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BEFORE PUBLIC LAW BOARD NO. 5839

AUG 19 1996

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES B. M. W. E.
and
UNION PACIFIC RAILROAD COMPANY
(Former Oklahoma-Kansas-Texas Railroad)

Case No. 7

STATEMENT OF CLAIM:

1. The dismissal of Welder A. S. Bell, III, SSN 450-13-2220 for his violation of Union Pacific Rules 1.1, 1.4, 1.6(1)(6)(7) and 1.7 in connection with charges of alleged threat and verbal abuse of a fellow employee at Chickasha, Oklahoma on Tuesday June 7, 1994 was unjust, extremely excessive and in violation of the Agreement. (NRAB File 95-3-398).

2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to the Carrier's service with seniority and benefits unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered beginning June 29, 1994 and continuing until he is returned to service.

FINDINGS:

At the time of the incident in question herein, the Claimant, Arthur S. Bell, III, was working as a Welder on Gang 8733. On June 8, 1994, his supervisor was apprised of comments and threats that the Claimant had allegedly made toward another Carrier employee, one Donald Wayne Baker. Mr. Baker had called the Carrier's Central Service Unit Safety Hot Line and left a message stating that the Claimant had made threats against Mr. Baker and his family. Effective June 9, 1994, Mr. Bell was removed from service pending an investigation.

On June 28, 1994, a formal hearing was held into the matter and it was determined that the Claimant was guilty of violating Carrier Rules 1.1, 1.4, 1.6(1)(6)(7) and 1.7. Subsequently, the Claimant was dismissed from the Carrier's service by letter dated July 7, 1994.

The parties being unable to resolve the issue, this matter comes before this Board.

The major issue being raised by the Organization is that the Carrier failed to schedule a hearing within 10 calendar days of the date when the Claimant was charged with the offense or he was held out of service, and therefore, the claim must be sustained pursuant to the rules. The Organization cites Article 23, Rule 1 of the MKT Agreement which the OKT adopted at the time of the merger. Article 23, Rule 1 states:

The hearing will be held within ten (10) calendar days of the date when charged with the offense or held out of service.

The Organization contends that since the alleged wrongdoing took place on June 7, 1994, and the Claimant was held out of service commencing June 9, 1994, the Carrier had to hold the hearing on or before June 19, 1994, in order to comply with the Rule. Since the hearing was not held until June 28, 1994, according to the Organization, the claim must be sustained.

The Carrier contends that by agreement with the MKT General Chairman on January 12, 1984, Article 23, Rule 1, was amended to read:

... the hearing will be held within twenty (20) calendar days of the date when charged with the offense except if an employee is

suspended from service, hearing will be held within ten (10) days from date suspended.

The Carrier contends that since the merger of the UP and the MKT, the language contained in the amended Rule has been consistently applied. The Carrier argues that since the Notice of Charges were issued on June 13, 1994, and the hearing was held on June 28, 1994, it was properly held within the twenty (20) days provided in the amended Rule. The Carrier also points out that the Claimant was paid for the time that he was held out of service until the outcome of the investigation. Hence, since the Claimant received compensation through June 30, 1994, there was no violation of the Agreement.

The Carrier also contends that if the Organization wants to enforce the rule as it was originally written in Article 23, Rule 1, then the Organization must also follow the original Rule 8 which states:

The right of appeal is hereby established. Appeal may be made in succession up to and including the highest official designated by the management, if Notice of Appeal is given within ten (10) days of the decision of the officer from whom the appeal is made, and to whom it is made.

The Carrier points out that that rule was amended to increase the number of days to twenty-five (25) calendar days for the appeal.

In this case, the dismissal letter was issued to the Claimant on July 7, 1994. The letter from the Organization appealing the dismissal was issued eleven (11) days later on July 18, 1994. The Carrier contends that if the Organization wants to stick with the

original rules, then all of the original rules must be enforced which require the shorter time limits. Hence, according to the Carrier argument, if the Organization wants to apply the earlier rules strictly, then the Organization's appeal is as invalid as the dismissal.

This Board has reviewed the arguments relating to the procedural issue and we find that it is in the interest of the parties to have the decision rendered on the merits. It is true that if the earlier time limits are enforced, both the Organization and the Carrier were in violation since neither party acted within the required ten (10) days. However, given the fact that the Claimant was paid for several weeks after he was removed from service and given the fact that it is in the interest of the continuing relationship between the parties to have the matter resolved on the merits, this Board finds that the later rules were in effect which require the Carrier to hold the hearing within twenty (20) days from the day of the Claimant being charged with the offense and the Organization must file the appeal within twenty-five (25) days after the date of the decision.

Consequently, this Board finds that the case is properly before this Board for a determination on the merits.


This Board has reviewed the evidence and testimony in this case and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of threatening the life and family of his supervisor and causing fear on the part of the supervisor in violation of the rules. There were sufficient witnesses to the action who confirmed the statements of the supervisor that the Claimant had threatened him.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its action to have been unreasonable, arbitrary, or capricious.

The record reveals that the Claimant had previously been dismissed by the Carrier on two occasions for making threats and engaging in violent behavior. Given that previous record and the seriousness of the offense that the Claimant was involved in here, this Board must find that the Carrier did not act unreasonably, arbitrarily, or capriciously when it terminated the Claimant. Therefore, the claim will be denied.

AWARD

Claim denied.



PETER R. MEYERS
Neutral Member



Carrier Member

DATED: 7-1-96



Organization Member

DATED: 7-15-96