

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
)	Case No. 31
and)	
)	Award No. 31
UNION PACIFIC RAILROAD COMPANY)	
)	

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 1, 2009

STATEMENT OF CLAIM:

1. The dismissal of Track Foreman Louis S. Sanchez, Jr. for violation of GCOR Rules 1.6(1), 1.6(2) , 1.6(6), 1.6(7), 1.5, 1.9, 90.1 and the Union Pacific Railroad's Violence and Abusive Behavior in the Workplace Violence Policy in connection with vandalizing another individual's vehicle and discharging a firearm into that vehicle on July 26, 2008 is based on unproven charges , unjust, unwarranted and in violation of the Agreement (Carrier's File 1510771).
2. As a consequence of Part 1 above, we request that Mr. Sanchez be reinstated to the service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage and benefit loss suffered by him since his removal from service and the alleged charge(s) be expunged from his personal record.

FINDINGS:

Public Law Board No. 7258 upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On August 4, 2008 Claimant was notified to report for an investigation in connection with an allegation that Claimant on July 26, 2008 was incarcerated as a result of his vandalizing another individual's vehicle and also discharging a firearm into that vehicle which was situated in a motel parking lot in Kearney, Nebraska, while possibly under the influence of alcohol. Claimant's alleged actions have also possibly resulted in subjecting the Railroad to criticism and

loss of goodwill. Carrier further advised that Claimant's alleged actions indicate a possible violation of Rules 1.6 (1)(Careless of the safety of themselves or others), 1.6 (2)(Negligent), 1.6 (6)(Quarrelsome), 1.6 (7)(Discourteous), 1.5 (Drugs and alcohol), 1.9 (Railroad Company), 90.1 (Carrier's Drug and Alcohol Policy), and the Union Pacific Railroad's Violence & Abusive Behavior in the Workplace Violence Policy. The notification further stated: "Please be advised that if you are found to be in violation of this alleged charge, that the discipline assessment may be a Level 5 and may result in your dismissal."

On August 8, 2008, the record reflects, there was a mutual agreement to postpone the investigation until August 19, 2008. An investigation was convened on August 19, 2008 and on August 28, 2008 the conducting manager rendered his decision to dismiss Claimant for violation of all of the cited rules. On September 26, 2008 the Organization filed the instant claim. The claim was denied by letter dated October 18, 2008. On January 8, 2009 that denial was appealed and that appeal was denied March 6, 2009. The Record reflects that the claim was discussed in conference without resolution on May 6, 2009.

It is undisputed that Claimant was charged by civil authority with the conduct that led to his dismissal. The documentary record evidence, specifically Exhibit H, the Cash Appearance Bond and Exhibit I, the criminal complaint, prove that Claimant was charged with the criminal offenses alleged. Moreover, the Claimant forthrightly recounted the conduct under direct examination. Claimant and a fellow Surfacing Gang Foreman were sharing a motel room, as they had done for the previous several years, while working away from home. Claimant testified that he and his roommate had finished at work around 7:00 pm. and returned to their motel. Shortly thereafter, Claimant recalled, he and his roommate went out together for dinner. Both Claimant and his roommate testified that they had a few beers with dinner. Upon returning to the motel, Claimant found that a neighboring guest had parked in Claimant's assigned parking spot. In response, Claimant testified, he tore one of the mirrors off of the truck parked in his assigned spot. Claimant's roommate, who testified at the Investigation, stated that when they returned from dinner to find the truck in his spot, Claimant became agitated and tried to break the mirrors off of the truck, but that he, the roommate, got him back into the room, waited until he thought Claimant had calmed down and went to take a shower. Claimant testified that at that point he "just cracked, I snapped" and got his handgun out of his suitcase and went outside and fired three rounds into the offending vehicle. Claimant testified that there were no witnesses to the shooting.

Claimant's supervisor testified at the investigation that he first learned of Claimant's arrest from another of his foreman who telephoned him at another location and explained what he had heard happened. Claimant thereafter called his supervisor on the telephone and explained that he was incarcerated. Upon Claimant's return to work, the Supervisor decided, based on the seriousness of the allegations against Claimant to remove him from service.

Carrier asserts that there was substantial proof to justify its conclusion as to the Claimant's guilt in violation of the rules identified. What is readily apparent, the Carrier avers, is that Claimant was incarcerated as a result of him vandalizing another individual's vehicle and

also discharging a firearm into that vehicle, while possibly under the influence of alcohol. The Carrier further contends that Claimant's actions may have also subjected the Railroad to criticism and loss of good will.

The Carrier next reminds this panel that its role is to verify that substantial evidence was adduced at the hearing to support a finding of guilt on the charges. Once substantial evidence to prove guilt is substantiated, Carrier contends that the panel is without authority to overturn the level of discipline assessed unless it is demonstrated that the discipline is arbitrary, capricious or an abuse of the Carrier's discretion. Here, the Carrier opines, the level of discipline assessed, dismissal, was commensurate with the egregious rules violations proven. Thus, the Carrier contends, there is no cause to disturb the discipline imposed and the discipline should not be overturned.

The Organization stakes its claim first on its argument that the Carrier has failed to prove a violation of any of the cited rules and second that all of the complained of conduct occurred while Claimant was off duty, away from the Carrier's property and staying at a non-Carrier provided lodging facility. Hence, the Organization urges, the Carrier has no right whatsoever to charge or discipline Claimant for off-duty/off-property conduct.

