

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: 85
Award No: 85**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. K. Miller by letter dated September 14, 2016, for alleged violation of the EEO Policy and Rule 1.6: Conduct was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File J-1619C-406/1672937 CNW).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall return Claimant K. Miller to service, dismiss all charges, afford all rights and benefits and make him whole as specified in our letter dated October 13, 2016."

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, Kenneth Miller, has been employed by the Carrier since June 10, 2006 and held a Bridge and Building ("B&B") Carpenter position when he was charged with

violating the Equal Employment Opportunity/Affirmative Action Policy (hereinafter referred to as the “Policy”) and Rule 1.6 Conduct for allegedly sending other employees discourteous text messages.

On September 4, 2016, the Carrier issued a notice directing the Claimant to report for a hearing and investigation, which was held on September 9, 2016. On September 14, 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 February 14, 2017. The Organization rejected the Carrier’s decision and moved to have the matter adjudicated before this Board.

The Carrier maintains that the documentary evidence and witness testimony presented during the investigation is substantial evidence that the Claimant sent vulgar, inappropriate and offensive text messages about B&B Foreman Robert Daniels to another employee, B&B Carpenter Brian Walsh. The Carrier asserts that arbitral precedent has upheld dismissals where substantial evidence of hostile and harassing conduct has been established. It avers that it has an obligation to keep the workplace free of vulgar and offensive comments or actions, which violate the standards, set forth in its Policy.

The Organization claims that the Carrier failed to provide the Claimant with a fair and impartial investigation. It argues that the charges were vague and the Carrier allowed testimony by telephone, depriving the Claimant of an opportunity to confront witnesses. The Organization maintains that it was not provided with documents to review before the hearing and the Carrier improperly withheld the Claimant from service pending the investigation. It also asserts that the hearing officer interfered with the Organization’s ability to pursue its inquiry into prior EEO violations by other employees.

The Organization avers that the Carrier violated Rule 19(A) when it did not hold the hearing within 10 days from when it had knowledge of the Claimant’s alleged text messages. It cites numerous arbitral awards where discipline has been set aside when the Carrier is found to have not held an investigation within the applicable time limits. In addition, the Organization asserts that Rule 19(B) was violated since the Claimant did not

receive a complete copy of the hearing transcript and the General Chairman was not provided with the notice of discipline or transcript within 10 days of the hearing. The Organization argues that the charges should be dismissed without further review of the record, based on procedural violations and failure to provide the Claimant with a fair and impartial hearing.

The Organization asserts that, should the Board reach the merits, the Carrier has not met its burden of proof that the Claimant sent the text messages. It argues that the Carrier interfered with its efforts to introduce the possibility that the messages were sent from some other source, known as “spoofing”. The Organization maintains that even if it is determined that the Claimant did send the text messages, the Carrier has not established a nexus between the alleged conduct and the Carrier’s business. It contends that such off-duty conduct is not related to the Carrier nor does it have a negative influence on its interests. The Organization argues that arbitral precedent requires the Carrier to prove there has been some adverse impact on its business or reputation.

The Board finds that the failure to provide the General Chairman with the notice of discipline and the transcript of the hearing and investigation “within 10 days of the hearing” is a fatal error. The Carrier’s contention that we ignore the error and proceed to decide the merits of the charges is rejected.

This Board, and most arbitral forums, loath forfeiture without considering the merits, particularly where there is no distinct disadvantage to the Claimant as a result of the alleged time limit violations. Here, however, the clear and unambiguous language in Rule 19(B) and the possible effect on the Claimant’s due process as provided for in the Agreement requires that we apply the plain meaning of the Rule.

Rule 19(A), in pertinent part, reads, “Decision shall be rendered within ten (10) calendar days after completion of hearing.” Rule 19(B) reads as follows:

When discipline is administered, copy of the discipline notice and the transcript shall be furnished the employee and the General Chairman. Transcripts shall be issued to the General Chairman at the time the discipline notices are issued to the employee, that is, within 10 days of the hearing.

