PUBLIC LAW BOARD NO. 7660
CASE NO. 99

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY

REQUEST FOR INTERPRETATION OF PLB 7660, AWARD 34

PLB 7660, Award 34 was adopted on October 10, 2016. It held, in pertinent part:

"Even if these facts prove the intent necessary to establish dishonesty of purpose on Claimant's part, the Board is not convinced that, with the possible misunderstanding of the term "residence" in Section 3 as it relates to an employee with multiple properties, a 23 year employee with an excellent record should lose his job and career over this infraction. While there is no doubt that the Carrier is empowered to dismiss an employee for dishonesty under its UPGRADE discipline policy, we believe that was an excessive response under the circumstances, and there are sufficient mitigating factors present to modify the penalty.

Accordingly, we direct that the Carrier offer Claimant reinstatement to a position that his seniority permits him to displace into, but do not order any compensation for the period the Claimant was off work in the interim.

The claim is sustained, in part, in accordance with the Findings."

The original claim requested the following remedy.

"As a consequence of the violation referred to in Part 1 above, the Carrier shall now make Claimant M. Starkey whole by compensating him for all

> wage and benefit loss suffered in addition to expunging the matter from his personal record."

A dispute arose over the implementation of the Award. It is undisputed that Claimant was returned to service without back pay. The issue raised is whether the Carrier's decision to return Claimant at the status of a second triggering/training event with a 36 month retention period was appropriate.

The Organization's position is that when issuing Award 34, the Board did not authorize the Carrier to impose a heightened discipline level or review period upon Claimant. It notes that the Carrier never asserted on the property, or before the Board, that Claimant would be subject to an elevated discipline level or a review period if he was found partially responsible, and argues that it should not be permitted to do so at this time. The Organization asserts that, because it was not raised, this elevated level of discipline could not have been contemplated by the Board when issuing Award 34, and the Carrier should not be permitted to rely upon it in subsequent discipline issued to Claimant.

The Carrier points out that Claimant was found guilty of the charge of dishonesty under its UPGRADE Policy, and was returned to work due to mitigating factors, not exoneration of the charges. It maintains that Claimant was placed at the status of a second triggering/training event with a 36 month retention period under the following provision of its Managing Agreement Professionals for Success (MAPS) Policy, which supplanted its UPGRADE Policy under which the disciplinary charge was brought, and was effective September 15, 2015.

> 3.7 Arbitration Decisions: If a dismissed employee is returned to service as the result of a court decision or an arbitration decision or award, the conditions of the decision or award will be controlling for the purposes of adjusting the employee's record. If a decision or award is silent with regard to the employee's record, the employee's record will

> revert to the status of a second triggering/training event with a thirty-six (36) month retention period. The time spent in dismissed status will not apply to the retention period of a prior violation.

The Carrier notes that there was a similar provision under its prior discipline policies, including UPGRADE, and that the Organization has been long aware of its existence. It contends that the application of such provision to employees returned to service but not exonerated has been consistent and previously upheld as appropriate, citing SBA 279 Award 1044 (which it argues is *stare decisis*) and SBA 1127, Award 10.

The Organization has made clear that it is not asking the Board to rule on the validity of the Carrier's policy. The narrow issue presented is whether the remedy directed by the Board in Award 34 reasonably contemplated that Claimant would be placed at a level on the discipline scale commensurate with the conduct with which he was found guilty. There is no reason for this Interpretation to consider in detail whether the Organization had prior notice of the Carrier's MAPS Policy or whether it has been consistently enforced, both contentions raised by the parties in their on property correspondence leading up to this Interpretation request.

While the Organization is correct that Section 3.7 of the MAPS Policy was not specifically raised by either party during the on property handling of the claim resulting in Award 34, which was adopted by the Board a year after MAPS effective date, the matter of the application of this provision has been previously addressed in SBA 279, Award 1044. That case was between the same parties under the same Agreement and discipline policy. Therein, the Board held, in part:

> ….. It is clear that Carrier's well-publicized policy in regard to arbitration decisions returning employees to service, while unilaterally promulgated, has been in effect and implemented by Carrier for a number of years.

> The Organization is correct that Award No. 1042 did not authorize this action, but, at the same time, the issue did not arise in the course of rendering that decision. Additionally, the Board is unaware of any challenge to this aspect of the MAPS policy at the time the procedure was initially promulgated.
>
> The appropriate course of action would be for the parties to address the issue in future negotiations or, conversely, to raise the issue at the time of a hearing before a Board. Given what has transpired here, the Board is unable to render a decision supportive of the Organization's interpretation.

In the normal course of on property correspondence, the Carrier routinely enters the parts of its discipline policy relating to the charged conduct and corresponding penalty, as well as any cited Rule violations. It urges that its action be upheld. The entire discipline policy, including what would happen should the Board partially sustain the claim but not exonerate the employee, is not discussed or included in the record. The Organization, as it did here, requests that Claimant be made whole and that the discipline be expunged from his/her record. Sometimes, it argues that the discipline was excessive and requests that it be modified. The Organization does not address what should happen to a Claimant found guilty of the charge, but returned to work based upon mitigating factors that it has pointed out should be considered.

It appears that the question of interpretation became an issue in this case when Claimant was charged with violating another Rule within the retention period and dismissed. The just cause inquiry raised in that case is subject to a different claim, where the appropriateness of the penalty will be assessed based upon the nature of the violation and Claimant's past disciplinary record, including his placement upon his return to work under the MAPS Policy. See, SBA 1127, Award 10.

Under all of these circumstances, we deny the Organization's request to find that the Carrier's decision to return Claimant at the status of a second triggering/training event

with a 36 month retention period did not comply with its obligation in effectuating the remedy directed in Award 34. Under the findings of SBA 279, Award 1044, we conclude that the Carrier's challenged action was appropriate.

Margo R. Newman
Neutral Chairperson

Dated: 10/31/2018

K. N. Novak
Carrier Member

Andrew Mulford
Employee Member