

PUBLIC LAW BOARD NO. 7660

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

and

**UNION PACIFIC RAILROAD COMPANY
[FORMER SOUTHERN PACIFIC
TRANSPORTATION COMPANY (WESTERN LINES)]**

**Case No: 79
Award No: 79**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. G. Tyesi by letter dated July 28, 2016 for alleged violation of Rule 1.6: Conduct - Careless, Rule 42.3: Main Track Authorization and Rule 136.4: On-Track Safety Procedures was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File AE-1645S-101/1669590 SPW).
2. As a consequence of the violation referred to in Part 1 above, Claimant G. Tyesi shall be returned to service, his record expunged of the incident, he shall be provided all rights and benefits unimpaired and he shall be 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, Gregory Tyesi, has been employed by the Carrier for approximately 8

years and held the position of Track Foreman when he was charged with violating Rule 1.6 Conduct (1) Careless, Rule 42.3 Main Track Authority, and Rule 136.4 On Track Safety Procedures. The charges are based on the allegation that on June 24, 2016, the Claimant went out of the “track and time” limits (the authority to occupy a track for an inspection, traversal, repairs, etc. to insure the absence of train traffic) without authorization creating a safety hazard for him and the employees under his supervision, and did not complete his written reports as required.

On July 11, 2016, the Carrier issued a notice directing the Claimant to report for a hearing and investigation, which was held on July 20, 2016. On July 28, 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 subsequent appeals by the Organization and rendered its final decision on December 19, 2016. An appeal conference was held on January 17, 2017, 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 submit its appeal of the discipline to the Carrier representative who issued the decision. It alleges that the Organization failed to send its written appeal to the General Superintendent of Transportation Services James Rawlinson, who issued the Notification of Discipline Assessed. The Carrier asserts that Rule 44(a)(2) requires that “the matter shall be considered closed” by the Board since the Organization’s appeal was not sent to Rawlinson.

With regard to the merits, the Carrier claims that the documentary evidence and witness testimony presented during the investigation is substantial evidence that the Claimant violated numerous safety rules. The Carrier asserts that the Claimant endangered himself and the gang he supervised when he did not verify the tracks and locations they were traversing and failed to follow many of the on-track safety procedures. It is also alleged that he did not conduct the required job briefing or properly complete his inspection reports and write his track authority limits on his windshield. The Carrier maintains that the industry standard to dismiss employees who engage in unsafe acts has been consistently

upheld in arbitral awards.

The Organization claims that the Carrier failed to provide the Claimant with a fair and impartial investigation. It maintains that the hearing officer exhibited a bias toward the Claimant during the hearing, thereby denying him due process.

When addressing the merits, the Organization asserts that the Carrier has not met its burden of proof that the Claimant engaged in willful misconduct. It argues that where the Claimant made a mistake, such an act does not constitute grounds for dismissal. The Organization maintains that discipline should be corrective and not punitive. It contends that the Carrier could have disqualified the Claimant instead of dismissing him.

Further, the Organization claims that the Carrier should have placed the Claimant in 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. The Organization asserts that the Carrier did not consider that the Claimant had been assigned to take on the “double duty” of both truck driver and foreman in order to perform the assigned task.

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 Rules 1.6, 42.3, and 136.4.

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’s hearing officer failed to provide the Claimant with a fair and impartial hearing is unsupported by the record.

The Carrier’s claim that the Organization violated Rule 44 (a)(2) by not responding to Rawlinson who issued the notice of discipline, dated July 28, 2016 is not a fatal flaw that

requires dismissal of the claim. A distinction can be made between a curable error, determined by the facts in the record as to whom the appeal was sent and the time limits found in Rule 44, which if violated, gives little possibility that it could be corrected. The rule, in pertinent part reads:

(2) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier will be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter will be considered closed, . . .

A reading of the provision cited above indicates that the subject of the section is the 60-day time limit. The issue addressed is that the appeal must be forwarded “within that time”.

The Board is not deciding here that the appeal should not be sent to the Carrier official who issued the notice of discipline. However, here the Carrier never objected during the on-property handling of the dispute that the Organization made its initial appeal to the Engineering Supervisor Bill Ince instead of Rawlinson. The Carrier’s response to the Organization, dated September 26, 2016, was written by Ince who does not object or address the issue, which indicates that the Carrier accepted the appeal as valid. Nor does Rawlinson write that he did not receive a timely reply. Instead, the Carrier responds to all of the Organization’s appeals without objection to the initial appeal going to Ince. As such we find that the Organization met its obligation within the spirit of the provision when it appealed the Carrier’s decision to Mr. Ince. The Board does not find any other procedural defects that require dismissal of the charges.

The Board finds that the documentary evidence and the Claimant’s admissions to not follow the on-track safety rules was a careless disregard for his safety and that of his gang. It is well established that where an admission is unequivocal, the Board need go no further in its review of the merits. Further, absent an admission, the Claimant’s supervisor Justin Rogers, Manager of Track Maintenance and Backhoe Operator Rafael Pamplona provide credible and reliable testimony that the Claimant failed to stay within the “track and time” limits and did not follow many other safety protocols. While the Organization makes a valiant effort to prove the Claimant made a mistake and that his conduct was not intentional,

we find that the record supports the finding that he was careless and displayed a reckless disregard for the safety of those he supervised.

Legions of arbitral awards in the industry have upheld dismissals where “Careless of Safety” and other serious safety violations are found. Here, the decision to dismiss the Claimant was not arbitrary, capricious, or excessive given the record established.

The Board finds that the Organization’s assertion regarding the applicability of the SAP Agreement must be rejected. 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 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 and found that the “ . . . 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.

Lastly, the Board finds no merit in the Organization’s assertion that the Claimant could have been disqualified from his position instead of being disciplined. The record and arbitral precedent supports the Carrier’s conclusion that it is not limited to disqualifying the Claimant where there is sufficient evidence that he committed serious safety violations.

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 the applicable rules on June 24, 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