The provision uses “shall”, which has a mandatory effect to its meaning instead of using a permissive term that gives the Carrier more discretion. Further, 19(B) specifically repeats the 10-day requirement contained in paragraph (A) when referring to the General Chairman and reiterates the period for issuing the notice of discipline. The plain meaning of Rule 19(B) must be applied as written since it represents the parties’ unequivocal agreement that the General Chairman possesses the transcript when the Claimant receives the notice of discipline.

The record confirms that the Carrier was required to issue the notice of discipline and transcript by September 19, 2016. The Notice of Discipline Assessed, dated September 14, 2016, and addressed to the Claimant, does not include the General Chairman as a recipient of a copy, but does list several other Carrier and Organization officials. Another copy of the Notice of Discipline Assessed, also dated September 14, 2016, is identical to the first one but includes a handwritten notation indicating the General Chairman as a recipient. Based on a reading of the correspondence compiled during the on-property handling of the matter, the second notice was issued after the Carrier was informed that the General Chairman had not received the transcript or the Notice of Discipline Assessed. However, a copy of the envelope containing the notice to the General Chairman was postmarked September 23, 2016 – four days after September 19 – and time stamped September 26, 2016, which is seven days past the 10-day period required by Rule 19(B).

The record does not support the Carrier’s belief that the General Chairman received timely notice and transcript. Further, the Carrier’s contention that its "clerical error" did not prejudice the Claimant is misguided. The failure to provide a hearing transcript and a notice of discipline is not equivalent to a clerical omission or incorrect information that is reasonably explained as human or technological error.

In addition, the Carrier’s assertion that the failure to provide the General Chairman with the transcript and notice did not deprive the Claimant of a fair and impartial hearing does not mean that its error did not affect the procedural guarantees afforded the Claimant by the Agreement. In Public Law Board (“PLB”) No. 6302, Award No. 217, held between the parties here, the actual effect on the Claimant was not weighed where the Carrier

violated express language in the agreement that set forth time limit requirements and mutual assent to a postponement. Further, there is nothing in the record that indicates the parties have a history of flexibility regarding time limits and other procedural requirements. Nor does the Agreement or prior arbitral precedent by this Board provide an alternative remedy to dismissal of the charges when time limits are violated and interfere with the Claimant's due process.

When considering the Carrier's assertion that the Claimant was not adversely affected by the error, a review of Rule 19 reveals that by not adhering to the requirements of paragraph (B), the Carrier interferes with the Claimant's ability to use the full period of time available to him to appeal the discipline imposed. A reading of Rule 19(F) indicates that the time frame to appeal the discipline is governed by Rule 21, Time Limit of Claims, which provides 60 days to appeal a decision from each respective level of review. As such, a delay in his union representative receiving proper notice of the discipline imposed and the accompanying transcript of the hearing deprives the Claimant of the full benefits afforded by the Agreement no matter how inconsequential it may seem. The burden of not adhering to Rule 19(B) cannot be borne by the Claimant.

As mentioned above, the Board prefers to address the merits of a dispute in its effort to reach a proper decision. However, the Board is also compelled to “. . . protect the integrity of the Agreement and the fidelity of the parties' agreed to language . . .” PLB No. 6302, Award No. 217. As such, we do not reach the merits and find that the Carrier violated Rule 19(B). The dismissal is set aside and the Claimant is to be reinstated with seniority intact and made whole in accordance with Rule 19 of the Agreement. The Board also exercises its discretion to forewarn the Claimant that the conduct he is alleged to have engaged in could lead to dismissal should the Board reach the merit of such charges.

AWARD

Claim sustained in accordance with the foregoing.



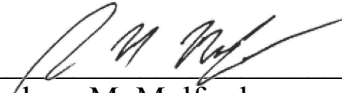
Michael Capone
Neutral Member

Dated: May 14, 2018



Alyssa K. Borden
Carrier Member

Dated: 05/16/18



Andrew M. Mulford
Labor Member

Dated: 5/16/18