

PUBLIC LAW BOARD NO. 7660

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)		
DIVISION – IBT RAIL CONFERENCE)		
	) Case No. 248	
and)		
	)	
UNION PACIFIC RAILROAD COMPANY)		

STATEMENT OF CLAIM

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. B. Alcorn, by letter dated December 16, 2022, for an alleged violation of Rule 1.6: Conduct – Discourteous; and additionally, Rule 1.6 stipulates 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 arbitrary, disparate and excessive; imposed without the Carrier having met its burden of proof; and in violation of the Agreement (System File PB-2248U-602/1781750 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant B. Alcorn shall now ‘*** be immediately reinstated to service and compensated for any and all wages list, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service. 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 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-4’).”

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.

Brian S. Alcorn (the Claimant), at the time of his dismissal by the Carrier, held the job of System Flag Foreman with over 15 years of service and no record of prior discipline. By letter dated October 17, 2022, he was requested to report for a hearing on November 8, 2022, to develop the facts and determine his responsibility, if any, in connection with the following charge:

On 10/10/2022, at the location of Topeka, KS, at approximately 11:30 hours, while employed as a Sys Flag Fm Cdl, you allegedly made an inappropriate gesture and mouthed an inappropriate statement while on a video conference with your Director, Manager, and Union Representative. This is a possible violation of the following rule(s) and/or policy:
1.6: Conduct – Discourteous

The October 7 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 a postponement at the Carrier’s request, the investigative hearing was held in this matter on December 1, 2022.

In response to questions from the hearing officer, the Charging Officer, whose title is Director of Track Maintenance, testified as follows. On October 10, he, a Manager II, a Senior Manager of Track Maintenance, and the Organization Vice Chairman were in a conference call talking about a Foreman position with the Claimant. At the end of the call the Organization representative asked him (the Charging Officer) if he would reconsider reinstating the qualification of a Foreman. He said no. At that time you could clearly see the Claimant on video say, “F_k you” and raised his two hands with the middle finger. The other two Managers on the conference call were not in his office but together in one of their offices.

The Senior Manager of Track Maintenance, in response to questions from the hearing officer, testified as follows. The conference call was held because the Union was asking if the Claimant could get his qualification back as a Flagging Foreman. Everyone was on audio except for the Claimant who was on video, but he was muted. Towards the end of the call the Claimant gestured with his middle finger “and I’m pretty sure his lips read, ‘F_k you.’” The Claimant had no questions of the witness but corrected the record to state that he was trying to regain his qualification as a Construction Foreman, not a Flagging Foreman.

In response to the hearing officer’s question to “tell us what you witnessed for this incident,” the Manager II testified that in response to a question from the Organization representative, the Director

“started to talk and as he did [the Claimant] had flipped him off and mouthed words, which we can’t be for sure but it looked to say, F you or F that and had flipped him off.”

In response to the hearing officer’s question, the Claimant testified that he is familiar with Rule 1.6: Conduct, item 7, Discourteous. The hearing officer then read aloud the portion of the rule that states, “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 asked, “#7 – Discourteous, flipping somebody off, do you see how that falls under discourteous?” The Claimant answered, “Yes, sir.” He then asked the Claimant, “Do you consider that misconduct, sir?” The Claimant answered, “Yes sir.” The hearing officer next asked, “Do you understand . . . that’s willful disregard also?” The Claimant answered, “Yes, sir.”

The hearing officer then asked the Claimant to explain what happened on October 10. That day [the Claimant’s testimony continued], while he was working as a Flagging Foreman in Seneca, Kansas, he had a hearing scheduled to challenge a disqualification as a Construction Foreman that he received the previous month with his prior work group. During the conference call he tried to state his case and was very passionate how he felt it was unwarranted. At the end of the call they were asked if they would consider rescinding the disqualification, and they clearly said no. Just a moment’s bad choice, he made an obscene gesture and mouthed an obscene statement at the camera. He mouthed “f_k that.” The hand gesture was the middle finger. He does not remember if it was one hand or two hands.

In a closing statement the Claimant stated that he has been an employee with Union Pacific Railroad for close to 16 years. He enjoys being an employee of Union Pacific, he said, and believes in the company. He expressed the hope that with 16 years of service a moment of indiscretion would not cost him his job. He declared, “I apologize for what I did. And I understand how it could be hurtful and I’m sorry.” He concluded, “, , , I would hope that the Company would see my record and would give me a chance to continue being an employee of Union Pacific Railroad.”

