

PUBLIC LAW BOARD NO. 7660

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

and

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

**Case No: 89
Award No: 89**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. P. Reyes, Jr., by letter dated August 12, 2016, for alleged violation of Rule 1.6 Conduct - Careless, Rule 1.6 Conduct - Dishonest and Rule 42.2.2: Other Speed Requirements was unjust, arbitrary, unwarranted and in violation of the Agreement (System File T-1645S-905/1668801 SPW).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall return Claimant P. Reyes, Jr. to service, dismiss all charges, afford all rights and benefits and make him whole as specified in our letter dated August 19, 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, Pascual Reyes, Jr., has been employed by the Carrier since March 19, 1979 and was assigned to a ballast regulator operator position on January 6, 2016 when the

equipment he was operating collided with a tamper machine. On January 26, 2016, he was notified in writing by the Carrier to appear for a hearing and investigation, on February 5, 2016, for being careless in his operating of the equipment and not following the safety rules regarding speed and stopping requirements. After several postponements the hearing was held on August 3, 2016. On August 12, 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 14, 2016. A conference was held on March 23, 2017 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 maintains that it did not violate the Claimant's right to a fair and impartial investigation when it held the hearing *in absentia*. It argues that conducting the investigation without the Claimant after numerous postponements requested by the Organization is not a procedural error. The Carrier cites arbitral precedent to support its contention that holding the hearing *in absentia* is acceptable where the Claimant's representatives were able to present evidence and cross-examine witnesses.

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 a post-accident investigation and re-enactment of the incident excluded all other possible causes except for the Claimant's careless operation of the equipment. It alleges that he failed to operate the machine at a safe speed that would have allowed him to stop within half the distance between his position and the equipment in front of him. The Carrier maintains that the Claimant was dishonest in his description of the cause of the collision.

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

The Organization argues that the Claimant was denied a fair and impartial

investigation when the Carrier refused to postpone the hearing until he was medically fit to appear. It asserts that the record contains sufficient medical documentation to support the conclusion that the Claimant was physically unable to attend. The Organization contends that allowing the hearing to proceed without the Claimant resulted in extreme prejudice to his ability to enter evidence and properly address the allegations.

With regard to the merits, the Organization claims the Carrier has not met its burden of proof that the Claimant caused the collision. It argues that the evidence produced does not prove the Claimant was speeding or careless. The Organization maintains that without the Claimant's testimony the Carrier cannot establish the substantial evidence required to prove the charges.

The Organization asserts 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 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.

Before moving to our findings on the merits of the evidence, the Board addresses the Organization's procedural objection that the Claimant's due process protections were violated when the hearing and investigation was held *in absentia*. We reject the Organization's valiant and strenuous argument that the investigation should have been postponed until the Claimant was able to appear. Numerous arbitral awards, including those issued between the parties here, have upheld the discipline imposed where the hearing was held *in absentia*. The record indicates that the investigation was postponed five times at the Organization's request. Where not limited by the Agreement, the Carrier is not obligated to agree to indefinite postponements. Where an employee is unable or unwilling to appear, the Carrier is entitled to hold a hearing and investigation after it provides the Claimant with proper notice and his representatives have the ability to present evidence and cross-examine witnesses.

With respect to the merits, and 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 evidence adduced during the on-property investigation, the Board finds credible and reliable evidence that the Claimant violated Rule 1.6 Conduct - Careless and Rule 42.2.2 Other Speed Requirements. The record sufficiently establishes that the Claimant operated the ballast regulator in a careless, negligent and unsafe manner that caused the collision on January 6, 2016.

The record does not contain substantial evidence that the Claimant was dishonest. The allegation that he misrepresented the speed at which he was traveling and the number of feet he slid before colliding with the tamper is based on unsupported hearsay evidence. While admissible, hearsay alone is insufficient to prove the fact being asserted. The Manager of Track Projects Daniel Nagy, when describing the results of the accident re-enactment conducted on January 7, 2016, testified that the Claimant stated the equipment slid 120 feet while traveling at “walking speed”. However, Mr. Nagy also testified that he did not interview the Claimant after the collision and the report does not indicate who input that information into its findings. The Claimant’s written statement does not make such an affirmation. The Foreman Raul Ayala testified that he spoke to the Claimant after the incident but does not state what the Claimant told him. Foreman Ayala testifies that he saw the Claimant operate the ballast regulator at “walking speed” when he was at the “spur” but did not see the collision which occurred at a different location.

The Claimant’s written statement indicating that there was oil and water on the tracks does not explain why his equipment slid 120 feet. The conclusion derived from the re-enactment, where oil and water were purposefully placed on the tracks to replicate the conditions during the collision, revealed that the Claimant would have been able to stop if he was traveling at a safe speed.

The Carrier was not arbitrary in its determination that the Claimant operated the ballast regulator at an unsafe manner. The record establishes that with or without oil and water on the tracks, if the Claimant was traveling at the proper speed he would have been able to stop well within required distance from the tamper. No mechanical defects were

noted and Ballast Regulator Operator Rene Sabala, who operated the equipment during the re-enactment, testified that the equipment slid more at a higher speed. He states that even if traveling faster than “walking speed” or at 10 miles per hour the equipment would have stopped. There is substantial evidence to meet the Carrier’s burden of proof that the Claimant operated above a safe speed and that his negligence caused the collision.

There is ample arbitral precedent in the industry where discipline, up to and including dismissal, has been upheld for unsafe acts leading to collisions. It is also well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. Here, however, we find that the discipline imposed is excessive based on mitigating circumstances and Claimant’s tenure. The Claimant has been in the Carrier’s service for over 37 years and has been qualified to operate a ballast operator since 1982. While it is apparent from the record that the Claimant did not properly operate his equipment, there is no indication that he previously committed serious safety infractions. His supervisors describe him as being an experienced and good equipment operator. Based on the foregoing, 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 January 6, 2016. The Board finds that the discipline imposed is excessive and the Claimant is reinstated as described above, without loss of seniority and benefits. 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.



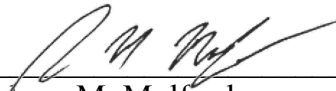
Michael Capone
Neutral Member

Dated: May 14, 2018



Alyssa K. Borden
Carrier Member

Dated: 05/16/18



Andrew M. Mulford
Labor Member

Dated: 5/16/18