PUBLIC LAW BOARD NO. 6237

AWARD No. 11
CASE No. 11

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Union Pacific Railroad Company

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained in accordance with the Findings

DATE: August 16, 2002

DESCRIPTION OF CLAIM:

By notice dated October 5, 2001, Claimant G. Purkey was dismissed for violating Rules 1.0, 1.6, 1.7, and 1.13 arising out of his conduct with his track supervisor on September 13, 2001 at Pocatello Yard. The notice of investigation cited the rules previously noted and alleged that Claimant became involved in an altercation, displayed quarrelsome conduct, and became insubordinate toward the supervisor. The disciplinary notice sustained all charges.

At the time of his dismissal, Claimant had more than twenty years of service. His prior record was asserted to be "spotless." None of the Carrier witnesses challenged this characterization and review of his actual record did not reveal any inconsistencies.

The Claim seeks to overturn the discipline.

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Two procedural objections were raised by the Organization at the hearing. They were directed at Claimant's removal from service in advance of the investigation hearing and the specificity of the notice of charges. Both lack merit. Claimant's removal from service on the date in question did not constitute discipline without benefit of a fair and impartial investigation. Absent explicit prohibitions in the applicable Agreement, and none have been cited on this record, Carrier's have the right to withhold employes from duty pending formal investigation. This is recognized in prior award precedent (see, for example, Award 21 of Public Law Board 3605) as well as in Rules 48(i)6 and 48(o) of the parties' Agreement. Regarding the adequacy of notice, it is clear that the notice did apprise Claimant of the precise nature of the charges and that he was able to prepare his defense. He was able to secure multiple representatives of his choice and arrange for witnesses to testify on his behalf. By its terms, Rule 48(c) does not require more.

In disputes of this kind, the merits issue for the Board's review is whether the record contains substantial evidence to support the Carrier's determination. In this regard, considerable deference is customarily accorded the hearing officer's findings, particularly those involving credibility of conflicting evidence, because the hearing officer saw each of the witnesses and was able to gauge

their demeanor and veracity during their testimony.

This record is unusual; it does not contain any findings by the hearing officer. In addition, the Carrier official who issued the disciplinary decision was not present at the hearing. Thus, the basis for deference is missing. Other irregularities call into question whether and to what extent the Carrier's decision-maker actually read the transcript of the hearing prior to issuing his decision.

It is undisputed in the record that there was no basis for finding Claimant guilty of violating Rule 1.13. This rule pertains to reporting for work and complying with instructions from supervisors. There is simply no evidence in the record to support the determination that Claimant violated this rule. Indeed, at Page 26, even the track supervisor, who took exception to Claimant's conduct in other respects, admitted that he did not know why Rule 1.13 was charged. Moreover, all of the other witnesses corroborated Claimant's testimony that he did not fail to comply with any instructions. Yet, despite this clear absence of inculpating evidence, the Carrier's decision-maker found Claimant guilty of violating this rule. These considerations compel the Board to overturn this finding.

The Carrier's finding of culpability with respect to Rule 1.0 is similarly lacking in propriety. During the discussion of preliminary matters at the hearing, transcript pages 8 - 13 show there was agreement that the hearing would deal only with the rules that were read into the record, which were Rules 1.6, 1.7, and 1.13. Rule 1.0 was not only not read into the record but its text was not provided anywhere for the Board's review. Yet, despite this understanding, the Carrier's disciplinary notice cites Rule 1.0 and, as noted previously, sustains all of the charges. These considerations compel the Board to overturn this finding as well.

According to the testimony, an Amtrak train derailed near Wendover on the Utah-Nevada border on September 13, 2001. Because it was within days of the September 11th attacks on the World Trade Center and the Pentagon, there was concern the derailment might be terrorist related. The terrorist attacks also prompted the Carrier to have its supervisors invite employees to discuss any concerns, safety or otherwise, they might have while at work.

Claimant's track supervisor was instructed to have a van with tools driven from Pocatello Yard to the Wendover derailment site. The supervisor relayed this instruction to Extra-Gang Foreman Combs who, in turn, busied himself with preparing the van. Although this plan did not involve Claimant's work that day in any manner whatsoever, he nonetheless apparently believed that driving the van to Wendover would violate seniority district limitations. Claimant thus entered into a discussion with the track supervisor over the propriety of the Carrier's plan. The discussion became heated and persisted for some minutes.

