

PUBLIC LAW BOARD NO. 7660

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

and

UNION PACIFIC RAILROAD COMPANY

**Case No: 81
Award No: 81**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. S. Vasquez, by letter dated July 11, 2016, for alleged violation of Rule 1.6: Conduct - Careless and Rule 1.6: Conduct - Negligent was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File B-1648U-208/1665825 UPS.)
2. As a consequence of the violation referred to in Part 1 above, Claimant S. Vasquez shall be returned to service with all rights and benefits unimpaired and compensated for time lost including all wage and benefit loss suffered."

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, Saul Vasquez, has been employed by the Carrier for approximately 12 years and held the position of Truck Driver when he was charged with violating Rule 1.6 Conduct (1) Careless and (2) Negligent, Rule 137.3.4: Employees Driving Around Crossing

Gates, and Rule 74.7: Railroad Grade Crossing. The charges are based on the allegation that on May 5, 2016, the Claimant drove the Carrier's fuel truck around lowered crossing gates in front of an oncoming train.

On May 26, 2016, the Carrier issued a notice directing the Claimant to report for a hearing and investigation, which after a postponement was held on June 21, 2016. On July 11, 2016, the Claimant was notified that the Carrier found him guilty of Rule 1.6 Conduct (1) Careless and (2) Negligent 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 20, 2016. An appeal conference was held on December 7, 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 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 Assistant Vice President Engineering Track Programs Phillip Danner, who issued the Notification of Discipline Assessed. The Carrier cites Rule 49(a)(2), which requires that "the matter will be considered closed" by the Board since the Organization's appeal was not sent to Danner.

With regard to the merits, the Carrier claims that the documentary evidence and the Claimant's admission to driving around the activated crossing gates is substantial evidence that the Claimant violated its rules and endangered the safety of its employees and the public. The Carrier asserts that an admission justifies its finding of guilt and therefore, the Board need go no further in its review of the evidence. It also argues that an admission of guilt is a waiver of any procedural objections by the Organization.

The Carrier contends that where substantial evidence has been established the Board must uphold the penalty imposed. It argues that the industry standard limits the Board's discretion to provide for leniency once the Carrier has met its burden of proof. The Carrier asserts that boards of adjudication have consistently sustained dismissal for careless and

negligent acts that constitute serious safety violations.

The Organization claims that the Carrier failed to provide the Claimant with a fair and impartial investigation. It maintains that the Carrier did not produce witnesses who had submitted written statements placed into the record. The Organization avers that it made objections, which were sustained but not stricken from the transcript of the hearing and investigation. It also alleges that it was not provided with documents in advance of the hearing, denying it the ability to prepare a proper defense.

When addressing the merits, the Organization asserts that the Carrier has not met its burden of proof that the Claimant engaged in willful or intentional misconduct. It argues that the evidence does not support the charges nor does it establish that the Claimant admitted to intentionally being careless or negligent. The Organization maintains that the Carrier ignored evidence describing the crossing gates as possibly malfunctioning, which led the Claimant to carefully maneuver his truck through the gates. It contends that, based on evidence of a malfunction, the Carrier could not find the Claimant guilty of Rules 137.3.4 or 74.7. The Organization concludes that such a finding by the Carrier is evidence that the Claimant was not intentionally careless or negligent.

The Organization claims the Carrier should have placed the Claimant in the Safety Analysis Process (hereinafter referred to as the “SAP”) 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 relies on applicable arbitral precedent where dismissals for similar conduct were found to be excessive, harsh and an abuse of discretion. It argues that at most the discipline should have been a corrective measure meant to rehabilitate. The Organization maintains that the Claimant’s honest mistake should have been given consideration and the Carrier acted arbitrarily when it dismissed him from service.

In discipline cases, the burden of proof is upon the Carrier to present substantial

evidence and, where it does establish such evidence, the penalty imposed is not an abuse of discretion. Upon review of all 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 charges. The Carrier's claim that the Organization violated Rule 49(a)(2) by not responding to Danner, who issued the notice of discipline, dated July 11, 2016 is misguided. A distinction can be made between a curable error, relative to whom the appeal was sent and a time limit, 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, 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 Danner. The Carrier's response to the Organization, dated August 3, 2016, was written by Ince who does not object or address the issue, and therefore indicates that the Carrier accepted the appeal as valid. Nor does Danner write that he did not receive a timely reply. Instead, the Carrier responds to all of the Organization's correspondence 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 procedural errors raised by the Organization are rejected. The Board finds the Claimant's admission of guilt, unequivocally established by the record, constitutes a waiver

of the objections. The Board need not go any further in its review to establish guilt when an admission is clear and irrefutable.

The Board finds that the documentary evidence and the Claimant's admission constitute substantial evidence that he drove his truck around the lowered crossing gates. There is no support in the record for the Claimant's affirmative defense that he believed the gates were activated by the other equipment working in the vicinity. It is well established by arbitral precedent that a mere assertion is not enough when claiming an affirmative defense. Some verifiable evidence must be presented in support of such a claim.

Moreover, even if there was a malfunction or intervening cause for the gates being lowered unnecessarily, the Claimant's decision to go over the crossing was a serious safety violation. He did not first verify the cause for the gates being in the down position before proceeding to drive around them. The Claimant's conduct constitutes a careless, negligent and reckless disregard for his safety and created a serious threat to others in the vicinity.

The Board finds that the Organization's assertion regarding the applicability of the SAP 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. We find no basis in the record here to ignore the findings in Award No. 47 regarding the SAP.

Legions of arbitral awards in the industry have upheld dismissals where “Careless of Safety” and other serious safety violations are found. In Special Board of Adjustment No. 279, Award No. 908, upholding a termination, the Board there stated, “It also reveals that Claimant operated his machine in a careless manner, disregarding the requirement to operate in a safe manner at all times. The record contains no mitigating circumstances that could be the basis for modifying the discipline assessed.” Here, the Claimant failed to recognize the inherent danger when operating a fuel truck that carries various hazardous materials through activated and lowered gates at a crossing.

It is well established that leniency is reserved to the Carrier where there is no abuse of discretion. The record does not contain any evidence that the Carrier was biased or prejudiced in dismissing the Claimant. Despite the Organization’s valiant efforts in urging the Board to impose a lesser penalty aligned with the standard of progressive discipline, the Carrier has an obligation and the discretion to discipline employees for serious offenses that endanger the safety of employees and the public. Rules regarding progressive discipline do not apply to such conduct unless specifically required by the Agreement. The penalty imposed by the Carrier is not arbitrary, capricious or an abuse of discretion and therefore, in accordance with ample arbitral precedent, the Board will not alter the discipline imposed.

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 May 5, 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