

PUBLIC LAW BOARD NO. 7660

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

and

UNION PACIFIC RAILROAD COMPANY

**Case No: 73
Award No: 73**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. S. Spray, by letter dated January 20, 2016, for alleged violation of Rule 1.6: Conduct - Careless of Safety, Rule 1.6: Conduct - Negligent, Rule 1.6: Conduct - Dishonest, Rule 1.6: Conduct - Immoral and Rule 74.2: Driver Responsibilities was unjust, arbitrary, unwarranted and in violation of the Agreement (System File T-1648U-906/1656644 UPS).

2. As a consequence of the violation referred to in Part 1 above, Claimant S. Spray must have this matter expunged from his personal record and he must '... be immediately reinstated to service and compensated for any and all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service.

Claimant be compensated for any and all losses related to the loss of fringe benefits that can result from dismissal from service, i.e., Health benefits for himself and his dependents, Dental benefits for himself and his dependents, Vision benefits for himself and his dependents, Vacation benefits, Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of the Union Pacific Railroad and a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters.

Claimant to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has been taken from him. Such losses can be his house, his car, his land and any other personal items that may be garnished from him for lack of income related to this dismissal."

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, Scott Spray, was employed by the Carrier on March 14, 1996 and held the position of Extra Gang Foreman when he was charged with violating Rule 1.6, Conduct (Careless of Safety) (Negligent) (Dishonest) (Immoral) and Rule 74.2, Driver Responsibilities. It is alleged that the Claimant admitted that while operating a company vehicle he backed into another vehicle causing damage after he had consumed alcohol. He is also charged with leaving the scene of the accident without reporting the collision. Extra Gang Foreman Christopher Fletcher accompanied the Claimant when the alleged incident occurred on December 28, 2015.

On January 20, 2016, the Claimant was notified in writing by the Carrier to report for a hearing and investigation, which was held on January 26, 2016, regarding the aforementioned charges. On February 10, 2016, the Claimant was notified that the Carrier found him guilty of the charges and that he was dismissed from service. An appeal conference held on August 31, 2016 did not resolve the dispute. The record indicates that the Carrier denied the subsequent appeals by the Organization and rendered its final decision on November 8, 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 violated its rules when he backed a company vehicle into another car in a restaurant parking lot and left the scene without reporting the accident or informing the owner of the other vehicle. The Carrier asserts that the Claimant initially denied the allegation but later admitted to the collision and that he had consumed alcohol. The Carrier cites arbitral precedent to support its claim that an admission relieves the need for an inquiry into the

Claimant's intent.

The Organization contends that the Carrier failed to provide the Claimant a fair and impartial investigation in violation of Rule 48. It alleges that the defects with the recording devices used during the hearing and investigation were not properly addressed by the Carrier, which led to restarting the hearing four times and the absence of testimony in the record.

The Organization argues that the Carrier did not meet its burden of proof that a collision occurred. It maintains that the other employee, Fletcher, and a waiter from the restaurant, did not confirm that the Claimant made contact with the parked car. The Organization asserts that photographs of the damage are inconclusive and do not establish that the markings on either vehicle were caused by the Claimant.

The Organization avers that the Claimant did not make an admission but instead stated that if he had collided with the other car he would have been in violation of Rule 74.2. As such, it asserts that there was no admission to the collision or any other misconduct. Further, the Organization contends that the Claimant was not dishonest when he provided the Carrier with additional information after recalling more specifics of the incident. It also alleges that the Carrier enticed the Claimant to provide a statement to its claim agents with a promise of leniency but instead used those statements as evidence against him. The Organization argues that the Claimant is a long serving employee, who is respected and considered hard working with no prior discipline and therefore, the penalty imposed is arbitrary 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 his supervisor Ryan Darling and Risk Manager Andy Redick. We also find that the Claimant was negligent and failed to report the collision as required. However, the

Board finds that the penalty imposed is an abuse of discretion and excessive.

The procedural errors raised by the Organization are rejected. The delays caused by faulty equipment did not deprive the Claimant of a fair and impartial hearing. The record confirms that the hearing officer procured another recording device and the hearing proceeded without interruption after several delays. The fact that some questions or answers may have varied when repeated is not uncommon during direct and cross-examination. There is no evidence that the Claimant was not provided with his right to cross-examine witnesses and review evidence, or to prepare an adequate defense. Absent any verifiable failure of due process the Board does not find a procedural flaw that requires us to dismiss the charges.

The Board does find that the Claimant admitted to being dishonest and we need go no further in our 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 to his supervisor and the Carrier's Risk Manager cannot be equated to the dishonest acts described in prior arbitration awards in the industry where dismissals have been upheld. Here, the Claimant initially exercised poor judgment and relied on bad advice to not tell the Carrier the truth when first confronted. However, a few days later he voluntarily contacted the Carrier official and amended his previous statement with his admission. He did so before the hearing and investigation of January 26, 2016 in his effort to be honest. During the hearing, he testified of his initial mistake and repeated his admission in his desire not to perpetuate a false statement or act.

In Award No. 13, this Board reinstated an employee who was 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.

The Third Division, Award No. 41558 relied upon by the Carrier is distinguishable from the facts presented here. In that case, the Claimant was dishonest when he engaged in a fraudulent act and attempted to deceive the carrier for personal gain. The Board there upheld the termination of the employee who also had many years of service. However, there the employee did not come forward with an admission and was engaged in a concerted activity to defraud the carrier for his own monetary gain.

However, the Claimant’s admission and decision to tell the truth does not shield him from discipline for his violations. He admitted to leaving the scene of the collision without reporting the accident. Further, his co-worker Fletcher told him he believed contact was made with the parked car but the Claimant did not check to see if damage occurred. Such acts are negligent, improper and a violation of his responsibilities when operating a Carrier’s vehicle. The fact that the documentary evidence fails to establish any damage occurred does not excuse the Claimant’s conduct.

We also find that the record contains positive comments about the Claimant from his supervisors who all praised his work ethic and performance in their testimony. In addition, after 20 years of service the Claimant has a satisfactory disciplinary record.

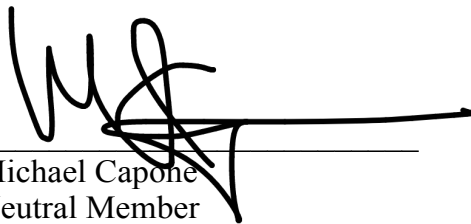
The Board is aware of the applicable standard that dishonesty constitutes grounds for permanent dismissal. We continue to hold, as it is well established in the industry, that leniency is reserved to the Carrier except where there is an abuse of discretion or where the penalty imposed is excessive. The Claimant’s decision to tell the truth before the hearing and investigation must be given some weight. We find that the Carrier’s decision to dismiss the Claimant is arbitrary and unwarranted. However, the Claimant’s misconduct in leaving

the scene of the collision without reporting an accident constitutes misconduct and a violation of the Carrier's rules.

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 and Rule 74.2 on December 28, 2015. The Board 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 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

Dated: 05/16/18



Andrew M. Mulford
Labor Member

Dated: 5/16/18