PUBLIC LAW BOARD NO. 7660

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT

and

UNION PACIFIC RAILROAD COMPANY [FORMER CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY]

Case No: 60
Award No: 60

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. B. Mauk, by letter dated September 4, 2015, for alleged violation of Rule 1.6: Conduct was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File B-1519C-201/1636539 CNW).

2. As a consequence of the Carrier's violation referred to in Part 1 above, Claimant B. Mauk shall be returned to service immediately and shall be' ... made whole by compensating him for all wage and benefit loss associated with railroad employment, such as but not limited to Railroad Retirement credit, seniority, suffered by him for his pre Hearing removal from service and Level 5 termination, any and all expenses incurred or lost as a result of Round trip Travel not paid, additional travel to the Hearing, lodging, meals, any and all loss, and the alleged charge(s) be expunged from his personal record.'"

FINDINGS:

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Agreement by and between the Brotherhood of Maintenance Employes Division – IBT (hereinafter referred to as the "Organization") and the Union Pacific Railroad Company (hereinafter referred to as the "Carrier"). Upon the whole record, a hearing, and all evidence as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the

dispute involved herein; and that the parties were given due notice of the hearing thereon. The Claimant was ably represented by the Organization.

The Claimant, Benjamin Mauk, has been employed by the Carrier since August 4, 2014 and was assigned to a track welder position. On August 25, 2015, he was notified in writing by the Carrier to report for a hearing and investigation, which was held on August 28, 2015, for failure to perform his function as a "point person" on brush cutting equipment which led to a collision. On September 4, 2015, the Claimant was notified that the Carrier found him guilty of the charges and that he was dismissed from service. The record indicates that the Carrier denied the subsequent appeals by the Organization and rendered its final decision on January 25, 2016. The Organization rejected the Carrier's decision and moved to have the matter adjudicated before this Board.

The Carrier claims that it has established with substantial evidence that the Claimant violated Rule 1.6 on August 21, 2015 when the work equipment he was assigned to as the Employee in Charge ("EIC") struck another vehicle at a grade crossing during brush cutting operations. The Carrier argues that the Claimant was responsible for overseeing the operation which included conducting a job briefing, calling out mileposts, and warning the operator in the main cab of the grade crossings and when to stop the machine. The Carrier asserts that the Claimant admitted to not performing these required functions. It maintains that the Claimant failed to follow protocols and checklists yet completed his paperwork as if he had done so. The Carrier contends that the Claimant had been properly trained on the movement of the equipment, track safety, in his role as an EIC. It argues that the Claimant's actions demonstrated a disregard for safe work practices, which can lead to collisions that cause fatalities, serious injuries and extensive property damage.

The Carrier cites several awards from various boards of adjudication where dismissals for similar conduct were upheld. It argues that there is ample precedent that carelessness and disregard for safety are proper grounds for dismissal.

The Organization maintains that the Carrier committed procedural errors and failed to provide the Claimant with a fair and impartial hearing, which should prevent the Board

from considering the merits of the charges. It argues that the Carrier failed to comply with the timeliness requirements of Rule 19 when it failed to provide the Organization with the Notice of Investigation at least two days before the hearing. It also claims the Carrier did not provide the Organization with documents and witness lists as requested, interfering with its ability to prepare a proper defense and that it failed to properly sequester witnesses, leading to a unfair and biased investigation.

The Organization contends that the Carrier has not met its burden of proof that the Claimant caused the collision on August 21, 2015. It argues that the contractor employee who was operating the equipment was at fault and was not charged. The Organization cites arbitral precedent in support of its contention that the Carrier has the burden of proof and that any factual dispute must be resolved in favor of the Claimant.

The Organization does not dispute that a collision occurred but argues that the Claimant, who had less than one year of service, was not properly trained on the operation of a "slot train" and was led to believe he was working with equipment that was not required to stop for vehicles at grade crossings.

The Organization asserts that the Carrier should have followed the terms of the Safety Analysis Process (hereinafter referred to as the "SAP Agreement") instead of pursuing discipline. It contends that the parties agreed to use SAP in lieu of discipline except in certain circumstances and therefore, the Carrier acted arbitrarily by violating the terms of an agreement between the parties.

The Organization maintains that there is ample arbitral precedent where discipline is to be progressive and not punitive. It argues that should the Board conclude that the charges are sustained, discipline should be used to correct behavior and not to unjustly punish the Claimant.

The Board does not find any procedural errors that prevent us from reviewing the merits of the charges. Rule 19 provides the Claimant with two working days to prepare witnesses and have a representative of his choice at the hearing. The Rule states that two

days are "considered reasonable" and that either party can request and be granted a postponement for "good and sufficient reasons". The Notice of Investigation was mailed by the Carrier on August 25, 2015 and received the next day. The hearing was held on August 28, 2015. Given the reasonable standard articulated in Rule 19, the Claimant had two working days to prepare his representative and call witnesses to appear at the investigation. Further, the Organization did not accept the hearing officers offer to postpone the investigation. The Board has previously held that "The notice provisions are specifically designed to permit an employee adequate time to arrange to be in attendance with a representative of his choosing and to present a defense to the specific charges. The failure to comply with that type of 'notice' provision can be ameliorated by permitting more time for the protection of the contractual right it was designed to address." See also, Special Board of Adjustment No. 924, Award No. 9, where it was held that "It is clear that the claimant and his representative willingly elected to proceed, and thereby waived any technical or procedural contention concerning the two-working day advance notice issue."

