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: 69
Award No: 69

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of C. Hilson, by letter dated February 11, 2016, for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6: Conduct - Negligent and Rule 43.5: Unattended Equipment was unjust, arbitrary, unwarranted and in violation of the Agreement (System File J-1619C-401/1652923 CNW).

2. As a consequence of the violation referred to in Part 1 above, Claimant C. Hilson must be reinstated to service, the charges dismissed and he shall be made whole for all financial losses suffered as a result of the violation, including straight time for his position or position he would have held, holiday paid, lump sum payments, retroactive wage increases, overtime for his position or position he would have held or bid to, health, dental and vison [sic] car insurance premiums, deductibles and co-payments and all months of service credited towards railroad retirement."

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, Clarence Hilson has been employed by the Carrier for approximately nine years and held the position of Foreman when he was charged with violating Rule 1.6, Conduct – Negligent and Rule 43.5, Unattended Equipment. The charges allege that on January 27, 2016, a brush-cutting machine under the Claimant's supervision was left unattended and not properly secured. The work arm of the equipment moved downward fouling the adjacent track and was struck by a passing commuter train.

On February 1, 2016, the Claimant was notified in writing by the Carrier to report for a hearing and investigation, which was held on February 4, 2016, regarding the aforementioned charges. On February 11, 2016, 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 to deny the claim on July 14, 2016. A conference was held on August 16, 2016, whereupon the matter was not resolved. The Organization moved to have the matter adjudicated before this Board.

The Carrier claims there is substantial evidence that the Claimant and his crew, Gang 3282, failed to properly secure the brush cutter, which had been moved to a "hole" or sidetrack for repairs. It argues that as the foreman, the Claimant was responsible to insure that the damaged arm could not move on its own and foul the adjacent track.

The Carrier avers that the Claimant's failure to properly supervise his crew demonstrates a disregard for the safety of the employees and the public. It argues that the Claimant was negligent in leaving the site of the defective brush cutter unsecured, which caused damage to the equipment and the commuter train, and also endangered the safety of the riding public. The Carrier cites numerous arbitral awards where dismissal for such conduct has been consistently upheld.

The Organization claims that the Carrier committed several procedural errors, which

should prevent the Board from reaching the merits of the charges. It alleges that the Carrier violated Rule 19 when it failed to provide timely notice of the charges. The Organization argues that the Carrier officials were prejudicial toward the Claimant when it entered part of a document as evidence but left out a section that was viewed as exculpatory. Further, the Organization maintains that the Carrier failed to produce the mechanic, Greg Krame, who was a material witness to the events surrounding the collision of January 27, 2016.

Turning to the merits the Organization argues that the witnesses' testimony is credible and consistent in establishing that the brush cutter was left under the supervision of the mechanic and not the Claimant. It alleges that the Claimant and his supervisor, Chris Townsend, received confirmation from Krame that the equipment was secured. Further, it asserts that the Claimant could not have left the equipment unattended as charged since the mechanic was working on the equipment and was the last person to operate it when the Claimant left the area to attend to other duties. According to the Organization, the Claimant and his crew relied upon the mechanic's expertise since he was there to attend to the defective equipment. The Organization maintains that the Carrier has failed to show how the Claimant knowingly and intentionally violated its rules when the mechanic was left in control of the equipment.

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.

The Organization cites numerous awards by boards of adjudication to support its claim the Carrier has not met its burden of proof. It also cites awards to bolster its contention that it claims confirms that the Carrier was arbitrary and excessive in issuing a penalty of dismissal.

The Board first addresses the procedural errors claimed by the Organization and

finds that none are fatal flaws that prevent us from reaching the merits of the claim. The Organization's assertion that the Carrier violated Rule 19(A) of the Agreement is rejected. The Claimant and his representative appeared for the hearing and investigation on February 4, 2016 after the Carrier sent its notice on February 1, 2016, which was received by the Claimant the day before the hearing on February 3. Rule 19(A), in pertinent part reads:

> Prior to the hearing the employee shall be notified in writing of the precise charge against him, with copy to the General Chairman, after which he shall be allowed reasonable time for the purpose of having witnesses and representative of his choice present at the hearing. Two working days shall, under ordinary circumstances, be considered reasonable time. The investigation shall be postponed for good and sufficient reasons on request of either party.

