

PUBLIC LAW BOARD NO. 7660
AWARD NO. 39

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s refusal to allow Mr. G. Gaines to exercise his accumulated seniority into the Maintenance of Way Department after being terminated from his management position violated Rule 9 of the Agreement (System File D-1448S-308/1608430 SPW).
2. Carrier’s dismissal of Mr. G. Gaines from the Maintenance of Way Department for alleged violation of Rule 1.6 and the Policy on Ethics and Business conduct in connection with charges that the Claimant was dishonest in closing out FRA defects and making false statements in connection with track conditions and reporting the repair of those track conditions was without just and sufficient cause and in violation of the Agreement.
3. As a consequence of the violations referred to in Part(s) 1 and/or 2 above, Claimant G. Gaines shall be reinstated with seniority intact and be compensated for any time lost after his announcement he was returning to the craft, including benefits related to vacation, insurance and Railroad Retirement credit and all charges related to this incident must be expunged from the Claimant’s personal record.”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant worked for Carrier for 11 years and was a Manager of Track Maintenance (MTM) at the time of the conduct leading to his dismissal from service. He served a notice of his intent to return to the craft on April 8, 2014. A Notice of Investigation dated April 11, 2014 was issued on charges of dishonesty or wilful disregard or negligence affecting the interest of the company, by closing out FRA track defects that were not repaired and making false statements in reporting that they were. An investigation was held on May 28, 2014. The June 9, 2014 Notice of Discipline Assessed finds Claimant guilty of the charges in violation of Rule 1.6 Conduct (4) Dishonest, and the Statement of Policy on Ethics and Business Conduct, and assesses him a Level 5 permanent dismissal. The instant appeal resulted.

On March 4, 2014, an FRA Inspector wrote Carrier up for three violations (fouled ballast) on the Galveston Subdivision because defects were not repaired within 30 days of when they were written up, as required. Further investigation showed that each of those defects was closed out as repaired by Claimant in the track maintenance planner. Claimant admitted in an interview with his superiors on March 5, that he had closed out these defects without making the repairs, and took responsibility for his actions.

At the investigation, Claimant explained that he should have closed them out as not yet being a defect (despite having been written up by the Track Inspector) because the ballast had not fouled the track to the point it failed to maintain the surface or alignment of the track, rather than closing them out as having been repaired. He testified that he visited each of the three locations, which he deemed were not critical and should not be prioritized in line with the availability of support and resources, and that some work was done on all locations, albeit not the full required level of repair that would be necessary for a fouled

ballast defect. Claimant stated that he always intended to do the right thing to keep the railroad safe and freight moving, and that it was common to manage defects by prioritizing, and then round robin around some less serious ones and go back and fix them later.

Carrier argues that Claimant's admission of guilt of the charges - removing defects from the system that were not repaired - meets its burden of proving, by substantial evidence, that Claimant was guilty of dishonesty, without consideration of intent, citing PLB 1925, Award 37; PLB 3978, Award 12; First Division Award 22205. It asserts that the termination penalty is appropriate as Rule 1.6 (4) is a Level 5 offense under its UPGRADE policy, and the Board often upholds discharge for that serious offense, citing PLB 6253, Award 19; PLB 6392, Award 27. Carrier notes that this offense occurred while Claimant held the position of MTM, a non-Agreement position, and that Rule 9 does not apply to an individual who was terminated prior to their return, but only to an employee whose position is abolished, who is displaced or demoted, or who relinquishes the position.

The Organization contends that Carrier violated Rule 9 by not permitting Claimant to return to service in the craft after he was removed or demoted from his MTM position. It asserts that, by such removal, Carrier prejudged the merits of his case, thereby denying Claimant a fair and impartial hearing. The Organization also argues that Carrier did not meet its burden of proving that Claimant was guilty of dishonesty, since he did not intend to deceive anyone by removing the defects from the system, but, rather, made a valid judgment (after going to the area) concerning whether the defects in issue were actually defects that needed immediate repair, which was in accord with his role as MTM. It notes that Claimant has already been punished by being dismissed as a Manager, and requests that Claimant be permitted to exercise his 11 year seniority back into the craft, and be made whole for losses sustained.

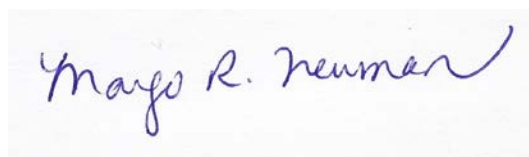
On the basis of the entire record, the Board first notes that the Organization did not show that Carrier violated Rule 9 by not permitting Claimant to return to service after he had been dismissed from his Manager position for dishonesty. That Rule, by its language,

applies only if a position is abolished, an employee is displaced or demoted, or if the employee voluntarily relinquishes his position, and does not grant a right of return to craft employees who have been terminated in managerial positions.

The Board is of the opinion that Carrier's assessment that Claimant was dishonest by closing out defects in the system knowing that the repairs had not been made is neither arbitrary nor unreasonable. As noted, Claimant admitted doing so both in a meeting with his superiors on March 5, 2014, and at the investigation on May 28, 2014. While his explanation as to why he chose to remove what had been noted by the Track Inspector as fouled ballast defects from the reporting system when they were not fully repaired, may reveal a judgment call that was motivated by the best of intentions, Claimant understood that such action was not truthful, and should not have been dealt with in that manner. He admitted as much during the investigation when he stated that he should have taken issue with their being recorded as defects (if he felt they weren't), rather than recording that they had been properly repaired, when they had not. Claimant's 11 years of service, his willingness to accept responsibility for his actions, and his intention to do what is right for Carrier with the resources available, may be factors that could be taken into account by Carrier when considering a leniency reinstatement. However, they do not provide a basis for the Board to overrule a reasoned disciplinary decision of Carrier that is supported by substantial evidence.

AWARD:

The claim is denied.

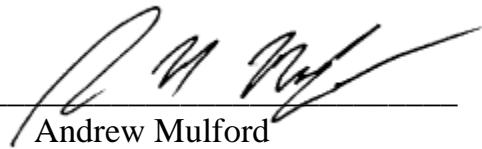
A handwritten signature in blue ink that reads "Mayo R. Newman". The signature is written in a cursive style with a large, sweeping flourish at the end.

Margo R. Newman
Neutral Chairperson

Dated: November 27, 2017



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member