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: 70
Award No: 70

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. M. Utley, by letter dated February 12, 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-403/1654584 CNW).

2. As a consequence of the violation referred to in Part 1 above, Claimant M. Utley 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] care insurance premiums, deductibles and co-payments, 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, Michael Utley, has been employed by the Carrier for approximately three years and held the position of Machine Operator 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, he did not properly secure a brush-cutting machine assigned to him and his co-workers. 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 12, 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 that it has established with substantial evidence that the Claimant failed to properly secure the brush cutter, which had been moved to a "hole" or side track for repairs. It argues that the Claimant, and the crew he was assigned to, Gang 3282, were responsible to insure that the damaged arm could not move on its own and foul the adjacent main track.

The Carrier avers that the Claimant's failure to inform the Track Supervisor Chris Townsend that the brush cutter could not be properly secured demonstrates a disregard for the safety of the employees and the public. It argues that Claimant was negligent in leaving 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 that 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 during a conference call by speakerphone on January 27, 2016, the Claimant, his foreman, his co-worker, and the track supervisor received confirmation from the mechanic Greg 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, Gang 3282 and Townsend, who was the superior Carrier official involved, relied upon the mechanic's expertise since he was there to attend to the mechanical failure. 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 that the Carrier has not met its burden of proof. It also cites awards to bolster its contention 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 there are no fatal flaws preventing us from reaching the merits of the dispute. 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 on February 2, two days before the hearing. 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 a representative 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 two full 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 indicates his willingness and ability to proceed with his defense.

We find the Awards regarding timeliness issues from the Third Division cited by the Organization to be 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 Board finds that the Carrier has not established with substantial evidence that the Claimant was negligent or that he left the brush cutter unattended and unsecured. The testimony by Track Supervisor Townsend, Foreman Clarence Hilson, and Brush Cutter Operator Marlin Perkins, who were all directly involved in addressing the brush cutter, are consistent and establish that the mechanic Krame assured Townsend, in the presence of the Claimant, that it was safe to leave the equipment as positioned. The witnesses' testimony and that of the Claimant indicate that during the speaker phone conference call between Townsend, Foreman Hilson, and the mechanic on January 27, 2016, it was clear that Krame described the mechanical issues he was responsible to address and insured everyone that the equipment was secured and would not foul the adjacent track. Townsend, who supervised both the Claimant and the mechanic, testified that the mechanic did the risk assessment and that the equipment was secure. The record establishes that it was the mechanic's responsibility to address the defective brush cutter and based on the mechanical problem ascertain the proper remedy to secure the equipment.

The claim by the Manager of Track Maintenance Daniel Elhosni that Gang 3282 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 of January 27. The Claimant and Perkins, who were present during the conversation between Townsend, Krame and Hilson, confirm that the mechanic did a risk assessment.

Given the mechanic's assessment and his discussion with Townsend, it was not unreasonable or negligent for the Claimant to rely on their decisions. The Claimant, Hilson, and Perkins confirm that once the movement of the equipment into the "hole" was complete and the mechanic assured them of its safety, they were directed by Townsend to go and perform another task, leaving the mechanic with the brush cutter.

The record does not support the Carrier's decision that the Claimant was negligent or that he left the equipment unattended. The decision to discipline the Claimant must be considered arbitrary and unwarranted.

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.

AWARD

Claim sustained.

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

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7660
Case No: 176

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT

and

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

REQUEST FOR INTERPRETATION OF AWARD NO. 70

On May 16, 2018, Award No. 70 was adopted, wherein the claim was sustained, reinstating the Claimant Michael Utley. The claim presented in Award No. 70 requested the following remedy:

> "As a consequence of the violation referred to in Part 1 above, Claimant M. Utley 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] care insurance premiums, deductibles and co-payments, all months of service credited towards railroad retirement."

The Organization objected to the Carrier's back pay calculation and the parties here request that the Board render an interpretation of the remedy based on the decision made in Award No.70. The interpretation addresses the Carrier's deductions made from the back pay amount due the Claimant and its failure to reimburse him for health insurance premiums incurred while out of service.

The Organization disputes the methodology used to calculate the offsets to lost wages such as outside earnings and contributions made to the National Health & Welfare Plan (hereinafter

referred to as the "H&W contributions") and taxes and benefits attributable to the Railroad Retirement Board (hereinafter referred to as the "RR payments"), which were paid by the Carrier for the Claimant upon reinstatement while he was out of service. The Organization maintains that the Carrier changed the methodology used to calculate the offsets to lost earnings resulting in the Claimant owing the Carrier monies upon returning to work. The Carrier averred that the procedure used was a long-standing practice and consistent with Rule 19(D) of the parties' Collective Bargaining Agreement (hereinafter referred to as the "Agreement"), which reads as follows:

> If the charge against the employee is not sustained it shall be stricken from the record. If the employee has been removed from position held, reinstatement shall be made with all rights unimpaired and payment allowed for the assigned working hours actually lost while out of service of the Company, at not less than the rate of pay of position formerly held, less earnings in outside employment, or for the difference in rate of pay earned, if in the service. An employee who has earnings from outside employment may deduct from those earnings actual necessary expenses in securing and performing work.

