

**PUBLIC LAW BOARD NO. 7660**

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

**and**

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

**Case No: 71  
Award No: 71**

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. M. Perkins, 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-402/1653667 CNW).
2. As a consequence of the violation referred to in Part 1 above, Claimant M. Perkins must be reinstated to service, must have the matter stricken from his disciplinary record and be compensated for all losses. "

**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, Marlin Perkins, has been employed by the Carrier for approximately one year 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 on Gang 3282. 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 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 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 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, the Claimant, 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 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 preventing 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 on February 2, two days before the hearing, as provided for in Rule 19(A). The rule states that two days is a reasonable time “ . . . for the purpose of having witnesses and representatives . . .” appear at the hearing. As such, the Claimant received proper notice. The Board does not find that the other procedural objections prevent us from addressing the merits of the charges.

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.

The Board notes here that this matter is based primarily on the same facts, circumstances and evidence reviewed in our Award No. 70. As we did there, 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 Michael Utley are consistent and establish that the machine operator Krame, who was called to address the brush cutter’s malfunction, was responsible for securing the equipment and 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 conference call between Townsend, Foreman Hilson, and the mechanic on January 27, 2016, it was clear that Krame described the mechanical issues 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 Claimant and Utley testify that

Krame did not want to move the brush cutter because he was concerned that it could be unsafe because it was close to the adjacent main tracks and more damage could occur to the equipment. The testimony of the witnesses confirms that given the mechanical failure, everyone relied on the mechanic's assessment of the equipment and that he believed it was secure.

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. The Claimant and Utley, who were present during the conversation conducted by speakerphone between Townsend, Krame and Hilson, confirm that the mechanic did a risk assessment.


Given the mechanic's assessment and his discussion with Townsend, who testified that he relied on Krame's judgment, it was not unreasonable or negligent for the Claimant and Gang 3282 to rely on their decisions. The Claimant, Hilson, and Utley 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 perform other duties, 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.

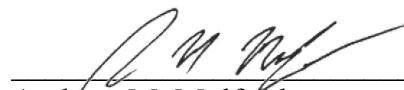
  
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Michael Capone  
Neutral Member

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

**PUBLIC LAW BOARD NO. 7660**  
**Case No: 177**

**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. 71**

On May 16, 2018, Award No. 71 was adopted, wherein the claim was sustained, reinstating the Claimant Marlin Perkins. The claim presented requested the following remedy:

“As a consequence of the violation referred to in Part 1 above, Claimant M. Perkins must be reinstated to service, must have the matter stricken from his disciplinary record and be compensated for all losses.”

The Organization objected to the Carrier’s back pay calculation and the parties requested that the Board render an interpretation of the remedy based on the findings made in Award No. 71.


The Organization presented three interpretative questions for our consideration and 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.

This matter was presented in companion to the parties' Request for Interpretation of Award No. 70, whose record contained the same facts and circumstances and were argued together before the Board. As such, our findings and conclusions contained in Award No. 70 have the same force and effect here.

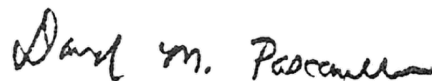
The Board finds that the first and third interpretative question are in favor of the Organization and shall not be relied upon as precedent in future disputes. The second interpretative question is decided in favor of the Carrier.

Date: February 15, 2021

  
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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.