

PUBLIC LAW BOARD NO. 7660

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

and

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

**Case No: 90
Award No: 90**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal of Mr. R. Yates, by letter dated July 20, 2016, for alleged violation of Rule 1.6: Conduct - Careless, Rule 136.7.5 Safe Traveling Distance Between Machines and Rule 1.13: Reporting and Complying with Instructions was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File RC-1645S-702/1670342 SPW).
2. As a consequence of the violation referred to in Part 1 above, Claimant R. Yates shall '... be immediately reinstated to the service of the carrier to his former position with seniority and all other rights restored, unimpaired and that the letter of dismissal be expunged from his personal record. In addition, Claimant Yates shall be made whole and compensated for net wages lost, both straight time and overtime, and benefit loss suffered by him since his wrongful and unwarranted removal from service and subsequent dismissal.'"

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, Robert Yates, has been employed by the Carrier since July 20, 2000 and held a Machine Operator position. On June 15, 2016, he was notified in writing by the Carrier to report for a hearing and investigation, which was held on June 30, 2016, for colliding with another machine while he was operating a System Rail Lift/Plate Inserter (“RLPI”) machine on June 1, 2016. On July 20, 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 the subsequent appeals by the Organization and rendered its final decision on December 28, 2016. An appeal conference was held on April 27, 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 claims it has established with substantial evidence that the Claimant violated Rule 1.6 on June 1, 2016 when the work equipment he was operating collided with another RLPI. It maintains that the Claimant knew the machine in front of him was having mechanical difficulty and moving at a lower speed. The Carrier contends that the Claimant knew he was to maintain a distance of 300 feet between his equipment and the other machine, which he failed to do. It asserts that the Claimant admitted he was distracted by a bag at his feet and could not stop in time to avoid the collision. The Carrier argues that the Claimant’s admission relieves the Board from making any further inquiry of the record.

The Carrier contends that such misconduct when operating large machines can cause serious injury or fatalities. It argues that arbitral precedent supports the discipline imposed where violations involving collisions are concerned. The Carrier asserts that the Claimant’s admission confirms that the dismissal is not arbitrary, capricious or excessive.

The Organization contends that the Carrier has not met its burden of proof that the Claimant had a willful disregard for safety on June 1, 2016. The Organization cites arbitral precedent in support of its contention that the Carrier has the burden of proof and that any factual dispute must be resolved in favor of the Claimant. It maintains that the Carrier’s

own witnesses testified that the Claimant was a long serving employee and believed that there was no intent or willingness to cause the collision or to be unsafe. The Organization asserts that the Claimant had no prior discipline and therefore, the discipline imposed is excessive. The Organization argues 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.

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 the 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, Rule 136.7.5, and Rule 1.13 when he failed to operate his RLPI safely and collided with the another machine.

The testimony of the Carrier's witnesses and that of the Claimant confirms that he did not follow the applicable rules when operating his equipment behind another machine. The Claimant's admission that he was distracted by his bag while operating his RLPI indicates careless and unsafe conduct. He acknowledged being distracted knowing that the machine in front of him was traveling a slow speed due to a mechanical problem. Such inattentive behavior is careless and negligent when operating large equipment that requires at least 300 feet to stop within a safe distance at a slow speed.

The Carrier need not prove that the Claimant acted in a willful manner. Its burden of proof is to show that the Claimant's actions were careless and constitute a disregard for the safe operation of the equipment. In Public Law Board No. 7798, Award No. 1, involving the same parties here, the dismissal of the employee was upheld where the facts and charges are very similar to the ones here. The Board found that the Claimant was not operating his equipment at the proper speed since he did not keep the required distance between his machine and the one in front of him.

Having found that there is substantial evidence in support of the charges, we next review the Carrier's assessment of discipline. There is ample arbitral authority for the discipline imposed by the Carrier given the Claimant's unsafe acts. Similar to the matter addressed here, Special Board of Adjustment No. 279, Award No. 908, concludes in upholding a termination that, "It also reveals that the 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." Further, the record indicates that the Claimant was previously involved in an equipment collision in 2009.

It is well established in the industry 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 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 employees and the public. 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 its rules when he operated his equipment in a careless and unsafe manner causing a collision on June 1, 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