulted in a safety hazard, and a violation of Rule 70.1 – Safety Responsibilities....."

The Organization acknowledges the general principle "that employees are to work now and grieve later." It cites the following version of the rule:

Safety and Health. An employee is not obligated to follow an order that threatens the employee's health or safety. Some arbitrators require that an actual threat exist, but the majority apply an objective standard to determine if the employee's safety or health-related fear was reasonable under the circumstances.

The Organization cites a number of awards that it contends support its position and asserts that "because the Claimant genuinely believed performing this work was unsafe, he had an intrinsic right to refuse to perform the work." In addition, it argues, "the Claimant also had an absolute right to make a good-

faith challenge” and that his “not performing work associated with an explicitly designated EIC position, while running a piece of equipment was based upon his good-faith belief, supported by a vast amount of evidence in this record . . . that doing so was unsafe.”

The Organization further argues that it was permissible for the Claimant to refuse the request that he obtain a track warrant because this would have required him to work outside his work classification. Claimant’s position of Track Operator, the Organization asserts, is classified in the collective bargaining agreement under Rule 9 (e) whereas the Foreman position, with which EIC duties are customarily associated, is classified under Rule 6. The Claimant, the Organization asserts, was under no obligation to know how to perform work which otherwise is not associated with the position he is holding. The Organization notes the Claimant’s testimony that the FRA 213 (a)(b)(c), and (d) training was arbitrarily credited to him by a prior manager although he never took the training he was credited with. It cites the evidence that Claimant intentionally did not possess seniority right in the Foreman and Track Inspector classifications and had not worked as a Foreman or Assistant Foreman the last ten years because of his discomfort with the increased responsibility associated with those positions. Claimant, the Organization argues, was unable to get remote track authority because he was not issued a computer, and the Carrier’s contention in its letter dated October 10, 2022, that he could have used his phone to obtain track authority violates existing Carrier rules and ignores the fact that dispatchers no longer issue authority over the phone except in emergencies. Finally, the Organization argues that computer-based training that Claimant and every other Engineering department employee is required to complete does not provide the practical experience necessary to confidently perform the duties of of an EIC in charge of a work group.

The Organization argues that even if it were to be granted that the Carrier was within its rights in requesting the Claimant to obtain a track warrant, the dismissal without warning of the Claimant, an employee with 24 years of service and no record of prior discipline who admittedly was respectful at all times during the July 7 conference call with his Manager and the Director and believed he was empowered to challenge what he believed to be an unsafe directive, was without just cause and constituted arbitrary, excessive, and unwarranted discipline. The Organization requests that the Claimant’s discipline be overturned and its requested remedy allowed.

The Claimant was charged with violation of two rules: 1.6: Conduct – Insubordinate and 1.13: Reporting and Complying with Instructions. The decision letter, dated August 15, 2022, notified the Claimant of the finding “that the evidence more than substantially supports the charges against you” and that he was thereby dismissed from service. Rule 1.6, to the extent pertinent, states as follows:

1.6 – Conduct

Employees must not be:

* * *

3. Insubordinate

* * *

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.

The Carrier Policy for Managing Agreement Professionals for Success (MAPS) in Appendix C, Glossary defines “INSUBORDINATION” as follows:

When an employee’s actions or statements indicate a refusal (as opposed to a failure for cause) to carry out the instructions of a supervisor which are work, safety or policy related and which conform to accepted Company and industry practice, or when an employee demonstrates gross disrespect toward a supervisor. **NOTE:** Any failure to comply with Union Pacific’s Drug and Alcohol Policy will be considered insubordination.

The MAPS Policy lists a violation of Rule 1.6 Insubordinate as a dismissal event.

Rule 1.13 provides as follows:

1.13 – Reporting and Complying with Instructions

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

The Carrier has the burden of proof, also known as the burden of persuasion, in dismissal and other disciplinary cases. In the present case the Carrier met its burden of producing evidence that the Claimant failed to comply with his supervisors’ instructions to obtain a track warrant when both the Director and the Charging Officer gave testimony to that effect and the Claimant admitted that it was true. The duty of going forward then shifted to the Claimant (or Organization) to produce evidence in support of the Claimant’s affirmative defense that he declined the instruction because he believed in good faith that it would be unsafe for him both to perform his Ballast Regulator Operator job and obtain track authority.