It is the position of the Carrier that the Claimant’s action in making an obscene gesture and mouthing an expletive directed at company officials were not only deliberate and inappropriate but also fundamentally incompatible with the standards of professionalism, respect, and decorum expected of employees, particularly during official proceedings involving senior management and union representation. His conduct, the Carrier asserts, constituted an egregious violation of Rule 1.6: Conduct – Discourteous. The Carrier notes that in his testimony at the investigation the Claimant admitted to making the obscene gesture and mouthing the phrase “f_k that” and that his actions were discourteous conduct under Rule 1.6. Not only were the Claimant’s actions and speech disrespectful to high-level management, the Carrier argues, but such conduct undermines the authority of management, disrupts the integrity of the disciplinary process, and sets a dangerous precedent for acceptable behavior. The evidence, the Carrier maintains, establishes that Claimant’s behavior was intentional, not subject to misinterpretation, and at the level of a dismissal offense under the MAPS Policy, which explicitly categorizes discourteous behavior of this nature as grounds for termination. The Carrier adds that Claimant was accorded all the due process rights required under the collective bargaining

agreement and that there were no procedural defects serious enough to void the assessed discipline. The Carrier requests the Board to dismiss or deny the claim.

The Organization acknowledges that the Claimant made an inappropriate gesture and mouthed an inappropriate comment, but argues that he “clearly had no intent to offend during his unjust treatment hearing of October 10, 2022,” and that the Carrier has therefore not met its burden of proof to establish the level of discipline imposed. The Organization asserts that the Claimant testified that he believed that his camera was off and that he was muted when he made the gesture and mouthed the inappropriate remark in reaction to what he perceived to be the Director’s arbitrary refusal to reconsider the Claimant’s disqualification. The Organization further cites the Claimant’s testimony that his comment was “f_k that” not “f_k you,” and argues that the remark “was not directed at any specific individual but was instead an off-handed comment made in a moment of frustration, while Claimant was muted.”

The Organization, citing Award 11 of PLB No. 6237, argues that Rule 1.6: Conduct – Discourteous is a vague rule and covers a broad range of conduct, ranging from the serious to relatively benign and must be read within the context of the relevant circumstance surrounding each individual dispute. It contends that profane language or gestures in and of themselves are not customarily grounds for termination and, citing a text on discipline, contends that even when directed at management, discharge is not generally upheld except where employees have consistently used such abusive language even in the face of repeated warnings to cease. The Organization nevertheless concedes that “Claimant’s use of such language during an unjust treatment conference was inappropriate.” It argues, however, that Claimant had no idea that his gestures were visible at all, was frustrated, and expressed his frustration in a manner he believed was private at the time. Because Claimant had no intent to be discourteous or cause offense to those on the conference call, the Organization maintains, dismissal was overly harsh discipline for the event. The Organization requests the Board to overturn the dismissal and provide the requested remedy.

The Organization asserts, mistakenly, that the Claimant testified that he believed that his camera was off and that he was muted when he made the gesture and mouthed the inappropriate remark in reaction to what he perceived to be the Director’s arbitrary refusal to reconsider the Claimant’s disqualification. In actuality, however, there was no such testimony by the Claimant at the investigative hearing. The contention that the Claimant believed that his camera was off and that he was muted when he made the gesture and the inappropriate remark appears for the first time in the Organization’s claim letter dated December 20, 2022, where the Organization representative quotes what appears to be part of a statement about the incident from the Claimant in which he declares, “With respect to the incident that occurred on October 16th, I didn’t believe that I could be seen since I couldn’t see anyone else. I reacted out of frustration and stress. I was flipping of [off?] the camera and mouthed the statement f#@k that. I wasn’t directing it at anyone.”