In support of its argument that the Carrier has no right whatsoever to charge or discipline Claimant for off-duty/off-property conduct, the Organization submitted the following National Railroad Adjustment Board (NRAB) First Division Awards: Award 14321 ("...To permit the Carrier to control or to discipline an employee for his conduct while off duty and not on the Carrier's property and the enumerated exceptions would be an unjust and improper interference with an employee's personal rights and private affairs."); Award 20671 (...we must conclude that the parties never intended that such rules were to be used to govern the conduct of the Claimant, and others, while off duty and operating their private automobiles...); and, Third Division Awards: Award 3411 ("as this Referee reads the evidence *** did not contend that Claimant's conduct did not call for some kind of action if he had been on duty, but since he was off duty the Carrier had no right to discipline this employee. What an employee does when off duty and not on the property of the Carrier would not justify discipline so long as his conduct does not interfere with his work...); Award 21293 ("...The most common cases involve on-duty misconduct. However, employees are also frequently disciplined or discharged for committing improper acts while off duty. In the latter type of cases, however, in order to justify disciplinary action, including discharge, there must be some evidence of damage to the Carrier....The generally understood principle in the industry is that a Carrier may not discipline an employee for what he does off duty. To do so would constitute an invasion of the employee's personal life by the Carrier and would place the Carrier in the position of sitting in judgement on neighborhood morals, a matter that should be left to civil authorities..."

We find that in the instant case that the Carrier failed to prove violation of the rules cited with substantial evidence. With regard to the alleged violation of GCOR Rules 1.6, the record reflects that Claimant was by himself when the misconduct that he admitted to took place. Claimant testified that there were no witnesses and although a fellow Union Pacific foreman was

there and witnessed Claimant trying to pull a mirror off of a truck, it would be a stretch to say that Claimant was culpably careless of the safety of himself or others or negligent; especially since that conduct took place well off duty and property, beyond the Carrier's control. As far as being quarrelsome or discourteous after his roommate got into the shower and Claimant went outside to shoot the truck, the record reflects that there was no one present for Claimant to be discourteous to nor quarrelsome with.

A careful reading of Rules 1.5 and 90.1 shows that the prohibitions contained therein apply when reporting for duty, while on duty, or while on company property; none of which apply to the case at hand. Moreover, the flimsy accusation that the admitted misconduct may have occurred while Claimant was "possibly under the influence of alcohol" carries no weight. The Claimant's statement that "well, anybody who drinks beer is automatically under the influence, anyway" does not provide a basis to show that he was in violation of any of the Carrier's alcohol related rules, especially in the absence of any toxicology tests.

In regard to the Carrier's Violence and Abusive Behavior in the Workplace Policy, again this Policy applies to conduct on the property, through its communication equipment or while engaged in business on the Carrier's behalf. Thus, violation of rules 1.6 (1), (2), (6) & (7), 1.5, 90.1 and the Carrier's Violence and Abuse in the Workplace Violence Policy have failed to be substantially proven.

Relative to Rule 1.9, Railroad Company, Carrier's bald assertion that Claimant's actions have "also possibly resulted in subjecting the Railroad to criticism and loss of good will" without a scintilla of evidence concerning the criticism or loss of good will likewise misses the mark. It is widely accepted in this industry and others that in order to discipline an employee for off duty misconduct, some nexus between the adverse behavior and a negative impact on the Employer's business mission must be demonstrated. Here, there was no such showing and accordingly, that charge cannot stand.

AWARD

Claim sustained in accordance with the findings.

ORDER

The Board, having determined that an award favorable to the Claimant be made, hereby orders the Carrier to make the Award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.

I dissent

D.A. Ring

D. A. Ring
Carrier Member

Dated at Chicago, Illinois, May 29, 2009

July 2, 2009

Richard K. Hanft

Richard K. Hanft, Chairman

T. W. Kreke

T. W. Kreke
Employee Member

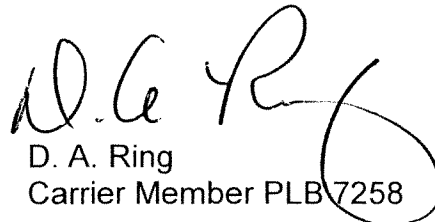
July 2, 2009

**CARRIER DISSENT TO
PUBLIC LAW BOARD 7258 AWARD NO. 31**

In Award No. 31 an individual has been reinstated to service who was dismissed in connection with vandalizing a vehicle in a motel parking lot by discharging a firearm. The individual was also incarcerated as a result of the incident. Claimant was assigned to an on line gang and being paid an expense allowance for working away from his residence.

In his Award the Referee has decided to ignore the arbitral precedent provided by the Carrier which substantiates that dismissal in such cases is entirely appropriate. Instead he has elected to issue his own perceived brand of justice and determined that what the individual does off duty is not subject to dismissal even the if the Awards counter his finding. He cites as his authority awards that are 30 – 50 years old. The Referee has ignored or dismissed all of the conduct rules the Individual was charged with.

Carrier dissents and disagrees with the decision. These are very serious charges and the Carrier has no tolerance for an employee who carries a firearm with him. We have seen the consequences of this first hand. This award has no arbitral precedent and we subscribe to the awards and arbitral precedent provided at the hearing that state that employees can be disciplined who are on expenses even though off duty.


D. A. Ring
Carrier Member PLB 7258