

PUBLIC LAW BOARD 6006

Case 107.
Award 107
Carrier's File No.: 1447502D.
Organization's File No.: 17-07
NMB Code: 119.
Claimant Machinist Allen Johnson.

PARTIES TO DISPUTE:

INTERNATIONAL ASSOCIATION MACHINISTS.
AND AEROSPACE WORKERS, AFL – CIO.

AND.

UNION PACIFIC RAILROAD COMPANY.

STATEMENT OF CLAIM:

1. The Union Pacific Railroad Co., (formerly the Chicago North Western Railway Co.), hereinafter referred to as the "Carrier", violated the controlling agreement, specifically Rule 35, when it unjustly and improperly dismissed Proviso Diesel Shop Machinist Allen Johnson, hereinafter referred to as the "Claimant", from service with the Carrier.
2. Accordingly, we request that the Carrier 1) return the Claimant to the service of the Carrier with all rights unimpaired; 2) make the Claimant whole for any and all lost wages commencing June 4, 2006 and continuing thereon until reinstatement; 3) have all contractual rights reinstated as if regularly employed; 4) have his personal record expunged of any and all references to the June 19, 2006 Investigation and subsequent discipline.

Findings:

The Claimant was hired by the Carrier on February 23, 1998, and was working as a Machinist at the Carrier's Proviso, Illinois Locomotive Facility.

On June 4, 2006, at approximately 0745 hrs, the Claimant was working on a locomotive. The locomotive was also being refueled by Firemen & Oiler Tony Harrell. The Claimant approached Supervisor James Michonski and reported excessive fumes,

due to the refueling. The supervisor approached Fireman Harrell and was reportedly discussing the situation with him when the Claimant interceded and began to verbally attack Fireman Harrell. The supervisor attempted to deflect the situation by having both employees speak directly to him. However, the matter escalated and both employees were told to walk away. The Fireman, allegedly walked away, but the Claimant approached him and started to speak at a heightened level. According to witnesses, the Claimant reached above the Firemen's helmet, grabbed a face shield and slammed it down on the Fireman's face. At that point, the Fireman either pushed the Claimant away with both hands or grabbed Claimant by the throat.

By letter dated June 4, 2006, the Claimant was issued a Notice of Investigation. He was directed to appear for a formal hearing on June 13, 2006, at 1 p.m. at the Proviso Locomotive Facility. The letter related to the incident of June 4, 2006, and advised the Claimant's actions were a possible violation of Rule 1.6 (6), Quarrelsome and Acts of Hostility. In the interim, the Claimant was withheld from service pending the outcome of the Investigation.

The Investigation was held as scheduled. The Carrier reviewed the evidence adduced at hearing. By letter dated June 19, 2006, the Claimant was advised the charges have been sustained, and he was being assessed a Level 5 Discipline, Dismissal from service.

By letter dated July 13, 2006, the Organization filed a claim on behalf of the Claimant appealing the discipline assessed. The parties exchanged communications and discuss the matter on property but were unable to come to a resolution.

Carrier's Position

The Carrier contends there are three areas of concern in discipline cases: 1) Did the accused employee receive a full and fair investigation with due notice of charges, opportunity to defend and the opportunity to have representation? 2) If so, did the employer show by clear and convincing evidence that the employee was culpable of the misconduct or dereliction of duty? and, 3) Was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh based on the facts and circumstances of the particular case?

The Carrier argues they have presented substantial evidence to support the charges against the Claimant. Clearly, they contend, the Claimant violated Rule 1.6 (6) when he became quarrelsome and "slammed" the face shield down on the Fireman's helmet.

In support of their contention, they reference the testimony of Supervisor Michonski who verified the Claimant initiated the confrontation and reached up and slammed the face shield into the Fireman's face. He confirmed the Fireman was walking away when the Claimant confronted him.

