PUBLIC LAW BOARD NO. 7633

Case No.: 12/Award No. 12
System File No.: 000712/1571897
Claimant: Ryan P. Lavin

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

Organization's Statement of Claim:

1. The discipline (dismissal) imposed on R. Lavin by letter dated July 19, 2012 for alleged violation of Rule 1.6 Conduct (Discourteous) and the Violence in the Workplace Policy in connection with allegations that the Claimant called a supervisor and made threatening remarks was without just and sufficient cause, unwarranted and in violation of the Agreement (System File 000712/1571897).

2. As a consequence of the violation referred to in Part 1 above, Claimant R. Lavin must now be afforded a remedy as prescribed by Rule 22(f).

Facts:

By letter dated May 11, 2012, the Claimant was directed to appear on May 30, 2012 for "an investigation and hearing on charges to develop the fact (sic) and place responsibility, if any, that at approximately 2300 hours, on April 23, 2012, you allegedly called a supervisor and made threatening remarks."

The Notice further stated that substantiated allegations would constitute a violation of Rule 1.6 Conduct (7) Discourteous and could result in the assessment of Level 5 UPGRADE discipline and permanent dismissal. The Claimant was also notified that he was being withheld from service pending the outcome of the hearing. After two postponements that were agreed to by the Organization, the investigation was held on July 13, 2012.

Carrier Position:

The Carrier has complied with contractual due process requirements. The Organization's procedural objections are not supported by contractual language and should be rejected by the Board.

The Carrier has proven the charge by the necessary substantial evidence. Manager Parker testified to the reasons that he was certain that the Claimant had called and threatened him. This was not the first hostile call the Claimant had made according to Director Rea's testimony. The Carrier cannot and does not take threatening calls lightly.

The evidence demonstrates that the Claimant has committed a serious violation and the Board is without authority to overturn the Carrier's appropriate response, which was consistent with the UPGRADE policy that previously has been upheld and with the Carrier's previously demonstrated zero tolerance policy in response to hostile and threatening behavior.

Organization Position:

The Carrier violated Rule 22 by unilaterally postponing the investigation, which was not held within 30 days of the date of occurrence as required by Rule 22(a). The Organization agreed to the postponements, but such agreement did not constitute a waiver of the 30-day requirement. The Claimant did not receive a fair and impartial investigation because a uniformed, armed special agent was in the hearing room throughout the proceedings, because Director Rea previously had not been listed as a witness and his telephonic testimony negated the Claimant's opportunity to properly face and cross examine the witness, who provided testimony that was irrelevant to the current charge. The Hearing Officer, who extracted the irrelevant testimony from Director Rea, had already made up his mind that the Claimant was guilty, as demonstrated by the transcript.

The Carrier has not shown that the Claimant violated any rule. Director Rea's testimony, based on his recollection of a two-year old phone call, does not prove the current charge, particularly because the Claimant denied ever making such a call. Nor is there evidence that Manager Parker received a call from the Claimant, let alone a threatening call. The Claimant also denies making a call to Manager Parker. The e-mail document from Director Novak is inadmissible because it was not provided until after the investigation, it is irrelevant and does not support the current charge and the supposed call did not result in a charge against the Claimant at the time. The police report, which simply contains a charge, is also inadmissible because it was not provided during the investigation. Even if the charge is proven, dismissal was unwarranted because it is punitive rather than rehabilitative or corrective.

Findings:

The Organization has raised a number of procedural contentions that the Board will respond to prior to consideration of the merits of the case. A fair and impartial hearing requires, among other things, that the Claimant have an opportunity to respond to evidence presented by the Carrier in support of the charge(s), even if the evidence is documentary and not testimonial. Thus the Board will not consider the May 1, 2012 e-mail from Director Novak and the April 24, 2012 police report, both dated before the investigation and thus available at the time of the July 13, 2012 investigation. This Board has elected to address the defect by omitting consideration of the post-investigation documents but not by dismissing the entire investigation as unfair and partial.

