

BEFORE PUBLIC LAW BOARD NO. 7566
CASE NO. 229/Award No. 229

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2020-00036
Claimant: Cory Newhouse

Statement of Claim

“Claim of the System committee of the Brotherhood that:

1. The dismissal imposed upon Mr. C. Newhouse for alleged violation of CN Social Media Policy, CN Code of Business Conduct, CN Prohibited Harassment, Discrimination and Anti-Retaliation Policy and U.S. Operating Rule H - Furnishing Information and Conduct, was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2020-00036 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant C. Newhouse's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement. Additionally, the Claimant shall have his seniority restored, his accredited months of service and all benefits that were not received during his time out of service, including, medical, dental and vision premiums, co-pays, deductibles and all other out of pocket expenses as well as 401(K) and CN Stock Purchase incentives.”

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

Facts

The Claimant was hired on April 7, 2014 and has established and holds seniority in the Carrier's Maintenance of Way Department. Assigned as a Foreman, he has a clean disciplinary record. On July 11, 2020 the Carrier was made aware of a post on Mr. Newhouse's personal Facebook page that involved a meme that he had received and posted. The post is described as

follows. Beneath the phrase “ALL LIVES SPLATTER” is a realistic depiction of the cab of an 18-wheeler that has run into a group depicted by about a half-dozen stick figures. Below the depiction is the phrase “KEEP YOUR ASS OUT OF THE ROAD.” Because the Carrier was concerned that the posting “appeared to be of an offensive or disrespectful nature,” the Claimant was removed from service and was directed by letter dated July 17, 2020 to appear at an investigation that took place on July 29, 2020. By letter dated August 17, 2020, the Claimant was informed that the Carrier concluded that he had violated the policies noted in the Organization’s claim and that he was dismissed. The Organization filed a timely claim on Mr. Newhouse’s behalf on September 15, 2020. The claim was properly progressed on the property without resolution and advanced to this Board for final and binding adjudication.

Carrier Position

Conclusive evidence, including the Claimant’s admission that he posted the meme, shows that he is guilty as charged. The inadvertent omission of a thumb drive that did not contain exculpatory material and did not jeopardize either the Claimant’s or the Organization’s ability to appeal the dismissal is not reversible error. The Hearing Officer’s refusal of evidence of other Carrier employees’ postings proffered by the Organization was because that evidence was irrelevant. The stick figures represent protestors in the Carrier’s view. The Carrier believes that a group within the Company was targeted because an employee reported the posting. This is not about free speech but about a violation of Carrier policies. The hearing was fair and impartial without prejudgment, with the Claimant afforded representation, with a Hearing Officer who acted professionally and who did not commit procedural violations. Dismissal for the violation of multiple rules was just and with sufficient cause as this is a Level 4 violation. This is an appellate procedure and the Board should not substitute its judgment for that of the Carrier in the face of the Claimant’s proven guilt.

Organization Position

The investigation was not fair and impartial because the Hearing Officer disallowed the Organization’s exhibits that showed postings by other Carrier employees and because the Organization did not receive the thumb drive showing the Claimant’s Facebook page. He was prejudged by the removal from service. The Carrier has not met the required burden of proof. Mr. Newhouse simply shared a post that he had not created. He had not been given a clear understanding of the Carrier’s expectations. Moreover, the Carrier has not shown that the Claimant’s off-duty conduct has a connection to Carrier operations. In other words, there is no nexus. The dismissal was arbitrary and unwarranted, punitive rather than progressive. The Claimant had seven (7) years’ tenure with a spotless record and was the object of disparate treatment.

Findings

When considering the CN Social Media Policy, of particular relevance is the statement that “discrimination, harassment, or violence (including threats thereof) on social media by one employee towards an individual or group of individuals, including the public, even outside the workplace” are behaviors that “may result in disciplinary action, up to and including termination from employment.” The CN Code of Business Conduct defines harassment as “behavior or communications, whether written or verbal, which a reasonable person would consider to cause offence or humiliation or affect the dignity of a person and, in the context of employment, results in an intimidating, hostile or offensive atmosphere. The Prohibited Harassment, Discrimination and Anti-Retaliation Policy – U.S. includes “Prohibited harassment on the basis of gender race, color, national origin, ancestry, religion, creed, physical or mental disability, veteran status, age sexual orientation, gender identity, or other protected basis, includes behavior similar to sexual harassment such as . . . visual conduct such as derogatory posters, photography, cartoons, drawings or gestures. USOR H requires familiarity with the CN Code of Business Conduct. A Level 4 violation of the CN Discipline Policy, which can result in immediate termination, includes “Intentional acts that cause harm to other persons . . . and Purposeful disregard for rules or policies.”