There are numerous conflicts in the testimony of the witnesses. Several of them undercut the testimony of the track supervisor and support Claimant's account. Others corroborated the supervisor's testimony and diminished that of Claimant. For example, the supervisor alleged that Claimant interrupted his conversation with Foreman Combs, became "real pushy" about the seniority issue, and "got in [the supervisor's] face." The supervisor said Claimant was within a foot of him at times. Foreman Combs did not corroborate any interruption of a conversation by Claimant. Moreover, he and most other witnesses place Claimant 5-6 feet away at all times. One witness estimated they were no closer than 4 feet and another placed them no closer than 2 feet.

The testimony is in agreement that what started out as a discussion between Claimant and the supervisor escalated into a heated argument. However, the only testimony on the point of responsibility for the change stands for the proposition that the supervisor provoked the escalation by referring to Claimant's name on previous time claims. The testimony of the other employee-

onlookers coincides on the fact that both Claimant and the supervisor were equal participants in the event in terms of volume and intensity.

The supervisor also testified that he tried to walk away twice from Claimant. This is not corroborated by any other witness, although there is support for the supervisor walking away once and being followed by Claimant, who kept up the discussion.

The Carrier's disciplinary notice does not provide any explanation for how these kinds of conflicts were all apparently reconciled against Claimant; apparently no action was taken against the supervisor even though the cited rules were equally applicable to him.

Rule 1.6(3) prohibits "insubordinate" conduct. The term is not explicitly defined in the rule. The context of the hearing transcript establishes that the parties understand the term to mean a refusal to obey orders or instructions. It is undisputed in the instant record that Claimant was not disobedient on the day in question. Even the supervisor admits that he never ordered or directed Claimant to cease the discussion or stay away from him. Moreover, the supervisor did not accuse Claimant of refusing any other instructions or orders. These considerations compel the Board to overturn the finding that Claimant was insubordinate. It is not supported by substantial evidence in the record.

Rule 1.7 is entitled "Altercations" and reads as follows:

> Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on railroad property.

As written, the implication from the text, when read together with Rule 1.6(6) and (7), is that Rule 1.7 prohibits improper *physical* contact between employees. The thrust of the witness' testimony is that the employees also understand the rule to preclude physical contact. It is undisputed that Claimant did not make any physical contact with the supervisor. Accordingly, the Board is compelled to find that Claimant's conduct did not constitute an altercation. The record does not provide substantial evidence to support a contrary conclusion.

Rule 1.6(6) prohibits "quarrelsome" behavior. This term is general enough to cover a spectrum of conduct, which can range from the quite serious to the relatively benign; it should be handled accordingly. On this record, the Board finds Claimant's conduct was quarrelsome on September 13, 2001. However, in light of the relevant circumstances, it is found to fall within the less serious end of the range. The record suggests that Claimant's reaction was provoked by the supervisor. Moreover, it is understandable that many Americans were much more easily excitable in the days immediately following the terrorist attacks.

Finally, some pages were missing from the copy of the hearing transcript provided to the Board. Two of the pages (pages 71 and 73 were missing while pages 70 and 72 were duplicated) eliminated some of Claimant's testimony. One more page (page 113) was missing from the closing statement of Claimant's representative.

Given the irregularities already noted, the lack of evidence to support some charges, the nature of Claimant's conduct, the mitigating factors cited, and Claimant's long years of service with a clear disciplinary record, the Board finds the penalty of permanent dismissal is unwarranted. Claimant should be offered reinstatement to his former employment status, with seniority and other rights of that status unimpaired, but without back pay.

AWARD:

The Claim is sustained in accordance with the Findings.

Gerald E. Wallin, Chairman
and Neutral Member

PUBLIC LAW BOARD NO. 6237

AWARD No. 11
CASE No. 11

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Union Pacific Railroad Company

RESPONSE TO REQUEST FOR INTERPRETATION

ARBITRATOR: Gerald E. Wallin

DATE: May 2, 2003

FINDINGS OF THE BOARD:

Award No. 11 of this Board required that Claimant be offered reinstatement to his former employment status, with seniority and other rights of that status unimpaired, but without back pay. Claimant was returned to service on or about August 29, 2002 accordingly. The Carrier also removed the dismissal reference from Claimant's disciplinary record and, instead, treated Claimant has having Level 3 status in Carrier's UPGRADE program for the administration of discipline. The net effect of this Level 3 placement appears to be twofold: First, future discipline of Claimant, if any, will be assessed at a higher level than might otherwise be the case; and, second, Claimant will remain in this Level 3 status until the expiration of an 18-month retention period that began September 13, 2001.