Neither the timing of the original investigation nor the postponements violated Rule 22. Rule 22(a) states that "The Carrier will make every effort to schedule and hold a formal investigation under this rule within thirty (30) calendar days from date of occurrence to be investigated." The investigation was initially scheduled for May 30, 2012, which was 27 calendar days after April 23 and thus clearly within the "every effort" parameters of Rule 22(a).

Rule 22(b) allows the postponement of formal investigations or the extension of time limits "by mutual agreement between the Carrier and the employee or his representative." The record establishes the agreement of former General Chairman Riley for the first postponement and General Chairman Cartwright for the second postponement. The Board must conclude that there was mutual agreement. The Organization is not at liberty to withdraw such mutual agreement after the fact.

The presence of the uniformed, armed special agent during the investigation did not serve to eliminate any of the claimant's due process rights. In the final analysis, it is the evidence adduced during the investigation and not the agent's presence that must determine the outcome.

Director Rea's testimony did not make the investigation other than fair and impartial. Nothing in Rule 22 requires pre-hearing discovery or the sharing of lists of likely witnesses. While the Claimant did not have the opportunity to face Director Rea in the literal sense, the Claimant and his representative were able to listen to Director Rea's testimony and to cross-examine him. Particularly in an investigation process that is not intended to mirror the formality of the usual courtroom trial, telephonic testimony, which the Organization has requested in other cases, preserved the Claimant's due process right. The Organization correctly asserts that Director Rea's testimony about the call he allegedly received from the Claimant two years ago does not prove the current charge. Nonetheless, particularly in a case in which there is a significant credibility issue, the Carrier has a right during the investigation to present testimony and documentation that may bear on the ultimate credibility determination. Therefore, Director Rea's testimony cannot be considered irrelevant. Finally, so far as procedural matters are concerned, the Board has read the transcript and does not conclude that the Hearing Officer prejudged the Claimant's guilt.

As to the call that resulted in the charge against the Claimant, neither he nor his Organization has offered any reason why Manager Parker would manufacture an untrue story knowing that, if accepted, that story would likely result in the dismissal of a 15-year employee. Nothing in the record indicates "bad blood" or an ongoing strained relationship between the two. Furthermore, Manager Parker stated that the call came on his Carrier cell phone—presumably a number that was easier for the Claimant to access than Manager Parker's personal phone number. The Manager was specific about the threat made and specific that the Claimant referred to him by name and said that Manager Parker knew who the caller was, having terminated him. On cross examination, Manager Parker repeated that he was certain of the identity of the caller because he recognized the Claimant's voice. Manager Parker provided a convincing level of detail and certainty. The Claimant's denial is viewed as self-serving and lacking credibility. Standing alone, Manager Parker's testimony provides substantial evidence of the Rule 1.6 violation.

The Claimant was aware of the relevant rules and policies. Rule 1.6 (7) Discqurteous states that "Any act of hostility, misconduct. . .is cause for dismissal. . ." The Carrier's Policy to Address Violence & Abusive Behavior in the Work Place states that "The Company has a zero tolerance policy with regard to all forms of violence in the workplace." No employer can afford to conduct business in an atmosphere where even implied threats are tolerated. And, except for very rare and unusual circumstances, an employee who threatens physical violence against another employee, whether the target is a member of supervision or a member of the represented group, does not deserve the benefit of corrective discipline, particularly when the consequences of a violation of Rule 1.6 are well known and of long standing.

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

written dissent to follow.

