

PUBLIC LAW BOARD NO. 7660

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)		
DIVISION – IBT RAIL CONFERENCE)		
	) Case No. 247	
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. J. Cutts, by letter dated October 3, 2022, in connection with allegations that he sent offensive and inappropriate text messages in violation of Rules EEO Policy – Dismissal; 1.6: Conduct – Careless; 1.6: Conduct – Discourteous; 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 to the performance of duty will not be tolerated, was excessive, arbitrary, disparate; without the Carrier having met its burden of proof; and in violation of the Agreement (System File RI-2248U-801/1779716 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Cutts shall now be returned to service and ‘. . . be made whole by compensating him for all wage and benefit loss suffered by him for his removal from service, any and all expenses incurred or lost as a result, and the alleged charge(s) be expunged from his personal record. Claimant must also be made whole for any and all loss of Railroad Retirement month credit and any other loss.’ (Employee’s 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.

Jake Cutts (the Claimant), at the time of his dismissal by the Carrier, held the job of System Truck Driver with 11 years of service and no record of prior discipline. By letter dated August 9, 2022,

he was requested to report for a hearing on August 24, 2022, to develop the facts and determine his responsibility, if any, in connection with the following charge:

On 07/30/2022, at the location of Milwaukee, WI, while employed as a Sys Truck Driver, you allegedly sent offensive and inappropriate text messages to the Gang Foreman. This is a possible violation of the following rule(s) and/or policy:

EEO Policy - Dismissal
1.6: Conduct – Careless
1.6: Conduct – Discourteous

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 the performance of duty will not be tolerated.

The August 9 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.” After two postponements an investigative hearing was held in this matter on September 13, 2022.

The facts of this case may be summarized as follows. On July 30, 2022, the Claimant sent a text message to his Foreman at 5:01 a.m. stating, “Forgot I was supposed to be there @ 5:30 & on top of all that I’m a few ticks behind this morning. Thanks, yours truly the one and only Jake mother f_en CUTTS.” At 5:58 a.m. the Foreman asked his Manager (the Conducting Officer in the present case) for permission to send the Claimant home on an unauthorized absence if he did not arrive at work on time. He did not mention the 5:01 a.m. text message to his Manager although he had read the message. In support of his request he told the Manager that he was tired of the Claimant reporting late for work. So far as appears in the record the Claimant had no violation of record of the attendance policy, either for being tardy or absent. Any prior tardies on the part of the Claimant would therefore have been excused, although the Claimant denied that he had ever been tardy before except for one instance which apparently had been excused. The Claimant arrived for his job briefing at 6:01 a.m., one minute late. The Foreman sent him home on an unauthorized absence. He had driven 84 miles to come to work. About 6:30 a.m. the Claimant called the Manager to complain about being sent home despite the fact that he left a text message for the Foreman that he would be late for work. The Manager asked for a screen shot of the 5:01 text message as verification, which the Claimant provided. The Manager did not reverse the Foreman’s action, but a short while later he called the Foreman and coached him on a proper interpretation of the Attendance Policy. He explained in his testimony that the Foreman should have informed him of the 5:01 text message from the Claimant at the time that he asked for permission to send him home. As a result of his treatment by the Foreman, for a period of hours during the day the Claimant sent a number of offensive text messages to the Foreman, including referring to him as Hitler and calling him a liar for listing the Claimant as an unauthorized absence. In response on August 9, 2022, the Carrier served the Claimant with the charge letter quoted above.

It is the position of the Carrier that the Claimant's text messages to the Foreman were a serious breach of professional standards and a direct violation of multiple company policies. It notes that Rule 1.6: Conduct explicitly prohibits discourteous, hostile, or immoral behavior and states that any such act affecting the interests of the company or its employees is cause for dismissal. The Policy to Address Violence and Abusive Behavior (Ex. 18), the Carrier asserts, reinforces a zero-tolerance toward verbal threats or hostile behavior that creates a reasonable fear of harm. The EEO Policy (Ex.19), it observes, prohibits offensive conduct that creates a hostile work environment, whether on or off-duty. The Carrier contends that the cumulative effect of the Claimant's messages violated these policies and undermined the respectful work environment the Carrier is committed to maintain. (37-39) The Carrier cites the Foreman's testimony that he was unable to perform his duties because of the barrage of texts and that the Hitler reference in particular constituted harassment. It points to the statement in the MAPS Policy (Ex. 20) that a single violation of Rule 1.6 Conduct may result in dismissal.