The appeal letter dated March 23, 2023, by the General Chairman emphasizes the fact that the Claimant was muted and asserts, “This was made clear in Claimant[‘]s own statement that was submitted in our initial claim. Claimant believed that he was muted, and since he could not see the

Carrier officers, they could not see him.” The fact is, however, that the alleged statement of the Claimant was not attached either to the claim letter or the appeal letter and was not offered into evidence at the investigative hearing. Nor was the content of the alleged statement testified to by the Claimant at the hearing. The appeal letter includes the statement, “At best the record contains a direct conflict of testimony between Claimant and Carrier’s primary witness against him, with no supporting testimony for Carrier’s witness. . . .” (emphasis added). Presumably this is the source for the Organization’s statement that the Claimant “testified” that he believed that his camera was off and that he was muted when he made the gesture and mouthed the inappropriate remark in issue.

The Board is persuaded that the Carrier has established by substantial evidence that the Claimant uttered the words “f_k you” and made the middle finger sign in response to the Director’s statement that he would not reconsider the disqualification of the Claimant from the Construction Foreman position. Two of the three managers who participated in the video/audio conference call testified that the Claimant stated “f_k you” and the third was not sure if it was “f_k you” or f_k that.” None of the managerial witnesses had any motive to falsely accuse the Claimant. The Claimant, who testified that he said “f_k that,” had a clear motive to protect his job and career with the Carrier. In addition, the middle finger sign is generally directed at an individual and not at some unknown “that.” The Board is satisfied that substantial evidence in the record supports a finding that the Claimant, when informed by the Director that his request for reconsideration of his disqualification as Construction Foreman was denied, responded with the words “f_k you” and the middle finger gesture.

The Claimant’s conduct violated Rule 1.6: Conduct – Discourteous and was a serious violation because a Director is considered a high level of management, and the Claimant was disrespectful, uncivil, and discourteous to him in front of other managers instead of showing the respect that the Director’s position commanded. There was an added degree of impropriety in this case because the meeting was held at the behest of the Claimant so that he could make his case to restore his Construction Foreman qualification. In a sense it was like setting up a session with someone and using the occasion to direct abuse at the individual. The Claimant’s actions were deserving of serious discipline.

There are, however, mitigating elements present in the incident. One cannot ignore the fact that Claimant was not in the same room with the Director and the other Managers and could not even see them since he was the only participant in the meeting who was on video. This could reasonably contribute to the Claimant’s failure to show the proper deference to authority which the Director’s position deserved. There was nobody in front of him that he was giving the middle finger sign to or uttering the words “f_k you.” There is an expression “out of sight, out of mind.” Not seeing anybody in front of him and knowing that he was muted, it is not unreasonable to view the incident as if the Claimant were in an island by himself responding to his frustration at his inability to regain his qualification as Construction Foreman and unaware that others could see every movement of his. However one chooses to describe the setting in which the incident here in issue took place, the Board is persuaded that the fact that the Claimant was the only one on video, so that he could not see the other participants in the meeting, and was muted must lead to the conclusion that the Claimant’s level of

culpability was significantly less than had the incident occurred where everyone was in the same room or, at least, everyone was on video. The Board so concludes.

Another element of mitigation here is the Claimant's service of 15 years with a clean record of no prior discipline. A fair and impartial hearing, as provided for in Rule 48 (a) of the collective bargaining agreement, applies not only to the procedures of the hearing but also to the decision in the matter. A hearing is the equivalent of a trial. Just as the verdict is an integral part of any criminal or civil trial so is the decision in the case an integral part of any hearing held pursuant to Rule 48 (a). A fair and impartial decision requires taking into account a claimant's work and disciplinary record with the company. There are some offenses that are so destructive of the employer-employee relationship and the trust and loyalty that must accompany it that even long and loyal service may not ameliorate the offense. But that is not the case here. The Claimant apologized for his actions and expressed remorse. His long service and excellent record have contributed to the company's success. The single brief incident for which the Claimant apologized and expressed regret is not something that can reasonably be viewed as irreparably damaging the Claimant's employment relationship with the Carrier in light of his overall contribution to the Carrier. *Cf.* PLB No. 7660 Award No. 170.

Claimant's offense was serious, but in view of the mitigating elements present, dismissal was harsh and unreasonable punishment for the offense committed. The dismissal must be reversed and the Claimant offered reinstatement to his former position without loss of seniority for his time off work. No back pay is awarded, but reinstatement shall be with retroactive restoration of health insurance and other benefits. This being the Claimant's first violation, his disciplinary status under the MAPS Policy shall be Training 1 with a 24 month retention period.

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