The provision provides that the Claimant be given notice that allows him to have witnesses and representation appear on his behalf at the hearing. It goes on to give the Claimant the ability to seek a postponement "for good and sufficient reasons". The Claimant appeared at the hearing with his union representative and was given the opportunity for a postponement by the hearing officer based on the objection that he did not receive notice within the two working days referenced in the rule. The Claimant declined the opportunity and proceeded with the hearing.

In Special Board of Adjustment No. 924, Award No. 9, it was found that the same rule was not violated where less than two days notice was provided and the claimant decided to continue with the hearing. The Board there concluded, "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 Claimant's decision here not to take advantage of the relief provided him through a postponement confirms his willingness and ability to proceed with his defense.

We find that the Awards regarding issues of timeliness from the Third Division and cited by the Organization are distinguishable from the language found in Rule 19 here. The findings in those Awards were premised on distinctly different facts and specific time limits that are not present here. The Board does not find any merit to the other procedural

objections cited by the Organization.

The Carrier has not established with substantial evidence that the Claimant was responsible for leaving the brush cutter unattended and unsecured. However, as foreman, the Claimant shared a responsibility to exercise a duty of care and check the brush-cutting machine after the mechanic completed his work.

The testimony of Track Supervisor Townsend, Brush Cutter Operators Mike Utley and Marlin Perkins is consistent in establishing that Mechanic Krame, who was called to address the brush cutter's malfunction, was responsible for securing the equipment and assured the Claimant and Townsend that it was safe to leave the equipment in its position where it was located even though he could not secure it with safety chains. The witnesses' testimony and that of the Claimant state that during the conference call between Townsend, the Claimant and the mechanic on January 27, 2016, it was clear that Krame described the mechanical issues and assured everyone that the equipment was secured. Townsend, who supervised both the Claimant and the mechanic, testified that he didn't discuss the possible unsafe condition with the Claimant but did so with Krame who told him the equipment was secured. The record establishes that it was the mechanic's responsibility to address the defective brush cutter and ascertain the proper remedy to secure the equipment.

The claim by the Manager of Track Maintenance Daniel Elhosni that the Claimant did not do a risk assessment and was responsible for the safety of the equipment is unsupported by the record. Elhosni was not at the location when the equipment malfunctioned and did not witness the movement of the equipment or participate in the conference call. The testimony of those who did participate in, or overhear the conversation between Townsend, Krame and the Claimant, confirm that a risk assessment was done. Perkins states that the mechanic discussed the risk assessment with the Claimant and assured him it was safe before they left the location.

The Claimant and the other witnesses provide credible testimony that the mechanic did not want to "spin" the equipment, which would have been an alternative step to securing the equipment. However, given the mechanic's assessment and his discussion with

Townsend, it was not unreasonable for the Claimant to rely on their decisions. The record supports his conclusion that during the post incident job briefing with Townsend and Krame, it was clear that the mechanic was assuming responsibility for the safety of the equipment. Both Utley and Perkins confirm that conclusion and testify that once the movement of the equipment into the "hole" was complete and the mechanic assured them of its safety, Gang 3282 left the scene to perform another job function, leaving the mechanic alone with the brush cutter.

Here, however, is where the Claimant was negligent. While he reasonably relied on the opinion of the mechanic responsible for securing the defective equipment, and was not told otherwise by his supervisor Townsend who heard the same conclusions from Krame, he had a duty to return to the work site and check the mechanic's work. His failure to follow up on the status of the equipment after leaving the mechanic there on his own constitutes a negligent exercise of his duties. The record, however, does not provide any indication as to whether the Claimant would have been able to prevent the collision if he had checked the mechanic's work.

Given these factors, the Board finds that the Carrier's decision to dismiss the Claimant is unwarranted. 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. The record relieves him of culpability related to the collision between the brush cutter and the commuter train, but not in his failure to exercise all possible discretion as a supervisor.

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 not established with substantial evidence that the Claimant violated Rule 1.6 or Rule 43.5 on January 27, 2016. The Boards also finds that the Carrier's decision to dismiss the Claimant was excessive under the circumstances and therefore, the Claimant is reinstated to his position, without back pay and without loss of seniority or benefits. 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

Dated: 05/16/18

Andrew M. Mulford
Labor Member

Dated: 5/16/18