They also reference the testimony of the Claimant who confirmed he "lowered Tony's face shield". They insist the evidence clearly showed that the Claimant was the initiator in both the verbal and physical confrontations.

They minimize the Organization's and the Claimant's attempts to justify his violent behavior by claiming he was simply frustrated and was concerned for the well-being of his coworkers because of the fumes caused by the refueling. The Carrier dismisses any assertions raised by the Organization that the hearing was biased because the Claimant was removed from service prior to the hearing and because they deemed questions asked by the Hearing Officer during the hearing to be inappropriate. They point out the Organization's contentions were not found to be credible on the property by the Hearing Officer who heard the testimony of all parties to the incident. Nor were they found to be credible when the transcript and evidence were reviewed by the appeals officer. They say there is no dispute that the incident occurred. They offer, the only conflicting testimony concerns the force with which the Claimant pulled down the face shield on the Fireman's helmet. They assert the supervisor testified, the Claimant used both hands when he slammed the face shield down, while the Claimant said he only used his two index fingers.

They remind the Board this is not the first time they have faced conflicting accounts of violent behavior in the workplace. They cite Award 79 and Award 104 of this Board. They argue, as in those cases, there is no reason to disturb the Hearing Officer's findings in the instant case. They contend there is no way to justify the Claimant's behavior. They insist violence in the workplace cannot be justified under any circumstances nor can it be tolerated. They assert the Claimant's actions were unwarranted and unacceptable.

They maintain the Claimant was afforded all contractual due process. They submit, he was apprized in writing of the precise charges, he was given appropriate notice in advance of the hearing to afford reasonable opportunity prepare a defense and to secure a representative, he was allowed to testify, given the opportunity to present witnesses and introduce evidence, examine all evidence presented, and question and cross-examine witnesses.

The Carrier submits the Claimant's behavior was sufficiently serious to warrant the discipline imposed. They assert that once the arbitration panel determines there was substantial evidence to support the charges, it lacks authority to overturn the discipline assessed. The Carrier emphasizes the gravity of the Claimant's offense. They urge violence in the workplace cannot be tolerated. They quote Third Division Award 32958, wherein the Board recognized the seriousness of violence in the workplace setting. They cite countless other arbitration awards which have reached similar conclusions.

They fault, the Machinist's claim for damages as being excessive and unsupported by the Collective Bargaining Agreement. They say, Rule 35 only provides that if an employee has been unjustly disciplined or dismissed, the discipline will be set aside and removed from his record. It further provides for reinstatement with seniority rights unimpaired and compensation for wage loss, if any, less any interim earnings.

Organization's Position

The Organization argues the hearing was neither fair nor impartial. They first point to the fact the Claimant was withheld from service pending the hearing. They argue there was nothing in the record to indicate that the alleged offense had risen to the level to warrant such serious action. They argue, the two individuals involved had separated immediately after the incident and the Claimant went to higher authority in an effort to report the incident. They insist there was nothing to indicate the incident would have escalated if the Claimant had remained in service. They believe the Carrier's action was prejudicial and certainly indicated a predetermination of discipline.

The Organization also takes exception to the fact Manager Maintenance John Fincher was both the Hearing Officer and the Judicial Officer in this case. They argue this was particularly troublesome since there was an air of pre-determination by

Hearing Officer Fincher early in the hearing as evidenced by the questions he asked during the hearing.

The Organization not only calls into question the hearing and the review process in this case, but the level of discipline assessed as well. They argue the other participant in the alleged incident was assessed only a minor suspension after he allegedly either grabbed the Claimant by the throat or shoved him with both hands. They say the Carrier never refutes this fact, but regards it as having no relevance. They point to the Claimant's eight years of service with no prior problems, particularly none of a severe nature.

The Organization insists removing the Claimant from service prior to a full and fair investigation violated Rule 35 of the July 1, 1921 Joint Agreement, as amended.