The Organization filed suit in the United States District Court for the District of Nebraska (Civil Action No. 8:19-cv-518). The District Court granted the Carrier's Motion to Dismiss for Lack of Subject Matter Jurisdiction finding the matter must be resolved by the Board.

The Board rejects the Organization's argument that the remedy sought in the "Statement of Claim" addressed by Award No. 70 must be granted because the Carrier did not object to the claim during the on-property handling of the initial dispute. Rule 19(D) of the Agreement specifically addresses reimbursement for time lost while out of service upon reinstatement. Regardless of whether the Carrier objected in a timely manner, the Organization's claim exceeds what is provided for in Rule 19(D) and therefore, the review here of the Agreement and any binding past practice requires that we address the three interpretative questions posed by the Organization.

The three interpretive questions presented by the Organization are as follows:

I. THE FIRST INTERPRETIVE QUESTION IS WHETHER THE CARRIER MAY CHARGE THE CLAIMANT TO RETURN TO WORK.

II. THE SECOND INTERPRETIVE QUESTION IS WHETHER THE CARRIER FAILED TO MAKE CLAIMANT WHOLE FOR ALL FINANCIAL LOSSES WHEN IT REFUSED TO CREDIT CLAIMANT FOR HEALTH INSURANCE LOSSES SUFFERED AS A CONSEQUENCE OF THE CARRIER'S VIOLATION.

III. THE THIRD INTERPRETIVE QUESTION IS WHETHER THE CARRIER FAILED TO MAKE CLAIMANT WHOLE FOR ALL FINANCIAL LOSSES WHEN IT DEDUCTED HIS OUTSIDE EARNINGS FROM HIS BACKPAY AWARD FIRST AND ONLY THEREAFTER ATTEMPTED DEDUCTION FOR HIS HEALTH AND WELFARE PLAN CONTRIBUTIONS AND/OR RAILROAD RETIREMENT BOARD CONTRIBUTIONS.

Upon a careful review of the record and the parties' oral and written arguments, the Board finds that the first and third interpretative questions can be addressed by the same conclusion and shall be addressed first. While the Organization has not provided sufficient evidence to establish a binding past practice in the absence of specific contractual language, we find that the Board is obligated to interpret the Agreement and the record provided to ensure that the proper remedy is made in accordance with our findings in Award No. 70 and the specific facts presented here.

The Organization contends that offsets to reimbursable lost earnings must be calculated by first deducting the H&W contributions and RR payments before subtracting outside earnings. Rule 19(D) does not specify how to calculate back pay upon reinstatement and there is no evidence of a binding past practice. The sworn statements in support of the Organization's suit in federal court do not constitute a binding past practice and there is no supporting evidence that establishes an historical custom between the parties.

The Carrier's response to the suit also contained a sworn statement describing the back pay calculation it claimed was made without change for 25 years, and as such, it asserts, constitutes an

established past practice. However, the record does not contain any reliable evidence in support of the sworn statement submitted by the Carrier that establishes the existence of a binding past practice where outside earnings have been historically deducted from the amount of lost wages before H&W contributions and RR payments.

It is a well-established standard in contract interpretation that a custom and practice of the workplace can establish a binding agreement between the parties where it is unequivocal, clearly articulated, and ascertainable over a period of time so that it can be identified as a fixed and mutually accepted practice. Evidence of such an agreement must be substantial for it to succeed. There is nothing in the record here to support such a conclusion.

In essence, the Board has been asked for an interpretation of Rule 19(D) as it pertains to the "payment allowed for the assigned working hours actually lost". The request for an interpretation made by the parties requires us to ensure that the remedy aspect of Award No. 70 complies with the purpose and intent of Rule 19(D). The sworn statement presented to the District Court statement by Carrier and relied upon here is not supported with any documentary evidence of the methodology used to calculate back pay. The record here contains an unsigned and undated statement by Director of NPS Payroll Accounting Jacob Langel, which does not specifically describe how the back pay payment is calculated nor does it state that the outside earnings were always deducted before the H&W contributions and RR payments when calculating back pay. Nor do we find the documentation of back pay calculation in cases decided by other boards to be reliable evidence or of a binding past practice.

While we recognize that the Carrier does not have the burden of proof, its assertions that it previously calculated back pay the same way without some scintilla reliable evidence cannot be

the basis for our interpretation of whether the methodology used satisfies Rule 19(D). The absence of both express contractual language and of a binding past practice requires the Board to apply a reasonable person standard to reach a proper remedy. Here, the conclusion that the Claimant should be required to provide out-of-pocket reimbursement for the H&W contributions and the RR payments, when the amounts can be deducted from his lost wages before his outside earnings, is completely inapposite to the "make whole" standard embodied in Rule 19(D) governing lost wages as a result of the Claimant's dismissal being overturned.