I. B. Helburn, Neutral Referee

Austin, Texas
March 10, 2014

LABOR MEMBER'S DISSENT
TO
AWARD 12 OF PUBLIC LAW BOARD NO. 7633
(Referee Helburn)

A dissent is required in this case because the Majority made errors on both the burden of proof issue and due process issue. In connection with the burden of proof, the Majority was wrong when it held that the Carrier's primary witness's testimony gave a "*** convincing level of detail and certainty ***" so as to meet the Carrier's evidentiary burden in and of itself. In connection with the due process issue, the Board considered testimony from a Carrier manager in connection with allegations involving an incident that the Carrier official contended occurred two (2) years prior to the formal investigation in this case. However, neither the Carrier official specifically, nor the Carrier in general ever cited the Claimant for this alleged wrongdoing at the time the Carrier official alleged it to have occurred or anytime thereafter. The controlling agreement's discipline rule provides the agreed to method of determining facts and placing responsibility in connection with allegations of wrongdoing. That method is a fair and impartial hearing conducted within the parameters of the express contractual requirements such as time limits and the requirement that the Claimant be notified of the precise nature of the charge. Thus the time for the Carrier to make allegations in connection with an incident approximately two (2) years prior had long since past and the Carrier's actions in sliming these allegations into the record in an attempt to support its dismissal in this case violated the Claimant's basic due process rights and this Board's sanctioning of such action must never be followed in the future.

In connection with the Burden of proof, the Majority held:

> "*** Manager Parker provided a convincing level of detail and certainty. The Claimant's denial is viewed as self-serving and lacking credibility. Standing alone, Manager Parker's testimony provides substantial evidence of the Rule 1.6 violation."

Manager Parker's initial testimony about the individual who made a threatening phone call was not convincing because he testified that he did not know who the caller was, but later concluded it was the Claimant because the caller stated that he was an employe that Manager Parker terminated. Had it been proven that the threatening caller was an honest and credible person telling the truth about being a former employe terminated by Manager Parker and if the Claimant was the only employe terminated by Manager Parker, the conclusion that this testimony is convincing would be logical. However, it cannot be inferred that the threatening caller was honest, because it is very possible that in a scheme to remain unidentified the caller was not honest about who he was. Moreover, the Claimant was not the only person Manager Parker terminated. Thus, at that point Manager Parker may have been certain about what he felt was the truth, but the testimony is not convincing because it takes facts not established for granted (i.e., caller was honest and was an employe terminated by Manager Parker and Claimant was that employe because he was the only one so terminated). On cross examination Manager Parker did allege he

recognized the Claimant's voice after the caller identified himself as an employe terminated by Manager Parker. But, this is problematic as evidence, because it is inextricably linked to accepting as fact (1) that the caller was truthful in identifying himself as a former employe who was terminated by Manager Parker and (2) the Claimant being the only person Manager Parker terminated or that Manager Parker could tell the Claimant's voice from another employes. In this regard, it is very possible that Manager Parker was speaking with one-hundred percent certainty to what he believed to be true, while being wrong. This is because those conclusions rely upon the caller's statements being accepted as fact and/or Manager Parker not recognizing that he may be wrong in his voice identification.

The Claimant denied that he made any threatening phone call and there is no probative evidence to support Manager Parker's testimony that the Claimant was the caller. Because the Claimant denied making the phone call and because Manager Parker could have very well been testifying to what he believed to be the case, this case did not necessarily present two (2) opposing assertions because it is very possible that both men were testifying to what they thought was the truth. The problem that the Carrier made and this Board followed was accepting as fact that the caller was an honest person who was accurately identifying who he was and not a dishonest person attempting to avoid being caught. The Carrier used the caller's information as a factual premise to find the Claimant guilty. Moreover, even if Manager Parker and Claimant provided directly opposing accounts of what transpired, arbitration panels have held that when there are two (2) plausible accounts of what transpired, there must be additional evidence beyond testimony to support the Carrier's findings. In either scenario, the discipline should have been removed for the Carrier's failure to meet its burden of proof. In support thereof are National Railroad Adjustment Board (NRAB) Third Division Awards 16154, 20706, 32890, 36945, 40219, 40443, Award 1 of PLB No. 7357 and Award 31 of PLB No. 7048.