This Board is of the opinion that the record does not contain sufficient evidence to establish that it would have been unsafe for the Claimant to comply with the instruction that he obtain his own track warrant for the work that he was to perform on July 7, 2022. Basically, what the Organization has done in this case is to set up two straw men in the figures of a Foreman and an EIC, unrelated to the specific facts of this case, proceed to argue that it was unsafe to request the Claimant to fill those roles, and then conclude that his dismissal was therefore improper. There is no evidence, however, that Claimant was asked to serve as a Foreman or an EIC on July 7, 2022.

The Charging Officer, for example, testified that in the job briefing on July 7, 2022, he told the surf gang that they would have to get their own time that day because they were short of people; that later that morning the Claimant and the other member of the gang called him and said that they were not going to and did not want to get time; that he called them back shortly together with the Director “and they were asked multiple times to get their track warrant, and they still did not agree to it.” (Tr. 16). From the Charging Officer’s testimony it is clear that the Claimant was asked to get his own track warrant and the other member of his gang was also asked to get his own track warrant. There is no suggestion in the Charging Officer’s testimony that either the Claimant or the other member of his gang was asked to assume responsibility for the track safety of anyone but himself.

The Claimant himself, in describing the conference call with the Director and the Charging Officer, testified, “We were told we had to get our own track and time.” (Tr. 42). Here again there is no testimony that the Claimant was asked to look out for the other gang member’s track safety or vice- versa. Rule 6 is relevant to the question of whether Claimant was asked to perform the duties of a Foreman on July 7, 2022. It states, in relevant part, as follows:

RULE 6 – FOREMEN – ALL CLASSIFICATIONS

An employee who is assigned to the duties and responsibilities of supervising, instructing or assisting in the work of employees assigned under their jurisdiction. . . .

Despite the lack of any evidence in the record that any employee was assigned under the jurisdiction of the Claimant, the Organization argues that requesting the Claimant to obtain his own track warrant was tantamount to asking him to perform the duties of a Foreman. There is simply no record support for such a contention.

Exhibit 15 to the transcript of the investigative hearing contradicts the Organization’s effort to equate the EIC position with requiring an employee to obtain their own track warrant. The exhibit is a slide course that is available to Union Pacific employees on on-track safety. Slide 4 of the exhibit identifies eight separate types of categories for which instruction in on-track safety is provided. These include, among others, separate units of instruction for a Lone Worker and an Employee-in-Charge. This belies the Organization contention that the work of obtaining track authority is typically assigned to an Employee-in-Charge to the extent that by the assertion the Organization means to imply that it is not typical for a lone worker to obtain track authority. Slide 4 shows that there is nothing unusual in a lone worker – such as the Claimant would have been on July 7, 2022 – being expected to obtain his own track authority. There is also a separate unit of instruction dealing with on-track safety requirements for a Machine Operator, Operators of Roadway Machines & Machines equipped with a Crane.

Slide 32 of Exhibit 15 is further evidence that obtaining track authority by the lone worker is independent of being an Employee-in-Charge. It contains a list of items that must be covered in the job briefing between a lone worker and their supervisor. This includes “The procedures that the lone worker intends to use to establish On-Track Safety”. Slide 34 states, “If communication cannot be

established with the supervisor or designated employee, a lone worker must verify OTS with the contact person in the following table:" The table provides for ALL lone workers where the COMMUNICATION NEED is "Communication with the dispatcher/control operator is necessary to establish On Track Safety: Track and Time, Track permit,Track Warrant, Work and time, Foul time, Track removed from service," the contact is to be with the Train Dispatcher.

The Board has referred to the Claimant as a lone worker. This is because on July 7 both he and the only other member of his gang were each asked to obtain his own track warrant, indicating that each worked separate of the other. Nor was any testimony offered at the hearing that they worked together. But regardless of whether the Claimant was a lone worker, the fact that this category of worker exists and obtains track authority separate and apart from an Employee-in-Charge is evidence that being required to obtain one's own track warrant does not signify that one is an Employee-in-Charge or that one is serving in the capacity of a Foreman, who, as noted above, is someone who has other employees assigned under their jurisdiction.

The Organization acknowledges the general principle "that employees are to work now and grieve later." It cites the following version of the rule:

Safety and Health. An employee is not obligated to follow an order that threatens the employee's health or safety. Some arbitrators require that an actual threat exist, but the majority apply an objective standard to determine if the employee's safety or health-related fear was reasonable under the circumstances.