This claim must be sustained because the Carrier violated the “fair and impartial” dictate contained in Rule 31 – Discipline Procedure, paragraph A. As the Carrier properly notes in its submission, where dismissal is involved, it must prove that an infraction has been committed and that the resulting discipline was warranted. The Agreement between the parties herein, consistent with the practice in the industry, requires that the charged employee receive a fair and impartial hearing before any discipline may be imposed. A fair and impartial investigation must allow the Organization to defend against the charges against the Claimant as the Organization sees best. One possible defense is that of disparate treatment—the imposition of discipline that is harsher than discipline imposed on others who have committed similar infractions. Disparate treatment is an affirmative defense that places the burden of proof upon the Organization. In order to possibly carry that burden, the Organization must be allowed to place in the record what it believes is convincing evidence. The Organization was denied this opportunity in the case now under consideration when evidence proffered by the Organization was rejected; not, in the Board’s view, due to bad faith but, rather, due to an unduly restrictive view of the discipline process. The Board further notes that the Carrier has the right and the responsibility to consider evidence of disparate treatment before assessing discipline and that includes the right to judge the evidence on a continuum from very persuasive to abysmally lacking. The bottom line in this case is that the absence of a fair and impartial investigation requires a sustaining award. This conclusion moots the other procedural and substantive contentions of the parties, thus we do not reach the merits of this case.

Award

Claim sustained.

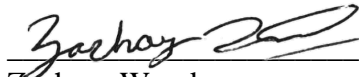
Order

The Board hereby orders the Carrier to reinstate the Claimant with his seniority intact, his work record properly expunged and with the remedies set forth in Rule 31.

In Dissent:



John K. Ingoldsby
Carrier Member



Zachary Wood
Organization Member



I.B. Helburn
Neutral Member

Dated: December 9, 2021

CARRIER MEMBER'S DISSENT

To

PLB 7566 AWARD No. 229

Brotherhood of Maintenance of Way Employees & Wisconsin Central Limited

(Referee I.B. Helburn)

A review of the Award issued by the Board indicates, without doubt, the Board erred in its decision when it asserted, incorrectly, that there was a violation of Agreement Rule 31(A)-Discipline Procedure, preventing Claimant from receiving a fair and impartial hearing. The record in this case does not support this assertion by the Board.

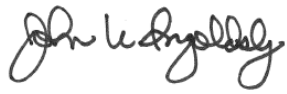
During the formal investigation, where the violation of the Carrier's Rules & Policies was established, Claimant's representative offered to enter into the record several pages containing, as characterized by the Organization in their appeal:

[T]he Organization attempted to enter evidence showing management/supervisory employees' personal Facebook pages with similar memes during the investigation who were not removed from service or investigated, only to be denied by the hearing officer, ...

The record clearly establishes the hearing officer reviewed the documents offered by the Organization, and properly held they should not be included in the investigation record as they were not relevant to whether or not Claimant committed the actions which resulted in a violation of Carrier's policies. In fact, the Carrier first gained knowledge of these other postings the day prior to the hearing, and once reviewed by the Carrier resulted in the dismissal of at least two employees responsible for the postings. To assert that this exclusion prevented Claimant from offering evidence on his behalf to demonstrate he was being treated unjustly and different from other employees in the same situation is error on the part of the Board.

The Board held that the exclusion of these documents prevented the Organization the opportunity to utilize the affirmative defense of disparate treatment, however, this analysis and conclusion does not hold under scrutiny. At the time of the investigation when the documents were offered, the Carrier had only been made aware of these postings the previous day. Adequate time to review and investigate the allegations had not elapsed and the attempt to offer as evidence of disparate treatment was premature. Additionally, at this point, no conclusion of Claimant's rules violation had been made, and therefore, any claim that he was being treated differently than others who committed similar infractions, was without merit and not relevant to the current proceeding. While the Organization has the ability to offer what it believes to be convincing evidence into the record to establish a defense, it is not a limitless opportunity to introduce evidence not germane to the investigation.

The Board is limited to determine the issues authorized by the RLA, which are: whether or not Claimant was proven guilty as charged, was Claimant provided a fair and impartial hearing, and, if so, whether or not the discipline assessed was warranted. The record established that Claimant received a fair and impartial hearing, as defined in the applicable collective bargaining agreement, and the conduct of the investigation served as no detriment to Claimant-a necessary element to any assertion that the hearing was not in fact fair and impartial. Claimant was conclusively proven guilty as charged, and the discipline assessed was just and with sufficient cause. As the Board has clearly erred in its analysis and conclusion, the Carrier dissents and asserts this Award should carry no weight in future disputes of like kind.

A handwritten signature in black ink, appearing to read "John K. Ingoldsby". The signature is fluid and cursive, with the first name "John" being the most prominent part.

John K. Ingoldsby
Carrier Member

December 9, 2021