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: 75
Award No: 75

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. I. Torres by letter dated March 31, 2016 for alleged violation of Rule 1.6: Conduct - Careless and Rule 1.6: Conduct - Dishonest was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File J-1619C-405/1658714 CNW).

2. As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier shall dismiss all charges and Claimant I. Torres:

'*** shall be made whole for all financial losses as a result of the violation, including compensation for:

1) straight time for each regular workday lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of removal from service (this about is not [sic] reduced by earnings from alternate employment obtained by the Claimant while wrongfully removed from service);

2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the Claimant was out of service;

3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any Junior employee for work the Claimant could have bid on and performed had the Claimant not been removed from service;

4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service;
5) also all months of service credit with the Railroad Retirement Board he would have accumulated had he not been unjustly removed from service.'"

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, Israel Torres, has been employed by the Carrier for approximately 20 years and held the position of Track Supervisor when he was charged with violating Rule 1.6 Conduct (1) Careless and (4) Dishonest. The charges are based on the allegation that the Claimant failed to accurately and honestly inspect tracks he supervised. It is alleged that the Claimant failed to report defects and make the necessary repairs. During the first few months of 2016, there were three derailments in the territory under the Claimant's supervision.

On March 11, 2016, the Carrier issued a notice directing the Claimant to report for a hearing and investigation regarding the aforementioned charges, which after a postponement, was held on March 23, 2016. On March 31, 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 the subsequent appeals by the Organization and rendered its final decision on August 23, 2016. An appeal conference was held on November 16, 2016, which did not resolve the dispute. The Organization rejected the

Carrier's decision and moved to have the matter adjudicated before this Board.

The Carrier maintains that the Board should not address the merits of the claim since the Organization committed a procedural error when it did not properly respond to the initial decision to discipline the Claimant. It alleges that the Organization failed to send its written rejection to the Superintendent of Transportation Services Erik Erickson, who issued the Notification of Discipline Assessed as required by Rule 21(B). According to the Carrier, the rule requires that "the matter shall be considered closed" by the Board since the Organization's reply was not sent to Erickson. The Carrier further contends that the Organization's claim of procedural errors is baseless and should be denied.

With regard to the merits, the Carrier points to documentary evidence and witness testimony presented during the investigation as substantial evidence that the Claimant falsified his track inspection reports on January 29, 2016. The Carrier avers that the Claimant could not have properly inspected 63 switches and over 5 miles of track in an 8-hour period without finding any defects. The Carrier concludes that the Claimant's track inspection records are falsified since the amount of switches and track he claims to have inspected in his 8-hour tour would have taken between 11 and 17 hours. In addition, the Carrier asserts that the non-switch inspections the Claimant reportedly made during a single tour of duty would have taken an additional 2 to 4 hours. It contends that the Claimant's track inspection for January 28 and 29, 2016, where he found no defects after inspecting 78 switches and over 18 miles of track is evidence that he falsified documents submitted to the Federal Railroad Administration ("FRA"). The Carrier maintains that the amount of switches and track the Claimant alleges to have inspected in the period reviewed is inconsistent with his previous reports and supports its conclusion that he falsified the documentation sent to the FRA. Further, it asserts that when other track inspectors, the Carrier's managers, and officials of the FRA, inspected the Claimant's territory, numerous reportable defects were found where he reported none.

The Organization claims that the Carrier failed to provide the Claimant with a fair and impartial investigation. It maintains that the charges were vague and that the hearing officer exhibited a bias toward the Claimant during the hearing. Further, the Organization

alleges that the Carrier failed to provide proper notice of the hearing and investigation in violation of Rule 19A. It also claims that the Carrier did not provide documents, exhibits and information regarding the charges in advance of the hearing.

When addressing the merits, the Organization asserts that the Carrier has not met its burden of proof that the Claimant engaged in any wrongdoing as charged. It claims the Carrier's witnesses were speculative and gave only hearsay evidence since none of them were present during the Claimant's inspections on January 29, 2016. Further, the Organization cites the testimony of Manager of Track Maintenance Eric Schierholz who it claims admitted he could not find any defects on the same tracks the Claimant was accused of misrepresenting in his reports.