Among the most concerning of the Claimant's messages, the Carrier asserts, were "Thanks, yours truly, the one and only, Jake motherf_____g Cutts," "I'll promptly be myself today and fiddle with my pudd oh wait that's what you were doing at 5am," "Smile Hitler just smile." The egregiousness of the Claimant's conduct," the Carrier contends, lies not only in the content of the messages but in the context and persistence of the behavior. These remarks, the Carrier contends, went far beyond the bounds of acceptable workplace communication, were not offhand remarks made in a moment of frustration, but were deliberate, repeated and targeted communications sent to supervisory personnel during and after a workplace dispute.

The Claimant's conduct, the Carrier contends, undermined the authority of supervisors, was hostile, abusive, and offensive, and grounds for immediate dismissal. His behavior, in the Carrier's view, violated Rule 1.6: Conduct and the EEO Policy. His actions, the Carrier argues, were offensive and hostile both to Claimant's Foreman and Manager, the Carrier asserts, and provided substantial evidence for his dismissal. Further, the Carrier maintains, numerous railroad awards have recognized that the discourteous, disruptive, and hostile conduct of the kind exhibited by the Claimant in the present matter are incompatible with a safe, respectful, and harassment-free workplace that it is obligated to maintain and warrant his dismissal. The Claimant was afforded all due process rights required under the collective bargaining agreement, the Carrier argues; he received a fair hearing; and his dismissal was supported by substantial evidence. It requests the Board to deny the claim.

The Organization takes the position that the Carrier developed no theory of its case relative to Rule 1.6: Conduct – Careless, did not identify what portions of the Carrier's EEO Policy – Dismissal the Claimant violated, and failed to recognize that violations of Rule 1.6: Conduct – Discourteous do not necessarily rise to the level of a dismissible offense, as explicitly stated in the MAPS Policy. The record contains no explanation, the Organization maintains, of how Claimant violated Rule 1.6: Conduct – Careless, and it must therefore be found that the Carrier has failed to meet its burden of proof concerning that alleged violation. Regarding the EEO Policy allegation, the Organization argues that "there simply was no comment made related to any protected class which would normally fall within the scope of the Carrier's EEO Policy." Nor, the Organization contends, was the matter treated

as an EEO violation by the Carrier's own managers as shown by the fact that it was never reported as an EEO violation.

The Organization describes the Claimant's text messages as "crass" and calls his comparison of the Foreman with Hitler as "absurd," but it argues that "the Carrier has not shown that absurd statements in and of themselves violate the Carrier's EEO Policy." The Organization notes that the EEO Policy states that EEO violations may result in appropriate discipline up to and including termination, and asserts that "even if the Carrier were able to show a technical rule violation of the EEO Policy (which it has not), the Carrier still has not met its burden of proof to substantiate the level of discipline imposed."

With regard to the allegation that Claimant violated Rule 1.6: - Discourteous, the Organization asserts its understanding from the testimony of the Charging Officer at pages 16 and 17 of the transcript of the investigative hearing that it is based on the Claimant's text message to the Foreman at 5:01 a.m. noting that he was "a few ticks behind this morning" and which he concluded with the sentence, "Thanks, yours truly, the one and only, **Jake motherf_____g Cutts.**" (bold in original). The Organization argues that "upon reflection" the Charging Officer viewed the word "motherf_____g" not to be offensive as shown by his testimony at pages 42-43 of the transcript where he was asked how he perceived a particular text message of the Claimant and answered, ". . . The motherf_____g part of it, . . . I don't take too much offense to it personally, as it is just a lexicon used by most people in today's world." Following its citation of the Charging Officer's testimony at pages 42-43, the Organization asserts, "As such, we submit that the Carrier did not meet its burden of proof to demonstrate that the Claimant's use of foul and/or sexually charged language amounted to anything more than shop talk or locker-room banter, which is irrefutably commonplace and normal within this industry." The Organization also quotes from the MAPS Policy, which states, "Note: 'Discourteous' conduct charges may result in, training, and/or dismissal depending on the circumstances."

The Organization further argues that Arbitration Boards have consistently held that when a claimant is disciplined under multiple violations, as in this case, but the Carrier prevailed in part of the charges, the discipline should be reduced. In addition, the Organization contends, taking into account that the Claimant is an 11 year employee who regrets any mistakes he may have made, failure to follow progressive discipline and to move directly to dismissal was arbitrary, excessive, and unwarranted. The Organization requests the Board to overturn the Claimant's dismissal and award its requested remedy.