The standard for determining whether the employee is entitled to be excused for refusing an assignment, as the rule makes clear, is an objective standard, not the employee's subjective belief that what they are being asked to do is unsafe. The evidence in the record established that the Claimant was thoroughly trained in how to obtain track authority, including a track warrant. At no time either in his conversations with his managers or during the investigative hearing did the Claimant contend that he did not know how to obtain a track warrant or how to comply with the instructions a dispatcher might convey to him as the holder of a track warrant. Rather he asserted that performing both his operator job and assuring his own on-track safety were too stressful for him and beyond his comfort level.

The Board could understand (but does not at this time rule on whether it would agree with) such a claim on the part of an employee who was requested to serve in the capacity of an EIC or otherwise be responsible for the on-track safety not only of himself but other employees also. The Board, however, is not persuaded on the facts in evidence in this case that an employee with the Claimant's years of service and repeated training in on-track safety had a reasonable fear for his safety so as to justify his declination to comply with his managers' instructions on July 7, 2022, to obtain his own track warrant in connection with the duties he was required to perform that day. No evidence was presented of any situation that was likely to come up in the Claimant's performance of his on-track duties as Ballast Regulator Operator on July 7 that would impinge on his responsibilities as holder of the track warrant to the extent that it would be reasonable to expect that he would not be able to perform both his operator duties and his responsibilities as holder of the track warrant in a safe manner.

The Board concludes that the Claimant did not have a reasonable basis to fear for his safety if he obtained his own track warrant in connection with the work he was required to perform as a Ballast Regulator Operator on July 7, 2022.

It follows that the Carrier has established by substantial evidence the Claimant violated Carrier Rule 1.13 – Reporting and Complying with Instructions. The question to be determined is whether the Carrier has also proved by substantial evidence that the Claimant was insubordinate in violation of Rule 1.6: Conduct – Insubordinate. The definition of insubordination in the MAPS Policy was quoted above and is here reproduced for the sake of convenience:

When an employee's actions or statements indicate a refusal (as opposed to a failure for cause) to carry out the instructions of a supervisor which are work, safety or policy related and which conform to accepted Company and industry practice, or when an employee demonstrates gross disrespect toward a supervisor. NOTE: Any failure to comply with Union Pacific's Drug and Alcohol Policy will be considered insubordination.

Must the Claimant's conduct in this case be characterized as a refusal to obtain a track warrant or may it also be considered a failure for cause? On the particular facts of this case the Board is of the opinion that the Claimant's actions can reasonably be viewed as a failure for cause. The considerations applicable to whether the Claimant's actions amounted to a failure for cause are not the same as those pertinent to whether he had a reasonable fear for his safety. The fact that for a period of three months the Carrier respected and deferred to Claimant's representation to it that it was unsafe for him to both perform his duties as Ballast Regulator Operator and obtain his own track authority could reasonably instill in his mind a firm conviction that it was accepted by both parties that it would be unsafe for him to both perform his operator duties and be responsible for protecting his on-track safety. In these circumstances it was unreasonable for the Carrier to attempt to undo in one day an arrangement that had been voluntarily established over a period of months. A more gradual process was called for in the circumstances.

The Board concludes that the Carrier has established by substantial evidence that the Claimant violated Carrier Rule 1.13 Reporting and Complying with Instructions but has failed to prove by substantial evidence that he also violated Carrier Rule 1.6: Conduct – Insubordinate. His dismissal is therefore reversed and the Carrier is directed to offer him reinstatement to his former position and to make him whole for all wages and benefits lost in accordance with this Board's decision in PLB No. 7660, Award No. 82. In accordance with the MAPS Policy he shall be assessed Training 1 status for his violation of Rule 1.13. His retention period shall be 24 months.

Finally it should be noted that the Board's decision herein is limited to the facts of the case, namely, where the Foreman position was vacant because he had bid onto another job; where the Carrier attempted to fill the Foreman position but was not yet able to do so; where a Track Inspector was not available to provide on-track safety for the employees involved; and where the claimant was requested to obtain on-track safety only for himself. The Board expresses no opinion regarding the respective rights of the parties in any other fact situation since such a case is not before it.

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.

/s/ Sinclair Kossoff 9/15/2025
Sinclair Kossoff, Neutral Member Date

Jennifer McNeil October 6, 2025
Jennifer McNeil, Carrier Member Date

 October 6, 2025
John Schlismann, Organization Member Date