The Organization's claim that the Carrier committed a procedural error when it did not share documents or witness lists prior to the investigation must also fail. There is no express language in the Agreement that requires the Carrier to provide the Organization with advance documentation or a witness list. The purpose of the hearing and investigation is for each party to hear and review all relevant evidence that pertains to the dispute. During the investigation either party can request additional information and witnesses. Once the record is established the Board is empowered to review its contents, which includes the on-property handling of the claim, and determining if the Claimant was provided with a fair and impartial investigation. Absent any contract language requiring discovery prior to the investigation, the Carrier is not obligated to provide information that is otherwise intended to be presented during the investigation for the Organization's review. The Board does not find any other procedural defects that require dismissal of the charges.

Before turning to the merits, the Board addresses the applicability of the SAP Agreement and finds that the Carrier, given the facts and circumstances presented here, had the discretion to apply its discipline policy. The SAP Agreement, in pertinent part reads:

> **C. Unavailability Of SAP To Employees.**
> SAP will not be available under the following circumstances:
>
> 1. When a potential violation of UP' s Drug and Alcohol policy occurs
>
> 2. When the employee intentionally and knowingly violates a rule, without attempting to mitigate the probable consequences, which could be severe. Examples of an intentional and knowing violation of a rule include failure to wear a seat belt, failure to complete a fire risk assessment before beginning hot work, violation of UP' s cell phone policy and ethical type violations. All other events will be determined by the Vice President Engineering or UP Regional Vice Presidents on a case by case basis using the standards contained within this subsection.

The provision indicates that the Carrier retains the discretion to decide "All other events . . . on a case by case basis using the standards contained within this subsection". Here, the SAP Agreement reserves to the Carrier the ability to review circumstances that are not of the "strict liability" ilk used in the examples found in paragraph 2. Subsection C provides the Carrier the ability to review "other events", using the same standard used in paragraph 2, and apply it to conduct involving serious safety violations, such as accidents that result in personal and/or property damage that are distinguishable from the examples used in the provision. Further, this Board in Award No. 47 rejected the use of the SAP and upheld the termination of an employee who was found to have operated his equipment unsafely where it states:

> failing to stop his vehicle in half the distance the track is seen to be clear, a rule he had been trained in and understood, was the cause of the collision, . . . Under the circumstances of these serious safety violations, which are dismissible events . . ., Carrier is not required to offer Claimant the ability to participate in SAP. Its failure to do so is neither arbitrary, capricious nor unreasonable.

The Board finds no basis in the record here to ignore its findings in Award No.47 regarding the SAP.

In discipline cases, as the one before the Board here, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Upon review of all the

evidence adduced during the on-property investigation, the Board here finds that the record contains credible and reliable evidence that the Claimant violated Rule 1.6 when he failed to properly perform his function as the EIC and his "riding point" assignment. He was required to control the movement of the brush cutting equipment when traveling in reverse while a contractor employee in the main cab was at the other end. The testimony of the Claimant and the other witnesses confirms that he did not follow the applicable rules when approaching a road crossing, which resulted in the equipment striking a vehicle. Such conduct violates Rule 1.6, which reads, "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 to the performance of duty will not be tolerated." The Claimant's actions constitute a disregard for the safe operation of the equipment he was in charge of and his own testimony underscores his unwillingness or inability to understand the severity of his action.

Our review of the record reveals that the Claimant's testimony is unreliable and that the Carrier's credibility determinations were neither arbitrary nor unfounded. One of the unsafe acts that led to the collision was the Claimant's failure to blow the horn when approaching the crossing, which he admits. The Manager of Track Projects, Kyle Vedders testified that the Claimant told him he did not know he had to blow the horn. However, the Claimant testifies that he had been working this assignment for two weeks and he knew the previous operator of the train was blowing the horn. He testified that he tested the horn at his end of the train which would have been the only place the horn could have been used given the direction of the train and the Claimant's position "riding point". The Claimant's testimony is contradictory and indicates that he knew or should have known the horn had to be used as the equipment was approaching the road crossing.

The Organization's strenuous argument that the Claimant, as the "point " person, was not responsible for stopping the equipment must be rejected. The record indicates that those who participate in the movement of Maintenance of Way ("M/W") work equipment must perform specific safety functions. The Claimant admits that he was trained and tested on the applicable rules for traveling on track equipment. The brush cutting function is performed using M/W track equipment. The record confirms that the Claimant had the responsibility

as the employee "riding point" and as the EIC to insure that those rules were followed. The Claimant further establishes that he failed to perform his job safely when he admits to not having a job briefing and a job-briefing book, which is required of an EIC and is an essential aspect of safety protocols.

There is ample arbitral authority for the discipline imposed by the Carrier given the unsafe acts of the Claimant. Similar to the matter addressed here, Special Board of Adjustment No. 279, Award No. 908, concludes in upholding the termination that, "It also reveals that the Claimant operated his machine in a careless manner, disregarding the requirement to operate in a safe manner at all times. The record contains no mitigating circumstances that could be the basis for modifying the discipline assessed." The Claimant as a short-term employee, who had not long before the collision been trained and tested on the safety requirements of his job, was unable to perform those functions in a safe manner.

It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. The record does not contain any evidence that the Carrier was biased or prejudiced in dismissing the Claimant. Despite the Organization's valiant efforts in urging the Board to impose a lesser penalty aligned with the standard of progressive discipline, the Carrier has an obligation and the discretion to discipline employees for serious offenses that endanger employees and the public. The penalty imposed by the Carrier is not arbitrary, capricious or an abuse of discretion and therefore, in accordance with ample arbitral precedent, the Board will not alter the discipline imposed.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Carrier has established with substantial evidence that the Claimant violated Rule 1.6 when he improperly performed his job function causing a collision on August 21, 2015.

AWARD

Claim denied.

Michael Capone
Neutral Member

Dated: May 14, 2018

Alyssa K. Borden
Carrier Member

Dated: 05/15/18

Andrew M. Mulford
Labor Member

Dated: 05/15/18