

PUBLIC LAW BOARD NO. 7633

Parties to Dispute:

Brotherhood of Maintenance of Way Employees)

Division – IBT Rail Conference)

and)

Union Pacific Railroad Company (former)

Missouri Pacific Railroad Company))

Award No. 186

Statement of Claim: Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. F. Stanback, by letter dated September 17, 2020, for an alleged violation of Rule 1.6: Conduct- Quarrelsome; Rule 1.6: Discourteous; SSI 10-I: Union Pacific Railroad Policies (Statement of Policy on Ethics and Business Conduct); The How Matters Policy; and additionally, Rule 1.6 stipulates that 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 was exceedingly harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File 092320/1743042 MPR).
2. As a consequence of the violation referred to in Part 1 above, the Organization requests that Claimant F. Stanback have the charges dropped from his record, reinstated to his former position immediately; and all restitution to be made to ensure that Claimant F. Stanback is made whole for all losses of compensation and benefits that resulted from the Carrier's unjust and improper discipline and any other remedies as prescribed by Rule 22(f).

Findings

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934; the Board has jurisdiction of the dispute herein.

By letter dated 09/17/2020 the Claimant was notified that he was dismissed, for the following violation:

“On 08/20/2020, while employed as a Truck Operator 2Tn+ you were in violation of Carrier rules and policies when you were involved in an altercation with another employee. This is a possible violation of the following rule(s) and/or policy:

1.6:Conduct—Quarrelsome
1.6:Conduct--Discourteous

SSI Item I0-1:UnionPacificRailroadPolicies(Statement of Policy on Ethics and Business Conduct) The How Matters Policy”

The Organization appealed the discipline and the Carrier denied the appeal. The parties were otherwise unable to resolve the dispute and this matter is now pending before the Board for a final and binding resolution.

The Claimant was hired in 2017 and had been with the Carrier for three years at the time of the incident. The Carrier asserts and the record confirms that the Claimant had an altercation with his Foreman in which profanity and loud voices were used. The Carrier asserts that the evidence shows that the Claimant hit the Foreman in the face. The Organization asserts, based on the Claimant’s recounting of the incident, that the Foreman had been harassing him on the radio that day; that the Claimant raised that issue with the Foreman while standing on the top stair of the truck the Foreman was driving; Claimant and the Foreman had a verbal altercation in part relating to whether Claimant’s truck was parked in an unsafe manner, and then the Claimant pulled the Foreman’s ball cap down over his face.

The Carrier’s position is that the conduct to which the Claimant admitted, e.g., a loud, verbal altercation and pulling the ball cap down on the Foreman’s face, is sufficient evidence in and of itself to warrant dismissal under the Carrier’s very clear policies against quarrelsome and discourteous conduct and confrontational behavior, and its zero tolerance for physical assault of any kind. According to the Carrier, the Claimant’s admission meets the “substantial evidence” test. The Carrier sites prior cases in which similar conduct has been held to warrant severe discipline.

The Organization alleges that the Claimant was never properly served notice of the formal investigation on September 1, 2020. The Carrier sent a Notice of Investigation dated August 24, 2020, to the Claimant at an address on “West 84th Driver.” The Claimant states he never received that letter and lives on “West 84th Drive.” The tracking information in the record confirms that the letter was not delivered before the hearing and was marked “addressee unknown.” Therefore, the Organization claims that the Carrier held an investigation without having notified the Claimant in accordance with Rule 22 (c)(1), and there is no need to address the merits of this matter as the Claimant was denied his due process notice prior to the investigation. The Organization cites an award that holds that lack of notice, even due to a clerical error, is a fatal procedural error.

The Carrier asserts that there are no procedural defects which would warrant voiding the just discipline in the case. According to the Carrier there is convincing evidence that the notice

was sent to the address on record provided by the Claimant, and the Carrier cannot be held responsible if the Claimant bears responsibility for the notice not reaching him, for example, by providing the wrong address. The Claimant was present at the hearing, was represented by his Union, presented evidence, and examined and cross-examined witnesses. Thus, the Carrier contends that the Claimant received a full and fair hearing and received the due process rights afforded him in the collective bargaining agreement.

The Organization asserts that, even if the hearing were proper despite the lack of notice, which it was not, the Carrier did not meet its burden of proof and the discipline was arbitrary and excessive and must be overturned. The Organization maintains that the altercation between the Foreman and the Claimant did not rise to the level of a violation of the cited rules. Although the Claimant admits pulling the ball cap down on the Foreman's face, the Organization contends that he certainly did not hit or punch the Foreman. The Organization reminds this Board that men working in a railroad yard cannot be judged as though they are working in a tearoom. This kind of language and conduct fits into the definition of shop talk, and while it may be discouraged, it has long been part of the culture of railroading.