While this is not a board of equity when determining *prima facie* claims based on contract language or a past practice, the Board is presented with an interpretative task limited to the proper remedy. Where the Agreement is silent, and no discernible past practice is available as to the established methodology used to calculate back pay, we find other boards in the industry have strived to insure that "make whole" relief does not unfairly burden one party over another. In the Interpretation No. 1 to Award No. 41708 of the National Railroad Adjustment Board's ("NRAB") Third Division, the Board restates a conclusion that 'Make whole relief is not intended to reward or punish either party. Rather, it is intended to allow the parties to resume their employment relationship as if the suspension or discharge had never occurred.' Here, without reliable evidence of how back pay was previously calculated, we cannot adopt the conclusion that the Claimant should be punished by being required to provide the Carrier with out-of-pocket reimbursement as a result of it deducting the H&W contributions and the RR payments before the amount of his outside earnings from his lost wages.

Further, without applicable contract language or a binding past practice, an absurd or nonsensical result must be avoided where an alternative interpretation provides a reasonable result.

Subtracting the H&W contributions and RR payments first from the lost earnings reduces the Carrier's back pay liability and reimburses itself for payments made on behalf of the Claimant. The subsequent subtraction of outside earnings, where it exceeds the remaining amount due the Claimant, satisfies the Carrier's back pay obligation and does not require the Claimant to incur out-of-pocket expenses, which is consistent with the "make whole" concept. The methodology used by the Carrier here offsets its back pay obligation but without returning the Claimant to his position "as if the suspension or discharge had never occurred." Such a calculation appears to put the Claimant in a position contrary to the meaning and intent of a "make whole" remedy used to calculate payment for lost income as provide for by Rule 19(D).

Based on the foregoing, the Board finds that the response to the first and third interpretative questions for the back pay calculation, based solely on the facts and circumstances described herein, is that the Carrier did not properly calculate ". . . the payment allowed for the assigned working hours actually lost while out of service of the Company . . ." as provided for in Rule 19(D). Given the unique circumstances presented and the absence of evidentiary support for either party's argument, and where the findings here are interpretative and related only to the remedy provided for in Award No. 70, the answer to the Organization's first and third interpretative questions contained herein shall not be considered as precedent for any future dispute and limited to the facts and circumstances presented here.

The Board finds that the second interpretative question must be answered in the negative. The request for an interpretation of the remedy provided for by Award No. 70, requires the application of Rule 19(D), which in clear and unambiguous language only addresses payment for ". . . working hours actually lost while out of service of the Company, . . .". This Board in Case

No. 82, Request for Interpretation of PLB 7660, Award 19, found ". . .Rule 19(D) to be clear and unambiguous. . ." and denied the Organization's request for additional payments not provided for by the rule.

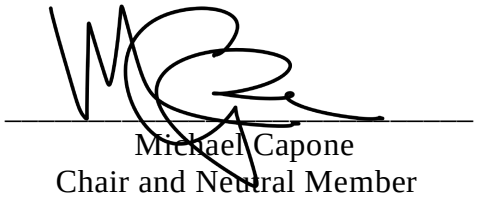
It is well established in the law of contract interpretation that where the language of the agreement is clear and unequivocal, its plain meaning must be applied. The clear meaning of a provision must be enforced even where the result is harsh or inconsistent with a regular practice or custom. This standard has been applied by the Board here in Case No. 82 and we find no basis in the record to stray from that conclusion. Nothing in the Agreement provides for reimbursement for health insurance premiums incurred by the Claimant while out of service. Rule 19(D) applies to payments for lost wages and does not provide for the relief sought here. Moreover, paragraph 8 of the Board Agreement, dated November 13, 2013, specifically states that "The Board shall not have the authority to add contractual terms or to change existing agreements governing rates of pay, rules and working conditions."

The Organization's assertion that the Claimant was required by law to obtain health insurance while out of service obligates the Carrier to reimburse him for those expenses is rejected. Nothing in the Agreement obligates the Carrier to reimburse an employee for such costs.

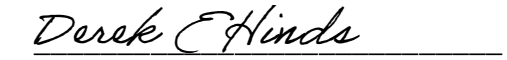
Further, the NRAB Third Division's awards relied upon by the Organization, where such reimbursements were found appropriate, are distinguishable from the facts presented here. There is no reference in those awards to contract provisions that contain the same language found in Rule 19(D). As such, the Organization's reliance on the Third Division awards is misguided. The Board denies the Organization's request to reimburse the Claimant for health insurance premium payments made while he was out of service.

The Board finds that the first and third interpretative question are in favor of the Organization and shall not be relied upon as precedent in future disputes, as provided for above. The second interpretative question is decided in favor of the Carrier.

Date: February 15, 2021

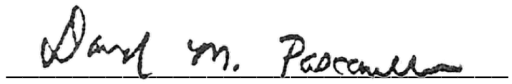


Michael Capone
Chair and Neutral Member



Derek E. Hinds
Carrier Member

Date: August 13, 2021



David M. Pascarella
Labor Member

Date: 8-12-21

The Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the date the Award is transmitted to the parties.