The Organization argues that the Claimant cannot be disciplined because he failed to find defects during his inspections. It maintains that the amount of time it took the Claimant to inspect the tracks is not substantial evidence that he failed to report defects or that he falsified the inspection reports. The Organization avers that the Claimant completed his reports the way he was instructed to do by his previous manager and was not told to change how he entered the information.

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 and therefore, the Carrier acted arbitrarily by violating the terms of an agreement between the parties.

In discipline cases, the burden of proof is upon the Carrier to present 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 credible and reliable evidence that the Claimant violated Rule 1.6.

We first address the procedural objections made by each party and find that none are

fatal flaws that prevent us from addressing the merits of the claim. The Organization's claim that the Carrier violated Rule 19(A) is rejected. The record indicates the notice was issued on March 11, 2016 for a scheduled hearing on March 16, 2016, which provided more than two days " . . . time for the purpose of having witnesses and representative of his choice present at the hearing." Several attempts were made to deliver the notice by the delivery service but the Claimant was not available to receive it. Further, the rule, in pertinent part reads, "The investigation shall be postponed for good and sufficient reasons on request of either party." The Organization requested a postponement on March 15, 2016, which was granted and the hearing was held on March 23. See also, Special Board of Adjustment No. 924, Award No. 9, where it was held that "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." As such rule 19(A) was not violated.

The charges are not vague as claimed by the Organization. The Carrier provided the Claimant with sufficient notice as to the alleged misconduct and when it occurred. Further, we do not find that the Claimant was deprived of a fair hearing. The record indicates that the hearing officer's efforts to manage a proper investigation were appropriate. The number of objections and continued interruptions did not prevent him from insuring that all relevant evidence and testimony was introduced into the record. The Claimant was allowed to cross-examine all witnesses, review all evidence, and present his own evidence and witnesses.

The decision by the hearing officer not to permit an arbitration award from being introduced as evidence was proper and did not violate the Claimant's due process. The award was not introduced as evidence related to the facts or charges but to support an objection made by the Organization regarding advance access to documents and a witness list. As such, the award was not relevant to the substance of the charges and therefore properly excluded. The Organization had the opportunity to present the award in support of its objection during the on property handling of the dispute.

In addition, the Organization's claim that the Carrier committed a procedural error when it did not share documents or a witness list prior to the investigation must also fail.

There is no express language in the Agreement that requires the Carrier to provide the Organization with advance documentation or a witness list. The purpose of the hearing and investigation is for each party to hear and review all relevant evidence that pertains to the dispute. During the investigation either party can request time to review documents or additional information and witnesses. Absent any contract language requiring discovery prior to the investigation, the Carrier is not obligated to provide information that is otherwise intended to be presented during the investigation for the Organization's review.

Before turning to the merits, the Board addresses the applicability of the SAP Agreement and finds that the Carrier had the discretion to impose its discipline policy. The SAP Agreement contains exceptions for incidents that are not covered by its alternative corrective measures used in lieu of discipline. The SAP Agreement, in pertinent part reads:

> **C. Unavailability Of SAP To Employees**.
> SAP will not be available under the following circumstances:
>
> 1. When a potential violation of UP' s Drug and Alcohol policy occurs
>
> 2. When the employee intentionally and knowingly violates a rule, without attempting to mitigate the probable consequences, which could be severe. Examples of an intentional and knowing violation of a rule include failure to wear a seat belt, failure to complete a fire risk assessment before beginning hot work, violation of UP' s cell phone policy and ethical type violations. All other events will be determined by the Vice President Engineering or UP Regional Vice Presidents on a case by case basis using the standards contained within this subsection.