They contend the record demonstrates the Claimant has voiced concerns relative to safety in the shop prior to the alleged incident. They assert the Claimant has reported what he deemed to be safety concerns and even OSHA violations to no avail. They say, this created a growing frustration within the Claimant while he continued to seek a sympathetic ear for such concerns.

They report that on the day of the incident the Claimant was working beneath the locomotive, which was being fueled by a Fireman Harrell. Rather than confront Fireman Harrell the Claimant sought assistance from a supervisor. Because no remedial action had taken place on other occasions the Claimant decided to eavesdrop on the conversation between the supervisor and the Fireman. At one point, he decided to verbally stress to the Fireman the importance of the situation. Despite the fact the conversation did not go well and the two parties were ingrained in their views, the Organization notes they remained respectful and did not engage in profanities or assaults on one another.

The Organization stresses there is conflicting testimony regarding whether or not the Claimant forcefully slammed the visor of Fireman Harrell's helmet down or simply used two fingers to lower it. Regardless, they say, the record established that neither party was ever totally out of control or they would not have heeded, Foreman Michonski's directive to separate. They say it was not the scene of uncontrolled violence rising to the level of attention the Carrier has given.

They submit the disparity in punishment between the Claimant and Firemen Harrell was due to the fact the Claimant was a whistle blower.

Furthermore, the Organization questions the failure of the Carrier to call Fireman Harrell as a witness at the investigation. They believe this indicates the Carrier was not interested in developing the facts of this case.

The Organization argues the Claimant was right in his concerns, particularly in light of the fact the work practice at issue was suspended after the alleged incident. They point to the testimony of Foreman Michonski who verified laborers are now asked to wait until the Machinists finish their work before they start fueling the locomotives.

Decision

The question in this case is whether the discipline assessed was warranted when all things are taken into consideration.

It is true violence in the workplace is becoming an increasing concern to employers and employees alike. Many actions that may have been overlooked in the past are now considered unacceptable and worthy of termination.

In the instant case, there is no doubt the Claimant should have avoided getting involved in the situation after he reported it to the supervisor. However, the record indicates the matter was raised before and did not result in a solution. It is understandable employees working in the pit of a locomotive shop are very susceptible to fumes that build up. It is an unsafe and uncomfortable situation in which to place any employee. This no doubt caused a great deal of frustration to the Claimant and other employees. We are quick to note, however, that this does not excuse the Claimant's overreaching involvement, but it does go a long way in explaining his frustration. Regardless, he should be aware or made aware there are other alternatives available which we believe he should have used, not the least of which is to contact the Organization and/or to file a claim against any violations of safety rules.

That aside, we do not believe the Claimant's actions were so severe as to warrant permanent dismissal. If anything he appears to have run from an escalation of the encounter once the Fireman retaliated. There is no evidence he has

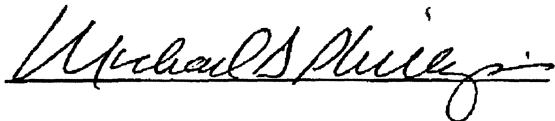
argumentative or confrontational behavior in the past and has been subjected to lesser degrees of penalty to no avail. Just cause requires not only that the punishment fit the crime but that lesser degrees of discipline are evoked before more serious forms of discipline are assessed. We do not believe the Claimant's behavior, as inappropriate as it was, rose to the level of requiring an escalation of discipline.

Award

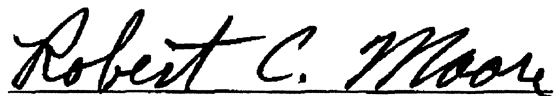
The claim is sustained to the extent the dismissal shall be reduced to a six-month suspension; the Claimant is to be reimbursed for any loss of wages and benefits in excess of the six-month suspension less any interim outside earnings.



Carol J. Zamperini
Impartial Neutral and Chairperson



Michael D. Phillips
Carrier Member



Robert C. Moore
Employee Member

Submitted this 27th day of May, 2008