

PUBLIC LAW BOARD NO. 7660

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

and

UNION PACIFIC RAILROAD COMPANY

**Case No: 78
Award No: 78**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. D. Whisenhunt by letter dated June 13, 2016 for alleged violation of Rule 1.6: Conduct - Dishonest was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File A-1648U-006/1665324 UPS).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Whisenhunt 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, David Whisenhunt, has been employed by the Carrier since August 29, 1978 and was assigned as a Track Inspector when he was charged with violating Rule 1.6 Conduct - Dishonest. The charge is based on the allegation that the Claimant falsely

reported inspecting certain tracks in his inspection reports for May 1 – 5 and May 17, and 18, 2016. It is alleged that the Claimant did not actually inspect the tracks since he never obtained the required track authority to inspect them.

On May 26, 2016, the Carrier issued a notice directing the Claimant to report for a hearing and investigation, which was held on June 6, 2016, regarding the aforementioned charges. On June 13, 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 on September 30, 2016. An appeal conference was held on October 6, 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 record contains substantial evidence that the Claimant falsely reported portions of track in his territory as having been inspected on several days in May 2016. Further, it asserts that on May 18, 2016, Carrier officials found numerous track defects and missing bolts in his territory. The Carrier contends that the Claimant admitted to not inspecting some of the tracks he included in his reports. The Carrier argues that where dishonesty is established, dismissal has been consistently upheld as appropriate by boards of adjudication in the industry.

The Organization asserts that the Carrier has not met its burden of proof that the Claimant was dishonest. Instead, it argues the Claimant used unorthodox methods to conduct his inspections. It alleges that for 20 years he performed and reported his inspections the same way. The Organization avers that the Claimant was never told that his track inspection reports were wrong and that there was never a derailment or a major defect found on the tracks he inspected.

The Organization argues that the Claimant has 38 years of service and any discrepancy with how he inspected his territory can be addressed without discipline. It cites several letters of support in the record by Carrier officials and co-workers praising the Claimant's work ethic and dedication to the Carrier.

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 evidence adduced during the on-property investigation, the Board finds that the record does not contain reliable evidence that the Claimant was dishonest and falsified his inspection reports. Contrary to the Carrier's conclusion, we do not find an unequivocal admission by the Claimant that he was dishonest. His testimony about how he conducted his inspections, while improper and incomplete, does not constitute an admission that he intentionally ignored his responsibilities or attempted to receive pay for work not performed. The Claimant does admit to not conducting inspections in a way sanctioned by the Carrier.

The Carrier's witness, Manager of Track Maintenance Gregory Hinker's testimony primarily sets forth the proposition that because the Claimant did not request "Track and Time" (the authority to occupy a track for an inspection, traversal, repairs, etc. to insure the absence of train traffic) he could not have traversed the tracks he claimed he did in his inspection reports. We do not find that such a conclusion constitutes substantial evidence of dishonest conduct when considering the entire record. The Claimant provides a detailed and specific description of his inspections. The Claimant testified that he has consistently inspected tracks without requesting "Track and Time". He infers that as an experienced inspector he can perform his job without the necessary protections provided by "Track and Time". The Claimant states that when the protection is provided on one track, he can inspect two or three other tracks in the same location. While such conduct may be an improper method of traversing tracks, it does not suffice to prove he falsified his inspection reports. Further, Hinker confirms that the Claimant had never before falsified his inspection reports or previously violated Rule 1.6.

The Claimant's conduct, however, confirms that he conducted improper inspections that create serious safety concerns. The discrepancies in the inspection reports can be attributed to his faulty inspection procedure. Such conduct constitutes a ". . . willful disregard or negligence affecting the interest of the company . . ." The Claimant's testimony indicates that he has been inspecting and reporting his track inspections the same way for over 20 years. It is not uncommon for long-serving employees to develop bad habits, even

where they have had success, despite the serious safety issues their misguided work practices create. The Carrier has presented substantial evidence that the Claimant has engaged in unsafe and improper conduct.

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 was dishonest. We do find that he did not follow proper procedures when doing his inspections. The Board recognizes that the Claimant has 38 years of service and is therefore afforded one final opportunity to keep his job. The Claimant is returned to service 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.

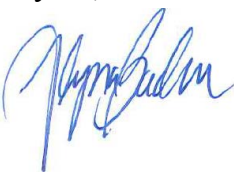
AWARD

Claim sustained in part, denied in part.



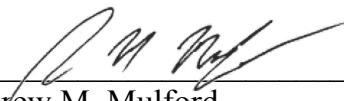
Michael Capone
Neutral Member

Dated: May 14, 2018



Alyssa K. Borden
Carrier Member

Dated: 05/16/18



Andrew M. Mulford
Labor Member

Dated: 5/16/18