

PUBLIC LAW BOARD NO. 7660

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

and

UNION PACIFIC RAILROAD COMPANY

**Case No: 74
Award No: 74**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Claimant C. Fletcher, by letter dated February 9, 2016, for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6: Conduct - Negligent and Rule 1.6: Conduct - Immoral was based on was [sic] unjust, unwarranted and in violation of the Agreement (System File T-1648U-905/1656645 UPS).

2. As a consequence of the violation referred to in Part 1 above, Claimant C. Fletcher 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 Carrier employed the Claimant, Christopher Fletcher, on August 21, 2000 who held the position of Extra Gang Foreman when he was charged with violating Rule 1.6,

Conduct (Negligent) (Immoral). It is alleged that the Claimant, a passenger in the company vehicle operated by his co-worker Scott Spray, failed to report an accident after he witnessed Spray back the vehicle into another parked car 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. On February 9, 2016, the Claimant was notified that the Carrier found him guilty of the charges and 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 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 after witnessing Mr. Spray back the company truck into a parked vehicle. It alleges that the Claimant admitted he left the scene, did not report the collision, and did not discuss reporting the incident with Spray. The Carrier cites several awards from various boards where dismissals were upheld for similar misconduct and indifference to duty and where an admission of guilt suffices to establish its burden of proof.

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 defective recording devices caused significant issues, including the absence of testimony in the record and the need to restart the hearing four times.

The Organization argues that the Carrier did not meet its burden of proof that a collision occurred. It maintains that the Claimant testified he was not sure there was a collision. The Organization asserts that the photographs introduced by the Carrier's were the only evidence regarding the alleged damage and were inconclusive in establishing that the damage was caused by Spray and that the visible markings were not pre-existing.

The Organization argues that had a collision occurred, the Claimant was not required to report the incident and therefore, was not negligent or immoral. As such, it contends that

the Claimant did not fail to provide information to the Carrier nor did he make any inaccurate statements. The Organization maintains that the Carrier has not cited any rule that would require the Claimant, as a passenger, to file a report. Absent such a requirement, asserts the Organization, the Claimant did not have any notice of the Carrier's expectation and therefore, cannot be held accountable for not making a report.

The Organization claims that in a separate investigation Mr. Spray took responsibility for not reporting the collision. It argues that the Claimant believed Spray would report the incident and that it is unreasonable to expect him to do so since he was not the driver.

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 failed to report the collision he witnessed. However, the Board finds that the penalty imposed is an abuse of discretion and excessive.

The Claimant admitted he believed the collision should have been reported. While he expected that Mr. Spray would have made the necessary report of the incident since he was operating the vehicle, the Claimant, as a witness to the accident, did not make an effort to locate the owner of the other vehicle who may have been in the restaurant he had just left, even after the waiter from the restaurant told him he was going to try and find the owner of the vehicle. Further, he worked with his supervisor the next day and failed to inform him of the incident. While there may be no explicit requirement for the Claimant as a passenger to report an accident he did not cause, Rule 1.6 does require that the Claimant not engage in an "indifference to duty" or in activities that ". . . are contrary to commonly accepted moral principals." The Claimant has a duty to report occurrences that may be of concern to the safety of employees and the public as well as to the Carrier's property. The Claimant's conduct was not as much negligence as it was an exercise of poor judgment in believing his co-worker alone was responsible for reporting the collision. The record does not sufficiently


establish that the Claimant was negligent, which would require evidence that he created harm or risk of harm to others or the Carrier's property. However, his inaction constitutes an indifference to duty.

The Carrier relies on arbitral awards to support its strenuous argument that dismissal is warranted when an employee is indifferent to duty or fails to report a job-related occurrence. In those cases, however, the decisions were based on charges of conduct related to causing a derailment, not reporting thefts, and insubordinate violent acts. The Board recognizes that leniency is reserved to the Carrier except where there is an abuse of discretion or where the penalty imposed is excessive. The circumstances here are not comparable to those where dismissals were upheld. As such, the Board finds that the dismissal here is an abuse of discretion.

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 on December 28, 2015. 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 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.



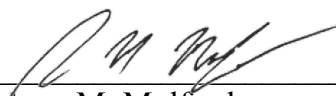
Michael Capone
Neutral Member

Dated: May 14, 2018



Alyssa K. Borden
Carrier Member

Dated: 05/16/18



Andrew M. Mulford
Labor Member

Dated: 5/16/18