The Organization further contends that dismissal was unwarranted and arbitrary. The Claimant testified that he told Manager Patten that the Foreman was provoking and harassing him. According to the Organization, the Carrier was obligated to act on this information to address the bullying before it erupted into an altercation. The Organization cites several awards that find that a supervisor provoking improper conduct or the failure of the employer to address the bullying behavior of a supervisor/co-worker to be a factor mitigating against dismissal. In those cases, as in this one, the ultimate penalty of dismissal is too harsh.

With regard to the matter of notice, under Article 22 the Claimant is to be given reasonable notice of the hearing and the charges in writing, in part so that the Claimant may obtain Union representation. The Carrier has the responsibility to provide reasonable notice to the Claimant. There is convincing evidence that the Carrier sent the Claimant notice by certified mail. It is not clear from the record why the letter was not received by the Claimant. If it was due to a faulty address, it is not clear on this record that the Carrier was responsible for the minor clerical error, and it is not clear that that is why the Claimant did not receive the letter. There is not sufficient evidence on this record to conclude that the Carrier was responsible for the Claimant not receiving the letter.

The Claimant did attend the hearing, with his Union representative. The Claimant and the Union fully participated in the hearing, asked questions of the witnesses, and presented the Claimant's testimony about the incident, and his version of the events. Under these circumstances the Board cannot conclude that the claim should be sustained because the Carrier failed in its obligation to provide reasonable notice of the hearing to the Claimant.

As for the merits of the claim, the Carrier presented a statement at the hearing of a single witness to substantiate the Foreman's account that the Claimant punched him in the face. Even if there is not substantial evidence on this record to establish that the Claimant punched the Foreman in the face, however, the Claimant admitted grabbing the Foreman's hat and forcefully pulling it down over his face. The Claimant testified that he is a large man, over 6'5," and he was the one

who initiated physical contact in the middle of an argument that the Claimant described as heated. The evidence shows, moreover, that the Claimant's decision to engage in aggressive physical contact escalated their altercation further. The Foreman got out of the vehicle in response to the Claimant's action and a co-worker felt compelled to step in between the two men so that they did not engage in further physical fighting. Shortly thereafter, the police were called.

On this record, the Carrier has established, by substantial evidence, that the Claimant committed a violation of Rule 1.6's prohibitions against conduct which is discourteous or quarrelsome. He also violated Rule 1.7, which prohibits employees from entering into altercations with each other. Heated altercations which become physical pose a particular safety risk in the workplace. The Claimant's actions went beyond the limits of excusable "shop talk" when he initiated physical contact with the Foreman.

The Organization argues that dismissal is not appropriate because the Claimant was being harassed by the Foreman that day, and had previously reported harassment to the Carrier, which took no action. While the Manager reported a discussion with the Claimant about his interactions with the Foreman before that day, he believed that the matter had been resolved with the Claimant. On the day in question the Claimant could have walked away from the verbal altercations and called the Values Line or the Manager, if he believed that he was being improperly treated by the Foreman. Instead, he escalated their verbal arguments by initiating aggressive physical contact.

Under these circumstances the Board concludes that the penalty of dismissal imposed by the Carrier is not arbitrary, harsh or excessive. Rule 1.6 permits dismissal when there is an "act of hostilityaffecting the interest of the company or its employees." An employee engaging in hostile physical action against another employee significantly affects the interest of the company and its employees. It is clear from the witness statements that the Claimant's physical aggression negatively affected other employees working with him that day, which included several new hires.

Furthermore, the Carrier has a responsibility to protect the safety of all of its employees and the evidence demonstrates that the Carrier treats workplace violence seriously. Excusing physical aggression may lead to even more serious risks for the safety of the employees involved, as demonstrated by the facts of this case. Employees have been trained on the dangers of workplace violence, and generally know that a decision to engage in physical aggression at work is likely to cost them their jobs. Under these circumstances, the Board can find no basis for overturning the penalty of dismissal.

AWARD

The claim is denied.

Signature 

Jeanne M. Vonhof
Neutral Member



John Schlismann
Employee Member
Date: November 22, 2023



Chris Bogenreif
Carrier Member
Date: 11/27/2023