

PUBLIC LAW BOARD NO. 7633

Case No.: 07/Award No. 07
System File No.: UP430LW12/1569254
Claimant: Brad D. Laramore

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

Organization's Statement of Claim:

1. The discipline (dismissal) imposed on Mr. B. Laramore by letter dated June 21, 2012 for alleged violation of Rule 1.6 Conduct (4) Dishonest and the Statement of Ethics and Business Conduct in connection with allegations that Mr. Laramore engaged in activities involving an outside contractor that were purportedly dishonest in nature and against the interest of Union Pacific Railroad was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP430LW12/1569254).
2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Laramore's record and compensate him for all losses suffered as a result of the Carrier's unjust and improper discipline.

Facts:

Claimant was employed as a Manager of Track Maintenance, a position not covered by the Agreement. While in his Manager position, the Claimant was terminated from the Carrier. The Claimant then attempted to exercise his seniority as an Agreement covered employee. By letter dated May 29, 2012 the Carrier directed the Claimant to appear on June 1, 2012 “for investigation and hearing on charges to develop the facts and place responsibility, if any, that while assigned as a Manager of Track Maintenance for the Kansas City Service Unit, you allegedly engaged in activities involving an outside contractor that were dishonest in nature and against the interest of the Union Pacific Railroad. Knowledge of these activities was learned on April 27, 2012.”

The Notice also identified Rule 1.6 Conduct as the Rule allegedly violated and indicated that Level 5 UPGRADE discipline (permanent dismissal) could be imposed if the charges were found to be true. By mutual agreement the hearing was postponed until June 11, 2012.

Carrier Position:

The Carrier has provided more than substantial evidence of the Claimant's dishonesty in the form of documents and additional information uncovered by General Auditor Hamann during the audit of the Claimant's activities. The Claimant did not provide documentation that he paid for work at his house performed by Razorback Rail. Furthermore, the Claimant admitted to each of the alleged behaviors that comprised the dishonesty charge.

The Claimant committed serious violations, which the Carrier has established. Once the charges are proven, the Board has no discretion to substitute its judgment for that of the Carrier as long as there is no showing that the Carrier acted arbitrarily and capriciously. Permanent dismissal is specified, as a Rule 1.6 violation brings Level 5 UPGRADE discipline. The Claimant's behavior has resulted in an extreme breach of the trust placed in him by the Carrier.

The Carrier has committed no due process violations. There was only one charging Manager, as Director Daneff simply sent the letter to the Claimant requiring his attendance at the investigation. Manager of Track Projects Martinez as the Manager in the Claimant's work group served as charging Manager. The labor agreement contains no language mandating discovery; therefore the Carrier was not obligated to share documents with the Claimant prior to the investigation. The Claimant and his representative were given recess time to review the documents during the investigation and they had been discussed with the Claimant during his prior interview with General Auditor Hamann.

Organization Position:

The Claimant did not receive a fair and impartial hearing because there were two charging officers: one who did not attend the investigation and the other who attended but had no knowledge relating to the charges. Furthermore, the Organization was unable to see relevant documents prior to the hearing.

The Carrier has not met the burden of proof, which must involve clear and convincing, not just substantial, evidence because this case involves alleged dishonesty. Intent has not been proven. The Claimant was honest and forthcoming during his discussion with General Auditor Hamann and during the investigation. Claimant Laramore acknowledged giving the tie plates to Razorback Rail but did not believe that he had done anything wrong and did not know that the Carrier would thereafter be charged for the materials. While he sent Kanza's bid to Razorback Rail, he must have clicked on a computer icon by mistake, as this was unintentional. The Claimant did not

know that he should have identified his son's employment with Razorback Rail as a possible conflict of interest and did not know that his approving payment to Razorback Rail for work his son was involved in represented a conflict of interest. No favoritism was involved. The Carrier has not shown what policy or procedure was violated. There was no rule that the Claimant could not employ Razorback Rail to do private work by constructing a French drain on his property. He claimed to have paid for the work and the Carrier has not shown otherwise.

Even if the Claimant is found to have committed the violation, the discipline was excessive and unwarranted as it was punitive and not corrective. The Claimant has 31 years and no prior discipline. At a minimum, he should be allowed to exercise his seniority and returned as a covered employee.

