

PUBLIC LAW BOARD NO. 7988

**CASE NO. 16
AWARD NO. 16**

**Brotherhood of Maintenance of Way Employees
Division - IBT Rail Conference**

and

SOO Line Railroad Company

**Claimant D. Rothers
System File No. D-50-21-587-02
Carrier File No. 2022-00026049**

BACKGROUND

On March 26, 2012 Claimant D. Rothers entered service with the Carrier and, since 2017, has occupied the Bridge Tender position on a crew assigned to the Hastings (MN) Lift Bridge. His duties involve opening and closing the bridge for trains traversing over it and for tugs, barges and boats navigating the Mississippi River.

On June 25, 2021 the Assistant Chief Engineer - Structures ("ACE-S") inspected Claimant's work locale. In the Bridge Tender Tower ("shack") he discovered a container with liquid of an amber hue suggestive of bodily fluid. Following that discovery on June 25, the ACE-S searched Claimant's Facebook social media account on June 27 and recognized that comments and pictures posted by Claimant in March 2021 continuing to June 2021 may implicate rules and policies.

On July 2, 2021 the Manager - Workforce Planning & Support issued to Claimant a notice of formal investigation and hearing stating, in part, as follows:

The purpose of the investigation and hearing is to develop all facts and circumstances and place your responsibility, if any, in connection with your alleged failure to comply with Social Media Policy and your alleged failure to comply with the Workplace Harassment Policy between March 2021 and June 2021, brought to the Company's attention on Sunday, June 27, 2021 in a follow-up to a workplace inspection conducted on Friday, June 25, 2021.

This indicates a possible violation of, but is not limited to, the following rules:

- Social Media Policy # HR 202
- Workplace Harassment - Including Sexual Harassment Policy 1300
- US Rulebook for Engineering Employees 1.6 Conduct
- US Rulebook for Engineering Employees 1.10 Games, Reading, or Other Media
- US Rulebook for Engineering Employees 29.1.E Electronic Devices
- Engineering Safety Rule Book CORE Safety Rule 9 Use of Electronic Devices

By mutual agreement the formal investigation and hearing convened on October 28, 2021 wherein Claimant and his representative presented testimony and examined the Carrier's witness and fifteen (15) exhibits.

On November 8, 2021 the Assistant Chief Engineer - Chicago notified Claimant that "the hearing record contains substantial evidence and proof that you violated" the charged rules and policies and also violated Rule 1.9 Respect of Railroad Company in the US Rulebook for Engineering Employees. "Based on the facts and evidence in the hearing record and your past discipline history, you are hereby **dismissed from CP effective immediately.**"

On January 7, 2022 the Organization appealed Claimant's dismissal noting that the Carrier cites duplicate rules on electronic device use for the same incident to inflate the charged misconduct and impose an arbitrary and excessive penalty. This "piling on" of rules violates Claimant's right to due process and a fair and impartial hearing since CORE Safety Rule 9 Use of Electronic Devices and Engineering Employees Rule 1.10 Games, Reading or Other Media duplicate Engineering Employees Rule 29.1.E Electronic Devices. Claimant complied with Rule 29.1.E which allowed use of an electronic device during recognized breaks or meal period as occurred in March 2021 continuing to June 2021.

Claimant's Facebook account was "friends only" restricted; the Carrier accessed it through an intermediary. Regardless, Claimant was unaware of the Social Media Policy ("SMP") as the Carrier provided no training or information about it. Assessing discipline for violation of a policy the Carrier never informed Claimant about violates due process. The Carrier construes the SMP to censor employees from accessing, sharing, posting or contributing to social media at any time. Aside from the SMP, the Carrier did not establish whether a manager or supervisor "prominently" posted Policy 1300 Workplace Harassment. Finally, listing Claimant's training courses without course content precludes the Organization from examining subject-matter covered to assess its relevance to the charged misconduct.

On March 7, 2022 the Carrier denied the appeal. Claimant received a fair and impartial hearing with notice of charges and an opportunity to present evidence. Multiple rules address electronic device use during work hours on Carrier property; citing all of them does not infringe

on due process for Claimant. He is responsible for familiarizing himself with rules and policies and held accountable for complying with them. There is substantial evidence of Claimant's rules violations based on his electronic device use during duty hours on Carrier property wherein he posted pictures of Carrier assets and posted comments with pictures that are sexually explicit, misogynistic and homophobic, portend violence and direct discriminatory references to persons of protected classes. The Organization's requested remedies are excessive and improper. Any remedy granted by the Board is limited to an "actual wage loss" offset consistent with longstanding practice and Interpretation No. 1 of First Division Award 24718.

