

**PUBLIC LAW BOARD NO. 7660**

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

**and**

**UNION PACIFIC RAILROAD COMPANY**

**Case No: 66  
Award No: 66**

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. C. Goy, Jr. by letter dated November 23, 2015 for alleged violation of Rule 1.6: Conduct - Careless, Rule 2.21: Electronic Devices; Rule 42.2.2: Other Speed Requirements; Rule 136.7.5: Safe Traveling Distance Between Machines; Rule 42.8: Following Cars or Trains; and Rule 70.1: Safety Responsibilities was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File B-1548U-202/1646479 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant C. Goy, Jr. shall now ' ... be made whole by compensating him for all wage and benefit loss suffered by him for his 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, and the alleged charge(s) be expunged from his personal record. Claimant must also be made whole for any and all loss of retirement month credit and any other loss."

**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, Clarence Goy, Jr., has been employed by the Carrier for approximately 18 years and held the position of Tamper Operator when he was charged with violating the rules cited. The charges allege that on October 23, 2015, the Claimant while operating a ballast regulator did not stop as required and collided with a tamper. The Claimant was also found to be dishonest when he initially claimed he did not have a cell phone with him, but later admitted he lied when one was found powered on in his personal belongings.

On November 5, 2015, the Claimant was notified in writing by the Carrier to report for a hearing and investigation, which was held on November 16, 2015. On November 23, 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 after a conference held on September 1, 2016, rendered its final decision to deny the claim on September 23, 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 was responsible for the collision between the ballast regulator he was operating and the tamper. The Carrier asserts that the Claimant accepted responsibility for the collision and that there were no mechanical defects found that would have interfered in the equipment's ability to stop. The Carrier asserts that the Claimant's failure to operate the equipment properly created a risk of severe injuries, fatalities, and property damage.

The Carrier maintains that the Claimant attempted to misrepresent the facts regarding the collision and was dishonest in denying he had a cell phone with him. It argues that the Claimant caused the collision and his misrepresentation of the facts constitutes grounds for dismissal. The Carrier cites numerous awards from various boards of adjudication that where substantial evidence is established, particularly where collisions are involved, a dismissal is not to be disturbed where there is no evidence that the Carrier acted arbitrarily.

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, which deprived the Claimant of procedural rights and therefore, the discipline imposed must be overturned. The Organization makes numerous claims of procedural error, including but not limited to the Carrier’s hearing officer acting with prejudice toward the Claimant and permitting its witnesses to engage in improper pre-trial collusion. The Organization cites Award No. 31 of this Board, which it claims specifically obligates the Carrier to avoid “even the appearance of impropriety.” 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 argues that the Carrier has not met its burden of proof that the Claimant caused the collision. It cites the Claimant’s testimony that he was traveling at a safe speed and applied the brakes but the equipment was unable to stop. The Organization asserts that poor track and brake conditions could have led to the collision. It asserts that the presence of leaves or oil spots may have caused the equipment to slide as evidenced by skid marks on the rails.

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. The Organization argues that the allegations against the Claimant should have been handled through the SAP Agreement and therefore, the Carrier acted arbitrarily by violating the terms of an agreement between the parties.

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 the Carrier’s rules when he caused a collision with the ballast regulator on October 23, 2015.

The Board finds that the Claimant was afforded a fair and impartial investigation. The Organization's claims of procedural errors in violation of Rule 48 are rejected. Despite the Organization's strenuous argument, we do not find evidence that the Carrier's hearing officer or any other Carrier official colluded or acted in a manner that deprived the Claimant of due process or of a fair hearing. The appearance of impropriety asserted by the Organization is a subjective conclusion unsupported by the record. Serious allegations of procedural misconduct must be bolstered with more than mere assertions.

The Organization's reliance on this Board's Award No. 31 to support its contention that the hearing and investigation was unfair is misguided. A review of Award No. 31 reveals that the Carrier witnesses there acknowledged that the *ex parte* discussions pertained to the investigation and that the Organization's representative was refused entry to the hearing room. Award No. 31 cites contents from the hearing record that leads to a reasonable conclusion that the accusing employees and other witnesses were being coached or subjected to undue influence. There is no such evidence in the record here. The Organization's representative did not inquire as to the purpose of the meeting nor did he attempt to enter the room with the Carrier officials and therefore, was not deprived entry. When the Carrier's witnesses were asked during the investigation about the discussion that took place before the hearing began, each one testified that they were engaged in a daily conference call or "production meeting" which begins at 9 a.m., an hour before the hearing began, and unrelated to the disciplinary matter pertaining to the Claimant. The record indicates that each witness was sequestered once the hearing began and therefore, there is no evidence that they were coached to address the Organization's allegation of collusion. Without some reliable evidence that the witnesses were meeting to discuss the charges against the Claimant, the appearance of impropriety cannot be established. The passing of papers across the table between Carrier officials, as alleged by the Organization's representative, does not constitute sufficient evidence of collusion or bias toward the Claimant.