The charge letter lists EEO Policy (Equal Employment Opportunity/Affirmative Action and Related Policy Directives) first among the three violations with which the Claimant was charged and found guilty. The EEO Policy states:

PROHIBITION OF DISCRIMINATION OR HARASSMENT

Union Pacific strictly prohibits any discrimination or harassment based on a person's race, color, sex, national origin, age, disability, religion, military and veteran status, sexual orientation, gender identity, gender expression, genetic information, pregnancy, or any other

basis prohibited by law (“protected status”). This policy covers all aspects of employment, including hiring, promotions, terminations, pay, and the work environment.

Union Pacific prohibits sexual harassment of employees, contractors, interns, volunteers, customers, visitors, previously unidentified third parties or others whom employees may come into contact while working, or while on Company travel. Union Pacific prohibits unwelcome sexual advances, requests for sexual favors, and other verbal or physical behavior of a sexual nature.

PROHIBITION OF OFFENSIVE BEHAVIOR & REMARKS

Union Pacific is committed to providing a work environment free from offensive behavior and statements directed toward race, sex, or any other protected status. This policy prohibits such offensive behavior and remarks in the presence of any individuals with whom employees may encounter while working. This policy prohibits such offensive behavior or statements in the workplace, while representing Union Pacific, including but not limited to while contacting any Union Pacific vendor or customer; while using any social media provided by or sponsored by Union Pacific; or during travel or overnight stays paid for by Union Pacific even if no one present is offended by the behavior or remark. Additionally, offensive conduct that is intended to or can reasonably be expected to, create a hostile work environment may be considered a violation of this policy, even if the conduct occurs off-duty, and/or off property, or through an employee’s private electronic devices.

Addressing first the section headed PROHIBITION OF DISCRIMINATION OR HARASSMENT, there is no evidence of any action on the part of the Claimant against the Foreman because of that individual’s protected status. The Foreman, it must be noted, is the only person referred to in the charge letter that the Claimant is alleged to have acted against in an offensive or inappropriate manner. Nor is there evidence that the Claimant made any sexual advances, requests for sexual favors, or directed any verbal or physical behavior of a sexual nature toward the Foreman that could remotely be considered discrimination or harassment directed toward him because of the Foreman’s sex.

Moving to the next section, PROHIBITION OF OFFENSIVE BEHAVIOR & REMARKS, the first sentence indicates that its object is to provide “a work environment free from offensive behavior and statements directed toward race, sex, or any other protected status.” The last sentence states, “Additionally, offensive conduct that is intended to or can reasonably be expected to, create a hostile work environment may be considered a violation of this policy, even if the conduct occurs off-duty, and/or off property, or through an employee’s private electronic devices.” As part of a policy intended to protect employees who fit into what the EEO Policy calls “protected status,” the only reasonable interpretation of this section is that it refers to offensive behavior and remarks, harassment, or creation of a hostile work environment that is based on an employee’s protected status, namely, race, color, sex, national origin, age, disability, religion, etc. This interpretation is reinforced by the facts that the lead sentence of both sections refers to “protected status” and that the language in question appears in a document whose title is Equal Employment Opportunity/Affirmative Action and Related Policy

Directives.” Other hostile, harassing, or otherwise offensive conduct is covered under Rule 1.6: Conduct and its various parts including Discourteous, Quarrelsome, Insubordinate or the Policy to Address Violence & Abusive Behavior in the Workplace. This Board so concludes.

The Carrier argues that the Claimant created a hostile environment for the Foreman in violation of the EEO Policy. However, there is no evidence that the Claimant sent any of his text messages here in issue to the Foreman in order to harass him or create a hostile environment for the Foreman based on the latter’s sex, race, or other protected status. Instead his hostile conduct toward the Foreman was motivated solely by the fact that the Foreman sent him home on an unauthorized absence after he had driven 84 miles to work, although he had left a text message for the Foreman at 5:01 a.m. that he would be a little late and had arrived for the job briefing at 6:01 a.m., only one minute late. This Board finds therefore that the Carrier has failed to prove by substantial evidence that the Claimant violated the EEO Policy.

With regard to Rule 1.6 : Conduct – Careless it is not clear on what basis the Claimant was charged with a violation of that rule. There is no evidence in the record to support a finding of a violation of this rule, and the Carrier, in its submission to this Board, has not argued that the Claimant violated the rule. This Board finds that the Carrier has failed to prove by substantial evidence that the Claimant violated Rule 1.6: Conduct – Careless.