Following conference on April 19, 2022 and an exchange of post-conference letters, the dispute remains unresolved and has been advanced to the Board for review and decision.

FINDINGS

Public Law Board No. 7988, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of this hearing and did participate therein.

The proceeding was conducted pursuant to the PLB Agreement dated December 16, 2021 where Paragraph (H) states, in part, as follows:

The parties agree that their . . . documentation will be limited to the notice of investigation, transcript of investigation, letter assessing discipline, and correspondence exchanged on the property, as applicable. . . . However, the Neutral Member shall have the authority to require the production of such additional evidence, either oral or written, as he or she may desire from the parties. The parties anticipate that cases will be routinely handled by the Board without any oral argument . . . In the event of an oral hearing . . . [n]o new evidence will be presented[.]

The Board's findings are drawn from the record defined by Paragraph (H) and evaluated in accordance with recognized and enduring precedent in railroad arbitration where the Board exercises its authority in an appellate forum. The scope of that authority is outlined in Third Division Award 21299 quoted in the Carrier's letter denying the appeal:

Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to

determine, but to pass upon the question whether, without weighing it, there is substantial evidence to sustain a finding of guilty. If that violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that the Carrier's action with respect thereto was discriminatory, unjust or unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.

Substantial evidence resides at the lower end of the evidentiary scale; it is not onerous to attain compared to clear and convincing evidence and beyond a reasonable doubt. Substantial evidence may be direct as in eye-witness observation and personal knowledge or indirect such as circumstantial and inferential.

The record contains substantial evidence that Claimant used an electronic device during duty hours on Carrier property in March 2021 continuing to June 2021. For example he posted pictures on Facebook social media of Carrier assets - - property and equipment - - which he snapped from the shack. Claimant acknowledged familiarity with the charged rules which prohibit use of electronic devices on duty except in limited situations. Claimant's electronic device use exceeded the exceptions and violate rules in the US Rulebook for Engineering Employees, specifically, Rule 1.9 Respect for Railroad Company, Rule 1.10 Games, Reading or Other Media and Rule 29.1.E Electronic Devices along with Engineering Safety Rule Book CORE Safety Rule 9 Use of Electronic Devices. The rules are work-related and reasonable for they proscribe activity that distracts from duties.

The Carrier established that Claimant's Facebook social media account was open and available for viewing by all. He identifies his position and employment with the Carrier amidst personal commentary with pictures posted during duty hours (April 11 and June 5 for example). The ACE-S testified that Claimant's comments with pictures were sexually explicit, misogynistic and homophobic, portending violence and with discriminatory references directed to persons of protected classes. Claimant did not rebut the ACE-S descriptions nor deny his posts. Claimant violated Policy 1300 Workplace Harassment; he acknowledged familiarity with the policy. Also, substantial evidence supports finding Claimant violated US Rulebook for Engineering Employees Rule 1.9 Respect of Railroad Company: "Employees must behave in such a way that the railroad will not be criticized for their actions."

Claimant testified he was not aware of and received no training on the SMP whereas the ACE-S testified that Claimant was generally aware of policies as he was rules qualified and completed training in February 2021 on workplace rights, responsibilities and accountability. The record shows Claimant's awareness of the Carrier's attention to social media websites as he completed "safer web browsing" training in 2017, 2018 and 2019. Claimant was aware of safe social media in the workplace prior to and after SMP became effective in 2018. Based on that awareness he has been afforded a fair and impartial hearing on social media in this proceeding.

The cumulative effect of Claimant's rules violations, Policy 1300 violation and social media awareness supports the charged violation of Rule 1.6 Conduct where "[a]ny act of . . . misconduct, willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported" and "[i]ndifference to duty or to the performance of duty will not be sustained." The ACE-S reported Claimant's misconduct because it affects the Carrier's interest when an employee, during work hours, discloses property and equipment assets and posts comments that are directed at non-employees or persons based on their protected classes.

As noted in the Carrier's decision denying the appeal, Claimant has prior discipline and the misconduct in this proceeding constitutes a "Major Rule Violation" described as "Conduct Unbecoming Offences" in the Hybrid Discipline and Accountability Guidelines. Dismissal is within a range of disciplinary measures. Any mitigating factors fall short of warranting a lesser penalty. The Board affirms the Carrier's action to dismiss the Claimant.

Award

Claim denied.

/s/ Patrick Halter

Patrick Halter

Neutral Member

Dated: March 15, 2023



Brian Scudds

Carrier Member

Dated: March 15, 2023



John Schlismann

Employee Member

Dated: March 15, 2023