The Carrier argued that any lack of evidence is made up by the Carrier hearing officer's credibility determinations. But, this misses the point that Manager Parker could very well have been wrong inasmuch as he testified to what he thought was the truth. This is why there must be evidence to support the charges, especially when both witnesses may very well be testifying to what they believe is the truth. Apropos here would be NRAB First division Awards 24887, 25116, 25119, Third Division Awards 36945 and 40219, Award 20 of PLB No. 6089 (involving these parties) and Award 1587 SBA No. 894. We further note that even arbitrators who defer to credibility determinations of Carrier hearing officers note they are not absolute. For example, see NRAB Third Division Award 28945. Other arbitrators who have deferred to credibility determinations made by hearing officer's have held that some rationale must be provided when there is no other evidence to support the testimony relied upon by the Carrier. For example see Award 76 of PLB No. 7163, where Arbitrator Wallin discusses the so-called "deferral doctrine". As the findings of Award 76 of PLB No. 7163 reveal, it is axiomatic that to accept a hearing

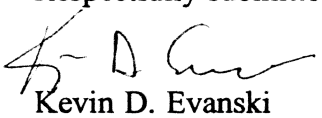
officer's right to make credibility determinations, that the hearing officer must in fact provide some rationale of how those determinations were reached. In this regard, for an appellate arbitration panel to simply assume that the hearing officer made determinations that were best suited to the Carrier's case when the record does not contain an explanation of how the credibility determinations were reached is utterly unfair to the Claimant. If the basis of the so-called "deferral doctrine" is that the hearing officer is best suited to judge the appearance of witnesses, it goes without saying that the Claimant's representative has every right to challenge those determinations as inaccurate or false. After all, the Claimant's representative is also present at the formal investigation. If the Board simply assumes credibility determinations were made by the hearing officer in a light most favorable to support the Carrier's case, when no such explanation is provided in the record, the Board is essentially reconciling the Carrier's handling of the case based on the entire record using evidence (credibility determinations) that neither the Organization or the Claimant will ever have the opportunity to challenge or even provide a position on. Moreover, the hearing officer does not get to modify his credibility determinations after the full and complete record is presented to the Board and the Board must not do it in the hearing officer's place.

Lastly, we will address the Carrier violation of the Claimant's due process rights when it allowed testimony from a Carrier manager about allegations occurring two (2) years prior to the investigation in the instant case and which the Carrier never charged the Claimant with wrongdoing and the Claimant denied occurred. The Carrier must provide a fair and impartial hearing before imposing discipline and that includes the express contractual provisions which, among other things, require the employe be notified in writing of the precise charges and the Carrier must make every effort to hold the hearing within thirty (30) days of the date of occurrence. Here, Director Rea contended that the Claimant contacted him approximately two (2) years prior to the investigation in this case making threatening phone calls. The Organization properly objected to this line of questioning as irrelevant to the charges and this charge was not listed on the Notice of Investigation. The hearing officer allowed the testimony over the objection, which was unfair to the Claimant because of his contractual right to a fair and impartial hearing on that issue held within the contractual parameters. The unfairness is spotlighted by the questions that are raised when its considered that the Carrier could have charged the Claimant with these allegations when the Carrier manager alleged they occurred, but didn't do so. For example, Director Rea obviously had the ability to charge an employe, because he charged the Claimant with being absent without authority in case that resulted in Award 170 of PLB No. 6402 (Employes' Exhibit "B") and was the charging officer in this case. Yet, Director Rea did not charge the Claimant for this alleged threatening phone call when Director Rea testified that Claimant identified himself as the caller. Its nonsensical and it brings Director Rea's actions into question far more than the Claimant's. Director Rea could have charged the Claimant and the allegations could have been investigated. Once the Carrier had the opportunity to investigate that charge and did not, it lost any right to assert facts surrounding those allegations in an attempt to

support its determinations in this case. Director Rea's testimony should have never been accepted by the Hearing Officer and never considered by the Board and it was against even the most narrow definition of due process. Considering the indisputable fact that Director Rea charged the Claimant in connection with two (2) dismissible offenses, there is no question that if the Claimant called and threatened Director Rea and identified himself that Director Rea would have charged him with that offense.

For all of the reasons stated above, this award is palpably erroneous and has no precedential value. I emphatically dissent.

Respectfully submitted,



Kevin D. Evanski
Employe Member