The provision indicates that the Carrier retains the discretion to decide "All other events . . . on a case by case basis using the standards contained within this subsection". Here, the SAP Agreement reserves to the Carrier the ability to review circumstances that are not of the "strict liability" ilk used in the examples found in paragraph 2. Subsection C provides the Carrier with the ability to review "other events", using the same standard used in paragraph 2, and apply it to conduct involving dishonesty or serious safety violations that are distinguishable from the examples used in the provision. Further, this Board in Award No. 47 rejected the use of the SAP where serious violations were alleged. We found that " . . . Carrier is not required to offer Claimant the ability to participate in SAP. Its failure to do so

is neither arbitrary, capricious nor unreasonable." The Board finds no basis in the record here to ignore its findings in Award No. 47.

The Board finds that the Carrier has met its burden of proof that the Claimant was dishonest when he submitted falsified track inspection reports for January 29, 2016. The documentary evidence and the credible testimony of the Carrier's witnesses support its findings that the Claimant did not properly inspect the switches and tracks he listed in his reports. The Claimant's supervisor Eric Schierholz, Track Inspector Trainer Ronald Dobbelare, and Manager of Special Projects Bob Mumm testified that the number of switches and miles of track reported as inspected by the Claimant, without finding a defect, indicates that he falsified his inspection reports. Further, the evidence establishes that the Claimant did not properly document defects that had to be reported to the FRA.

The Carrier's witnesses and the documentary evidence convincingly establishes that many of the same discrepancies found in several other of the Claimant's inspection reports supports the conclusion that he falsified the one for January 29, 2016. Moreover, inspections of the Claimant's territory by other Carrier officials and FRA inspectors found serious defects, in some cases not more than 10 days after the Claimant's inspection where he claimed he did not find any defects. In some cases, there had been no train traffic over the same tracks between inspections, which were out of service due to the defects, yet the Claimant did not note issues in his reports covering the same tracks. The defects found were severe enough to meet FRA criteria that would require immediate remedial action by the Carrier. According to Schierholz's testimony, in many instances where someone else inspected the same tracks walked by the Claimant, defects were found requiring that the tracks be taken out of service.

The Claimant's inspection reports for January 29, 2016 indicate that he inspected 20 tracks and 62 switches during his 8-hour tour of duty. The reports do not note the actual track condition and indicate no defects were found. However, given the credible testimony that it takes between 10 and 15 minutes to properly inspect a switch, the Claimant could not have completed his inspection during his 8-hour tour. Further, the evidence shows that when the Claimant inspected the tracks and switches in the presence of his supervisor they

covered less territory and found numerous defects. The record establishes that the Carrier has sufficient support for its conclusion that the Claimant was dishonest in his reports.

Despite the Organization's valiant effort to show that the Claimant was not told to report the defects he found as FRA defects but instead as Track Maintenance Planner defects, does not explain how other inspectors found defects in his territory where he found none. The Claimant's testimony does not sufficiently explain how he could inspect the number of switches and tracks he claimed he did during his eight-hour tour on January 29, 2016 or why he did not find defects in his territory where the record indicates that defects did exist.

The Carrier's credibility determinations of witnesses who testified during the hearing and investigation are not to be disturbed absent evidence that its conclusions are arbitrary. A review of the documentary evidence and testimony does not provide a basis to ignore the Carrier's assessment of the testimony. It is well established by arbitral precedent that the Board sits in review of the Carrier's findings made on the property and does not make *de novo* findings. Here, there is no basis to replace the Carrier's credibility determinations of the witnesses' testimony with our own.

Legions of boards in the industry have found that acts of dishonesty are serious infractions were dismissal has been consistently upheld, irrespective of the previous disciplinary record or length of service. See Public Law Board ("PLB") No. 6402, Award No. 40, PLB No. 7633, Award No. 35 and PLB No. 6459, Award No. 19. 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 is not excessive. The record does not contain any evidence that the Carrier was biased or prejudiced in dismissing the Claimant.

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 when he falsified track inspection reports on January 29, 2016.

AWARD

Claim denied.

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