The Organization questioned the propriety of Carrier's placement of Claimant in Level 3 and requested an interpretation of Award No. 11.

Because their Public Law Board agreement provided for such requests, the Carrier apparently joined in the effort and a submission schedule was established. The interpretation issue stated by the Organization is as follows:

> Was the Carrier's decision to return Claimant Purkey to service with an UPGRADE disciplinary status of Level 3 appropriate?

In support of its position, the Organization made a number of contentions. Prominent among them was the contention that the Carrier's action amounted to additional discipline beyond what was directed by Award No. 11.

The Carrier also advanced several contentions in support of its action. Chief among them was the assertion that Claimant had been handled consistent with other employees whose discharges were overturned by an arbitration award on a leniency basis. The UPGRADE policy specifically provides that such employees will be placed in Level 3 status.

For the reasons to follow, it is not necessary to recite all of the other contentions raised by

the parties.

After thorough review of the submissions of the Organization and Carrier as well as Carrier's rebuttal submission, the Board's response to the interpretation issue posed is that we presently lack the authority to answer it; the answer to the issue is solely within the province of subsequent review panels that may be convened to review future disciplinary action involving Claimant, if any.

Certain undisputed facts and well established principles of just cause compel the foregoing conclusions. First, it is clear that the parties' Public Law Board agreement both grants and limits the Board's authority. While Section 8 of the agreement recognizes the Board's authority to modify discipline, it also mandates that the Board's "... disposition of the dispute shall be based on valid material suppled under Sections 6. and 7." The Carrier's UPGRADE policy is not among the materials permitted under Section 6 nor was it provided to the Board with Carrier's transmittal letter of November 19. 2001 that supplied those materials.[1]

Second, Claimant's reinstatement was not made on a leniency basis. He was reinstated because the Carrier failed to properly prove all but one of the charges against Claimant and it failed to prove the requisite severity of the remaining charge against him. The Carrier's UPGRADE policy does not appear to cover a reinstatement resulting from a failure of proof..

Thus, this Board could not have imposed a Level 3 UPGRADE status and an 18-month retention period upon Claimant even if we had been inclined to do so, which we were not. Rather, our modification of Claimant's discipline was merely an exercise of the limited flexibility inherent in a traditional just cause review.

At this point, some brief discussion about certain just principles may provide meaningful guidance to the parties even though it cannot directly answer the pending interpretation issue.

Unless the parties have bargained to remove that jurisdiction from the Public Law Board, the reasonableness of a disciplinary penalty is always one of the issues reviewed in a just cause analysis. No such removal of jurisdiction has been noted in the parties' Agreement here. Accordingly, in a traditional just cause review, the analysis seeks to determine whether there has been prior discipline for the same or similar conduct in relatively close proximity to the penalty under review. If there is, then more severe discipline for a repeated offense will usually be found to be warranted and will be sustained. If there is no previous related misconduct, or if there is but it is too remote in time, then an employee will generally be treated as having a previously clean record as to that form of misconduct. In such a case, accelerated discipline will usually will be found to be unreasonably harsh and will be adjusted downward. The key point is that the significance of the existing disciplinary record is a question of fact to be determined by a future tribunal when it is convened to analyze the propriety of a future disciplinary penalty.

By placing Claimant in Level 3 with an 18-month retention period, what the Carrier is really saying is that, for a period of 18 months, it does not intend to treat Claimant as having a clean slate if he engages in future misconduct. Rather, it intends to treat Claimant as a repeat offender and discipline him accordingly. However, the reasonableness of this approach is ultimately a question of fact to be determined by a future review tribunal upon consideration of all of the relevant circumstances existing at the time, including the status of Claimant's existing disciplinary record.

---

[1] Section 7 of the Public Law Board agreement is not applicable in this case. The parties waived their right to provide written submissions or make oral arguments in the original dispute.

That tribunal may agree with the Carrier or it may disagree. It may agree that Level 3 treatment for a period of 18-months is reasonable or it may determine that such treatment was unreasonably harsh. The one fact that is clear at this point, however, is that is premature for this Board to make that determination.

Gerald E. Wallin, Chairman
and Neutral Member