

PUBLIC LAW BOARD NO. 7660

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT**

and

UNION PACIFIC RAILROAD COMPANY

**Case No: 65
Award No: 65**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. S. Gartner, by letter dated December 16, 2015, for alleged violation of Rule 1.6: Conduct - Dishonest was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File A-1648U-003/1649279 UPS).
2. As a consequence of the Carrier's violations referred to in Part 1 above, Claimant S. Gartner shall be returned to service.

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 Employees 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, Shae Gartner, has been employed by the Carrier for approximately 18 years and held the position of System Switch Tie Foreman when he was charged with violating Rule 1.6(4), Conduct (Dishonest). The charges allege that the Claimant made false statements to the Carrier’s Audit Department when questioned about fuel charges by other

employees using his personal identification number (“PIN”).

On November 20, 2015, the Claimant was notified in writing by the Carrier to report for a hearing and investigation, which was held on December 8, 2015, regarding the aforementioned charges. On December 16, 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 subsequent appeals by the Organization and rendered its final decision on April 19, 2016. An appeal conference held on May 9, 2016 did not resolve the dispute. 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(4) when he lied to investigators from its Audit Department on November 16, 2015, that he had not given his PIN to another employee for fuel purchases. The Carrier maintains that the Claimant later informed his supervisor that he had shared his PIN with two employees and admitted as much during the ensuing hearing and investigation. It argues that the Claimant’s admission to his supervisor does not mitigate that he was dishonest when questioned by Carrier officials.

The Carrier cites arbitral authority that once an admission is made the Board need not make any other inquiries and the penalty imposed should be upheld. It maintains that boards of adjudication have consistently upheld a dismissal after a finding of dishonesty even where the employee had many years of service.

The Organization alleges that the Carrier failed to provide the Claimant with a fair and impartial hearing and investigation. It maintains that the Carrier violated Rule 48 – Discipline and Grievances, depriving the Claimant of procedural rights and therefore, based on these fatal flaws, the discipline imposed must be overturned.

The Organization argues that the Claimant misled the Carrier’s Audit Department investigators regarding the use of his PIN but immediately approached his supervisor and told him that he had shared the PIN with two other employees to facilitate fueling of the

Carrier's work vehicles. The Organization asserts that at no time did the Claimant admit to or engage in any act of theft or fraud. It maintains that the Claimant recognized that he was wrong for being dishonest when questioned by the investigators and sought to correct his error as soon as possible. As such, the Organization contends that the Carrier's decision to dismiss the Claimant is arbitrary, excessive and unwarranted.

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 substantial evidence that the Claimant violated Rule 1.6 when he made a false statement to the Carrier's Audit Department investigators. However, the Board finds that the penalty imposed is an abuse of discretion and excessive.

The procedural errors raised by the Organization are rejected. An admission of guilt that is unequivocally established in the record constitutes a waiver of the objections. The Board need not go any further in its review to establish guilt when an admission is clear and irrefutable.

With regard to the merits, and as mentioned above, an admission justifies a finding of guilt and therefore, the Board need go no further in its review of the record as to whether the Carrier has established substantial evidence in support of the charges. However, the Board finds that given the specific facts and circumstances established in the record, the decision to dismiss the Claimant is arbitrary and excessive. The Claimant's decision to correct his false statement 30 minutes later to his supervisor, who was present during the interview with the auditors, cannot be equated to the dishonest acts described in the prior arbitration awards in the industry where dismissals have been upheld.

Further, this Board, in Award No. 13, reinstated an employee who it found guilty of dishonesty for making a false statement about entering incorrect track repair information during the hearing and investigation. The claimant there, when questioned further during the hearing, recanted and admitted he made a false statement. The Board found that the

employee was “ . . . forthright during the investigation, admitted his wrongdoing and dishonesty, explained his motivation and positive intentions, and accepted responsibility for his inappropriate actions”. The Board determined that the record contained mitigating circumstances where the employee had 13 years of service, had positive and supportive comments from his superiors, and had a clean disciplinary record. We concluded, “ . . . under the specific circumstances of this case, the penalty of dismissal was excessive and unwarranted.” The Board here finds no evidence or rational reason to stray from our previous conclusions. See also Award. No 14.

Here, the Claimant made his false statement during an interview with auditors and soon after went to his supervisor, Manager of Track Projects Brian Bailey, to report his dishonesty. When questioned during the hearing and investigation he again reiterated that he made a false statement to the auditors and explained his motivation, which was to permit other employees to use the PIN in order for them to fuel the Carrier’s equipment. The record establishes that the Claimant acted in an effort to permit employees to perform their duties and not for his or anyone else’s personal gain. The record contains positive comments from Manager Bailey who stated that the Claimant was a productive employee. In addition, the Claimant after 18 years of service has a clean disciplinary record.

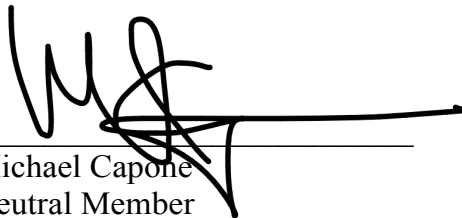
These facts are distinguishable from the ones contained in the numerous arbitral awards cited by the Carrier where the claimants were dismissed after having been found to be dishonest for personal gain or to hide acts of deception against the Carrier’s best interest. The Board is aware of the applicable standard that dishonesty constitutes grounds for permanent dismissal. We continue to hold, as it is well established in the industry, that leniency is reserved to the Carrier where there is no abuse of discretion or where the penalty imposed is excessive. Here, based on the foregoing, given the specific facts and circumstances, we find that the Carrier’s decision to dismiss the Claimant is arbitrary and excessive.

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 on November 16, 2015. The Board also finds that the Carrier's decision to dismiss the Claimant was excessive and therefore, the Claimant is reinstated to his position, without back pay and without loss of seniority and benefits. His record for all time out of service shall be adjusted to reflect a suspension without pay.

AWARD

Claim sustained in part, denied in part.



Michael Capone
Neutral Member

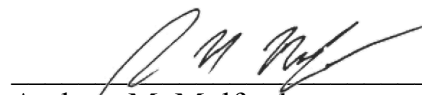
Dated: May 14, 2018



Alyssa K. Borden
Carrier Member

Alyssa K. Borden
Carrier Member

Dated: 05/16/18



Andrew M. Mulford
Labor Member

Andrew M. Mulford
Labor Member

Dated: 5/16/18