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. Absent any contract language requiring discovery prior to the investigation, the Carrier is not obligated to provide the Organization with information that is otherwise intended to be presented during the investigation. See Public Law Board (“PLB”) No. 6470, Award No. 5, PLB No. 7529, Award No. 1, and PLB No. 7008, Award no. 18. The Board does not find any other procedural defects that require dismissal of the charges.

With regard to the merits, we do not find that Claimant made an admission of guilt as claimed by the Carrier. However, the documentary evidence and the testimony of the Track Supervisor Philip Worthington and Manager of Track Projects Arthur Williams establish that the Claimant was reckless when the ballast regulator he was operating collided with the tamper. The record indicates with substantial evidence that the Claimant was responsible for the collision. There is no support for his testimony that leaves or oil on the rails would cause him to slide approximately 600 feet into the tamper when he was traveling at 15 miles per hour. Further, the Claimant does not dispute the testimony of Williams that he may have been distracted when taking a drink. In addition, Worthington testifies that he did not hear the Claimant acknowledge the stop order, as required, immediately before the collision. The record establishes that there were no mechanical defects to the equipment and no indication of oil or leaves on the tracks. When all of the equipment operators, including the Claimant, were previously directed to conduct stop tests, all equipment was able to stop safely.

The Claimant admits he knew he should not have had a cell phone with him while on duty and that he was dishonest when he denied having one when first asked by Williams after the collision. Rule 2.21, Electronic Devices, prohibits having a cell phone while on duty. Section A of the rule, Personal Electronic Devices, reads, “Devices must be powered off with any earpiece removed from the ear, and properly stowed while on duty.” The Claimant’s cell phone was turned on and found in his lunch bag, which was with him while he was operating the equipment.

The reliable and consistent testimony of Williams and Worthington, and the documentary evidence, provides substantial evidence that the Claimant was responsible for the collision. The Carrier’s credibility determinations of witnesses who testified during the

hearing and investigation are not to be disturbed absent substantial evidence that its conclusions are arbitrary. A review of the documentary evidence and testimony does not provide a basis to ignore the Carrier's assessment of the testimony. It is well established by arbitral precedent that the Board sits in review of the Carrier's findings made on the property and does not make *de novo* findings. Here, there is no basis to replace the Carrier's credibility determinations of the witnesses' testimony with our own.

The Organization's valiant argument that the Claimant's collision should have been addressed through the SAP must be rejected. The SAP Agreement contains exceptions for incidents that are not covered by its alternative corrective measures used in lieu of discipline. 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 Claimant knew he was in violation of the Carrier's cell phone policy when he had his personal cell phone on and in his bag while operating the equipment. Accordingly, the Claimant was not eligible for participation in the SAP.

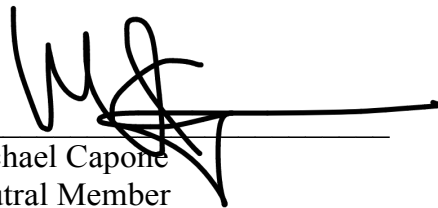
There is ample arbitral authority for the discipline imposed by the Carrier given the unsafe acts of the Claimant. Similar to the matter addressed here, Special Board of Adjustment No. 279, Award No. 908, concludes in upholding the termination that, "It also reveals that Claimant operated his machine 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." See also, this

Board's Award No. 47, PLB No. 7194, Award No. 2, and PLB No. 6621, Award No. 3.

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, this Board and others have consistently upheld the Carrier when it has exercised its discretion to dismiss employees for serious offenses that endanger the safety of employees and the public. Rules regarding progressive discipline do not apply to such conduct unless specifically required by the Agreement. 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.

**AWARD**

Claim denied.

  
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Michael Capone  
Neutral Member

Dated: May 14, 2018

  
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Alyssa K. Borden  
Carrier Member

Dated: 05/16/18

  
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Andrew M. Mulford  
Labor Member

Dated: 5/16/18