Findings:

The Claimant received a fair and impartial hearing. There was only one charging manger, as Director Daneff simply performed an administrative function when she issued the letter requiring the Claimant to attend the investigation. While it is true that charging Manager Martinez had no knowledge of the events resulting in the charges against the Claimant, the Board does not view that as determinative. A fair and impartial hearing requires that the Claimant and/or his representative have an opportunity to hear and question the Claimant's accuser. In reality, General Auditor Hamann was the accuser in this matter. She testified during the investigation and was questioned by the Claimant and his representative, Mr. Wright. Thus the Claimant's due process rights were observed.

The Carrier was under no obligation to provide relevant documents to the Organization or the Claimant prior to the investigation because the parties have not negotiated any discovery requirements that are contained in Rule 22 Discipline and Investigations. What is critical is that the Organization's requests for recesses in order to examine documents as they were produced during the investigation were honored.

It is a matter of record that the Claimant did those things the Carrier alleged he had done. The Claimant acknowledged that he gave the tie plates, Carrier property, to Razorback Rail without obtaining permission to do so from higher Carrier authority. The Claimant also acknowledged that he provided the Kanza bid to Razorback Rail, with the latter thereafter submitting a revised bid that was accepted by the Carrier. Record evidence establishes that the Claimant's son was employed by Razorback Rail and that the Claimant had not told his employer of his son's relationship with the subcontractor. And, the Claimant stated that Razorback Rail performed work at his residence; installing a French drain.

The question for the Board is one of intent which, in the final analysis, must be inferred from the record. Had there been only one of four incidents, it is possible that the Board might have concluded that the Claimant had exercised poor judgment but had not

been intentionally dishonest. However, the Board is faced with a pattern or series of events all involving the same subcontractor. That pattern is not viewed simply as a series of independent poor judgments. Even without a specific policy statement for guidance, the Claimant should have known to protect the interests of the Carrier by not making the plates available to Razorback Rail at no cost. He had no authorization to give away material that might have been sold to Razorback Rail or sold for scrap. That Razorback Rail later charged the Carrier for the tie plates that had been received for free underscores the Claimant's failure to protect his employer.

The Board has considered the Claimant's contention that sending Kanza's bid to Razorback Rail was unintentional—simply the result of an inadvertent click of the mouse on an icon, but the explanation is rejected. Very soon after the Claimant received Kanza's detailed bid, it was forwarded to Razorback Rail with instructions to submit a revised bid. In so doing, the Claimant corrupted the competitive bidding process that was designed to protect the Carrier. What occurred was inconsistent with the "inadvertent error" explanation.

Standing alone, the Claimant's failure to make his son's employment by Razorback Rail known to his own employer may not have warranted Level 5 UPGRADE discipline and might have been viewed simply as poor judgment. However, when viewed in the context of the Claimant's overall relationship with Razorback Rail, the failure to declare at least a potential conflict of interest adds to the concern that the Claimant's relationship with Razorback Rail was hardly one of the proverbial arm's length.

That concern is intensified by the installation of the French drain. The Organization's contention that the Carrier has not shown that the Claimant did not pay for the work is misplaced. The work is a matter of record. If no payment was made by the Claimant, the Carrier cannot prove a negative. Rather, since the work was done and the *prima facie* case was made, the burden shifts to the Claimant to show that he paid for the work. He has failed to produce a cancelled check, a receipt for cash payment, proof of a charge to a credit card or any other evidence of payment to Razorback Rail for installation of the drain. In other words, the Claimant has been unable to establish that the work done was other than a favor that in context must be viewed as a *quid pro quo* for favors the Claimant had done for Razorback Rail.

The Board is convinced that the relationship with Razorback Rail violated Rule 1.6 (Conduct-Dishonest). The Carrier has rightfully contended that the Claimant committed a serious breach of the trust placed in him. Even when his long tenure and previous record are considered, the Carrier's disciplinary action cannot be viewed as arbitrary and capricious. The Board has no basis for substituting its judgment for that of the Carrier.

Award:

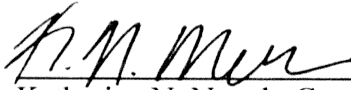
Claim denied.

Order:

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.



Kevin D. Evanski, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
March 10, 2014