The remaining charge against the Claimant is a violation of Rule 1.6: Conduct – Discourteous. There is ample evidence that the text messages sent to the Foreman by the Claimant were discourteous, rude, disrespectful, and even insulting where in separate messages the Claimant referred to the Foreman as Hitler and then a liar for sending him home on the basis of an unauthorized absence. The inquiry, however, cannot end there. There is substantial evidence in the record of what may be called provocation on the part of the Foreman. The Foreman sought permission from his Manager (the Charging Officer in this case and also the Claimant’s Manager) for advance permission to send the Claimant home on an unauthorized absence if he did not report for work by 6:00 a.m., the starting time. Thus the Charging Officer testified that on July 30, 2022, at 5:58 he was called by the Foreman to inform him that the Claimant was going to be late again. The Charging Officer was working at another site that day. The Foreman said that he was tired of the Claimant showing up late and that he wore out his free changes [sic]. The Charging Officer told the Foreman that he would support his decision as Foreman and to send the Claimant home. (Tr. 12)

After the Foreman sent the Claimant home, the Claimant called his Manager (the Charging Officer) to plead his case. He told the Manager that he had sent the Foreman a text at 5:00 a.m., letting him know that he was going to be late. The Manager asked for a screen shot of the text for verification, which the Claimant provided. (Tr. 14). At 7:15, the Charging Officer testified, he called the Foreman and began to coach him on the Attendance Policy. “Coaching,” the Charging Officer testified, “was geared toward the fact that [the Foreman] failed to mention to me in the first conversation that [the Claimant] had sent him a text at 5:01, letting [the Foreman] know that [the Claimant] was going to be late.” (Tr. 17-18). The plain implication of the Charging Officer’s testimony is that had the Foreman

notified him of the prior notification at 5:01 a.m., he (the Manager) might not have authorized the Foreman to send the Claimant home on an unauthorized absence.

Other evidence on the question of provocation is the testimony of the Foreman on cross-examination. He was asked, “And you let the employee drive an hour, knowing that he’s gonna be there late, to send him back home. Is that a practice you usually do?” He answered, “No. . . .” He added that he did not see the Claimant’s text message until about 5:55 a.m. The Charging Officer was asked on cross-examination, “Is it a practice . . . if an employee calls a Foreman or calls you and tells you he’s running late, that you guys let him drive an hour to get to work, then tell him to go back home?” He answered, “Typically, no.”

The evidence shows that the Foreman obtained permission from his Manager (the Charging Officer) to send the Claimant home if he was late based on an incomplete report to his Manager. The Manager testified that at the time he asked for permission to send the Claimant home the Foreman should have informed him of the 5:01 a.m. text message from the Claimant stating that he would be late. In addition, shortly after learning of the text message from the Claimant, the Manager telephoned the Foreman in order to coach him in a proper interpretation of the Attendance Policy. These facts indicate that it is plausible to believe that the Manager would not have authorized the Foreman to send the Claimant home had the Foreman told the Manager of the 5:01 a.m. text message he received from the Claimant that he was running “a few ticks behind this morning.” Such a belief is supported by the fact that both the Foreman and the Charging Officer testified that it is not typical to permit an employee who calls to report that he will be late to drive a long distance to work and then send him home. This Board concludes that substantial evidence in the record shows that there was provocation on the Foreman’s part that contributed to the Claimant’s discourteous, disrespectful, and insulting conduct toward the Foreman.

In PLB No. 6237, Award No. 11, the Board set aside the dismissal of the claimant based on the fact that his actions were provoked by the claimant’s foreman. Provocation on the part of the Claimant’s Foreman is also present in this case. In addition the Claimant is an employee with 11 years of service, and the only information in the record on his past record is the Organization’s representation that it is discipline free. These considerations persuade the Board that the Claimant’s dismissal was not proper and must be set aside. However, his discourteous, disrespectful, and insulting conduct may not be overlooked. It is the Board’s determination that the appropriate remedy in this case is reinstatement with one-half back pay, no loss of seniority for time off work, and retroactive restoration of benefits. One-half back pay shall be reduced by one-half of earnings from other employment during the period of Claimant’s dismissal. Retroactive restoration of benefits and the determination of any other issue regarding remedy shall be in accordance with this Board’s decision in PLB No. 7660, Award No. 82.

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

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