

PUBLIC LAW BOARD NO. 7633

Case No.: 04/Award No. 4
System File No.: CEI000212B/1565732
Claimant: Edgar D. Mims

UNION PACIFIC RAILWAY COMPANY)
)
 -and-)
)
 BROTHERHOOD OF MAINTENANCE)
 OF WAY EMPLOYES DIVISION)

Statement of Claim:

1. The discipline (dismissal) imposed on Mr. E. Mims by letter dated March 1, 2012 for alleged violation of Rule 1.6 Conduct (1) Careless of Safety and the part that reads: ‘...’*Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated*”....’ As contained in the General Code of Operating Rules, in connection with allegations that the Claimant violated weight restrictions while on restricted duty was without just and sufficient cause, unwarranted and in violation of the Agreement (System File CE1000212B/1565732).
2. As a consequence of the violation referred to in Part 1 above, the Claimant must now be afforded a remedy as prescribed by Rule 22(f).

Facts:

By letter dated February 3, 2012, the Claimant was directed to appear on February 8, 2012 “for investigation and hearing on charges to develop the facts and place responsibility, if any, that while employed as Welder on Gang 1100 at Chicago Heights, Illinois, on January 26, 2012, you allegedly exceeded your weight restrictions while on restricted duty.”

The Notice also noted that the alleged violation involved Rule 1.6 Conduct (1) Careless of Safety and that Level 5 UPGRADE policy discipline, permanent dismissal, could be assessed if a violation were found.

Carrier Position:

There is substantial evidence that the Claimant violated Rule 1.6 Conduct (1) Careless of Safety so that the Carrier has met its burden of proof. The Claimant was restricted to lifting no more than five (5) lbs. with his right arm. He disregarded his medical limitations by using a ratchet weighing 26-45 lbs and a claw bar weighing under 30 lbs., with the use of the ratchet involving physical exertion beyond the Claimant's threshold. MTM Smith saw the Claimant move the claw bar and provided clear testimony about which employees were present and when. MTM Smith also observed the Claimant gauging track.

This serious violation merited Level 5 UPGRADE discipline (permanent dismissal), which the Board lacks the authority to overturn. The UPGRADE policy, upheld by many referees, calls for dismissal for an unsafe act.

The Claimant was accorded all due process rights. The Hearing Officer asked for clarification but did not behave improperly. Foreman Johnson telephonically substantiated his written statement, which was properly entered into the investigation. The Organization's objections to the statement were properly addressed during the investigation. While weight or pressure is needed to gauge track, the amount cannot be measured, but the Claimant had to ratchet rail, which would have required more than five lbs. of force to move the claw bar.

Organization Position:

The Claimant did not receive a fair and impartial hearing because the Hearing Officer asked leading questions of charging officer MTM Smith and because of the Carrier's documentation that was attached to the June 1, 2012 denial letter.

The Carrier did not meet its burden of proof. The post-hearing documentation was both improper and constituted insufficient evidence. MTM Smith provided contradictory and confusing testimony about the location of individuals, and thus his credibility should not be accepted. There is no testimony about how the ratchet was moved to or was installed on the track and there is no way to measure necessary pressure. The evidence does not establish clearly who used and/or moved the claw bar. Foreman Johnson's testimony should have been excluded and there is no proof that he actually wrote or signed what is said to be his letter. Furthermore, Foreman Johnson and MTM Smith provided contradictory testimony. The Claimant credibly denies using the gauging tool and stated that he carried the claw bar in his left hand.

Even if discipline is called for, the permanent dismissal is punitive rather than corrective or rehabilitative.

Findings:

The Board notes that it has not considered the documents concerning the ratchet and claw bar attached to the Carrier's June 1, 2012 denial. These exhibits, submitted post

investigation, could have been submitted during the investigation allowing the other party the opportunity to elicit testimony and comment on the same.

The Board has studied the hearing transcript and does not find that the Hearing Officer asked leading questions or engaged in other behavior that resulted in other than a fair and impartial hearing. Nor is MTM Smith's testimony about what occurred in the office contradictory or confusing. Beyond that, the critical questions concern the Claimant's handling of the ratchet and claw bar. With the above-noted documentation excluded, the only evidence about the weight of these tools is the testimony of MTM Smith that the claw bar weighed 8-10 lbs. and the ratchet weighed 6-7 lbs. and Foreman Johnson's telephonic testimony that the claw bar weighed about 25 lbs. The Organization has not contended that either tool weighed less than 5 lbs and both are judged to have weighed more than the Claimant's medical limitations. There is no evidence that shows that the Claimant carried the ratchet to the track or placed it on the track and there is no gauge on that tool that provides a reading on the necessary pressure exerted when aligning the track. MTM Smith simply said that he saw the Claimant using the ratchet. The Carrier insists that more than five lbs. of force would be necessary and the Organization contends that the nature of a ratchet means that very little force is required. The Carrier's unsubstantiated supposition about the amount of force required is far less than the substantial evidence necessary for the Carrier to meet its burden of proof.

The Claimant denies that he handled the bar. MTM Smith voiced certainty that the Claimant carried the claw bar from the track to the truck in his right hand. Foreman Johnson, after writing a statement that also said that the Claimant carried the tool in his right hand, testified that he was not sure of the hand used. The Claimant's denial does not overcome the testimony by MTM Smith and Foreman Johnson that the Claimant handled the claw bar. And, the Board accepts as credible and dispositive of the point, MTM Smith's testimony, reinforced on cross examination, that the Claimant carried the claw bar in his right hand.

In the final analysis, the Carrier has not met the burden of showing that the Claimant's use of the ratchet violated his medical limitations. The Carrier has shown that the Claimant carried the claw bar from the track to the truck in his right hand and that did violate his medical limitations. It is possible that by doing so he was a danger to himself because he might have worsened his physical condition rather than promoted healing. And the Board notes that not only is there no evidence that the Claimant was careless of the safety of others, but also that the Claimant carried the claw bar away from the track in order to remove a tripping hazard. While the Claimant violated the obligation to adhere to his medical limitations, the proven elements of the incident are not as serious as the Carrier would have the Board believe and, indeed, offer mitigation in the Claimant's removal of the safety hazard. For these reasons, while the Board is loathe to disturb the discipline for a proven violation, the Board also believes, considering the facts of this particular case, that discipline has served a corrective purpose and that a lengthy suspension rather than dismissal is the proper disciplinary response.

Award:

Claim sustained in part and denied in part.

Order:

The Board, after consideration of the dispute identified above, hereby orders that the Claimant be returned to work without back pay but with his seniority intact. The Carrier is to make the award effective on or before thirty (30) days after the award is adopted.



Kevin D. Evanski, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
February 28, 2014