

PUBLIC LAW BOARD NO. 7660

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

and

UNION PACIFIC RAILROAD COMPANY

**Case No: 77
Award No: 77**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. K. Brower by letter dated on June 3, 2016 for alleged violation of Rule 1.6: Conduct - Careless, Rule 42.2.2: Other Speed Requirements and Rule 136.7.3: Work Zone Around Machines was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File A-1648U-005/1663930 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant K. Brower shall be returned to service, with all rights and benefits unimpaired and compensated for time lost."

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, Kurt Brower, has been employed by the Carrier since April 7, 1997 and was assigned to a ballast regulator operator position on May 5, 2016 when the

equipment he was operating collided with a tamper machine. On May 11, 2016, he was notified in writing by the Carrier to report for a hearing and investigation on May 25, 2016, for not following the applicable safety rules regarding speed and stopping requirements which led to the collision. On June 3, 2016, the Claimant was notified that the Carrier found him guilty of the charges and he was dismissed from service. The record indicates that the Carrier denied the subsequent appeals by the Organization and rendered its final decision on September 29, 2016. A conference was held on October 6, 2016 to discuss the matter and there was no change in the Carrier's decision. 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 the work equipment he was assigned to made a rear end collision with the tamper. The Carrier asserts that the Claimant admitted his actions caused the collision and damage to its equipment. As such, it argues, there is no reason for the Board to consider any of the factors in the record since the Claimant's guilt is established.

The Carrier maintains that the Claimant's unsafe and careless operation of the ballast regulator posed a serious risk of injury to other employees and caused extensive damage to its equipment. It cites numerous arbitral awards where dismissals for such conduct have been consistently upheld.

The Organization argues that the Claimant is a long serving and dedicated employee and, therefore the Carrier's decision to terminate him is excessive and an abuse of discretion. It maintains that since there were no injuries this incident should have been addressed through 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 maintains that there is ample arbitral precedent where discipline is

to be progressive and not punitive. It argues that should the Board conclude that the charges are sustained, discipline should be used to correct behavior and not to unjustly punish the Claimant.

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 credible and reliable evidence that the Claimant violated Rule 1.6, Rule 42.2.2, and Rule 136.7.3. The Claimant admitted to being distracted and not adhering to the proper procedures and therefore there is no need to address the facts established in the record regarding his guilt.

Before reviewing the penalty imposed, the Board addresses the applicability of the SAP Agreement and finds that, given the facts and circumstances presented here, 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 the ability to review “other events”, using the same standard used in paragraph 2, and apply it to conduct involving serious safety violations, such as accidents that result in personal injury or property damage that are distinguishable from the examples used in the provision. Further, this Board in Award No. 47 rejected the use of the SAP and upheld the termination of an employee who was found to have operated his equipment unsafely where it states:

failing to stop his vehicle in half the distance the track is seen to be clear, a rule he had been trained in and understood, was the cause of the collision, . . . Under the circumstances of these serious safety violations, which are dismissible events . . . 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 regarding the SAP.

It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. The Board here finds that given the Claimant’s credible description of the events leading to the collision, the discipline is excessive and an abuse of discretion. The Claimant acknowledged that he exercised poor judgment. The facts here are distinguishable from our findings in Award No. 60 where the employee was found lacking in credibility and whose actions were extremely careless and unsafe. Here, the record confirms that the Claimant is a long serving employee who is dedicated to his job. His actions on May 5, 2016 were due to his effort to check on a spot previously worked on that he felt might have been a problem. He was not required to do so but considered it important enough to move the ballast regulator toward the area he wanted to check and did not properly position himself to apply the brakes when returning to his place behind the tamper. While he acted improperly, his actions are distinguishable from those where we have upheld dismissals for similar charges involving wanton and reckless behavior. As such, we find the discipline imposed to be excessive. The Claimant is afforded one final opportunity to keep his job.

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 its rules when he caused a collision on May 5, 2016. The Board finds that the discipline imposed is excessive under the circumstances and the Claimant is reinstated as described above, without loss of seniority and benefits and without back pay. 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