

PUBLIC LAW BOARD NO. 7633

Case No.: Case No.: 22/Award No.: 20
System File No.: UP: 1580238/BMWED: CE10001212B
Claimant: Ronald Willard

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

Organization's Statement of Claim:

1. The Level 5 UPGRADE discipline assessment (dismissal from service) to Mr. R. Willard for an alleged violation of Union Pacific Rules 1.6 (Conduct – Part 6: Quarrelsome) effective April 7, 2010 was not justified.
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall overturn the discipline; reinstate Claimant to service, and compensate him for his losses pursuant to Rule 22(f).

Facts:

By letter dated December 7, 2012, the Claimant was directed to attend an investigation and hearing on December 18, 2012 “to develop that fact (sic) and place responsibility, if any, based on the alleged incident between yourself and Mr. Harris, that while employed as Trackman on Gang 1108, at Dolton, Illinois, near Milepost 0.5 at approximately 1030 hours, on November 28, 2012, you allegedly violated Union Pacific’s Conduct Rule.”

The letter further noted that the allegation, if substantiated would constitute a violation of Rule 1.6 Conduct (6) Quarrelsome and could result in Level 5 discipline (permanent dismissal) under the Carrier's UPGRADE policy. The letter further informed the Claimant that he was being withheld from service pending the results of the investigation. The investigation was postponed until December 21, 2012.

Carrier Position:

There is substantial evidence showing that the Claimant violated Rule 1.6 and the Carrier's Policy to Address Violence & Abusive Behavior in the Workplace. Witnesses testified to the Claimant's hostile behavior. The serious nature of the threatening behavior justified the

discipline in accordance with the UPGRADE policy that previous boards have upheld. The Claimant's behavior was intolerable. The investigation was scheduled in accordance with Rule 22(i) as there was mutual agreement on a postponement so that necessary individuals could attend. The Carrier did not fail to give the Claimant a copy of the CBA because he never asked for one. The pre-investigation knowledge that the Hearing Officer had of the events in question did not *per se* create an unfair and partial hearing. Other boards have made similar rulings. The Charging Officer and witnesses were sequestered together because of limited available space. The witnesses were made available to provide the Claimant with a fair hearing. Questioning by the Hearing Officer after closing arguments was necessary to ensure a record containing all pertinent information and did not prejudice the Claimant. There was an option, but no requirement, that the Claimant have a representative present during on-property questioning. The Claimant's due process rights were ensured by a fair and impartial hearing after he was informed of the charges against him.

Organization Position:

The investigation and hearing was not conducted within 20 days of the date on which the Claimant was suspended from service, nor did the Carrier make every effort to have the investigation within 20 days. This requires a fully substantiated claim, as boards have held that time limits will be strictly enforced. The Carrier did not provide a fair and impartial investigation. The Hearing Officer, who did not preside in a fair and impartial manner, previously had discussed the case with the Charging Officer, who was also a witness for the Carrier. Furthermore, the Charging Officer and witnesses were sequestered together. The Hearing Officer reopened the investigation after closing statements and constantly overruled objections. The matter was prejudged by a Hearing Officer intent on building a record for an arbitrator. The Carrier has failed to meet its burden of proof to show a violation by the Claimant. There was a brief exchange of words involving everyday railroad language—nothing that could be characterized as quarrelsome. Also, witnesses provided conflicting testimony, creating a “net wash.” The dismissal was unwarranted, serving only to punish rather than correct an employee with no prior disciplinary history.

Findings:

The Organization has raised several procedural or due process challenges, which the Board considers prior to consideration of the merits, starting with the timing of the investigation. Rule 22(i) embodies the parties' agreement that the “Carrier will make every effort to schedule and hold a formal investigation within twenty (20) calendar days of the date the employee is suspended. . .” That language is not absolute, and provides for at least a modicum of flexibility. The investigation originally was set for the 22nd day after the Claimant was withheld from service and by mutual agreement was postponed for an additional three days. The Board does not find that the above-noted facts resulted in a contract violation in this case.

The decision of Conducting Manager D. P. O'Hara to reopen the investigation following closing statements was faulty, constituted poor practice and should not be repeated in the future by this or any other Conducting Officer. Claimants and/or their representatives have a right as a matter of due process to make closing statements that are responsive to all of the testimony and

exhibits in the record. If the Conducting Officer believed that the Claimant's representative included supposed new evidence or a new contention in his closing statement, the Board believes the Conducting Officer had a right to note on the record his belief that this was new evidence or new contention as would a Carrier officer in his or her later response to the Organization's appeal, assuming discipline was levied. The Board considers closing statements simply as statements and not as evidence. Despite the inappropriate reopening of the hearing, the Board does not find that this constituted "harmful error" in that it altered the outcome of the investigation. Nor does the fact that the Charging Officer and witnesses were sequestered together require that the claim be sustained.

Information about the incident obtained by the Conducting Officer prior to the investigation did not *per se* lead to an investigation that was unfair and partial. Conducting Officer O'Hara was informed that something had occurred, but he did not conduct an informal investigation to determine the nature of the incident involving Claimants Harris and Willard. While Conducting Officer O'Hara's conduct of the formal investigation was imperfect, the Board does not find that this led to an altered outcome.

The substantial evidence shows that Mr. Harris approached Claimant Willard, cursed at him and was "in Willard's face." Despite Claimant Willard's denial, there is substantial evidence that he used his elbow to push Mr. Harris away, as opposed to simply turning and walking away. Substantial evidence further indicates that after Mr. Harris pushed back and the two men had separated and began to work, Claimant Willard walked up to Mr. Harris and told him, "If they don't fix this I will. Or something to that effect" (Carrier Exhibit A, TR, p. 53). Whether or not this was meant as a threat, it could have had the effect of reigniting the incident.

Railroad work is inherently dangerous, requiring continuous concentration and the application of safe practices to avoid if at all possible accidents that could result in personal injury and even death and property damage. Those who engage in any sort of workplace violence may create an unsafe situation not only for themselves but also for those around them who are distracted by the altercation. Because of this, the Carrier has both a right and an obligation to enforce a zero tolerance policy for fighting of any kind and even for behavior that is merely quarrelsome. Rule 1.6 so states. The UPGRADE discipline policy has found favor in prior awards. The Board, having considered Claimant Willard's five years of service, his role in the incident and his denial that he elbowed Mr. Harris finds no reason to substitute its judgment for that of the Carrier in this case.

Award:

Claim denied.

Order:

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

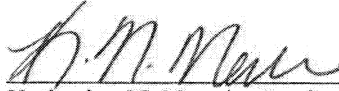
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CASE 22

AWARD 20



Andrew Mulford, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
February 6, 2015