

PUBLIC LAW BOARD NO. 7633  
CASE NO. 35

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYES

PARTIES  
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY  
(former Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed on Claimant J. Brown by letter dated June 24, 2013 for alleged violation of General Code of Operating Rules Rule 1.6 Conduct (4) Dishonest and Rule 1.13 Reporting and Complying with Instructions was without just and sufficient cause, unwarranted and in violation of the Agreement (System File CEI0061013/1590067 MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant Brown must now be compensated for all losses suffered as a result of the Carrier's unjust discipline and afforded any other remedy prescribed by Rule 22(f).”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was working in the exempt position of Manager of Track Maintenance when he was placed on Administrative Leave on April 24, 2013, and dismissed on May 10, 2013 for engaging in dishonesty by falsifying FRA inspection reports to indicate track defects had been remedied when they had not been. His dismissal letter indicates that he would continue to be paid through May 31, which would be the date of record of his

termination. Claimant attempted to exercise his seniority on June 29, 2004, which he had retained pursuant to Rule 18(a), but was denied that opportunity and was issued a Notice of Investigation on May 22, 2013, on the charge of dishonesty in falsifying FRA records. As a result of the June 11, 2103 Investigation, a Notice of Discipline was issued on June 24, 2013, finding him guilty of the charges and in violation of Rule 1.6 Conduct (4) Dishonest, and Rule 1.13 - Reporting and Complying with Instructions, and assessing him a Level 5 dismissal. This appeal protests the discipline.

The Organization argues that Carrier violated Rule 22, Discipline and Investigations, in three ways. First, it asserts that Carrier terminated Claimant prior to the holding of any investigation, which was his right under Rule 22 (a)(1) as an employee with seniority under the Agreement, and improperly refused to allow him to exercise his seniority, thereby denying him a fair and impartial hearing. Second, the Organization points out that Carrier failed to give proper notice of the investigation to Claimant as required by Rule 22(c)(1), by mailing it to his former office address when he no longer had access to Carrier's premises, and Claimant stated at the hearing that he had not received a copy of the notice previously. Third, the Organization alleges that Carrier failed to timely conduct Claimant's investigation within 20 calendar days of the date he was withheld from service under Rule 22 (i), and did not even meet the 30 day time limit contained in Rule 22(a)(1) as measured from the date Claimant attempted to exercise his seniority under the Agreement. The Organization relies upon the following precedent in arguing that these defects denied Claimant due process, are fatal flaws to Carrier's issuance of discipline in this case, and require that the dismissal be overturned: Third Division Awards 2941, 6250, 41808, 12767, 36041; Public Law Board No. 1844, Awards 19, 26, 28, 58 and 62; Public Law Board No. 3882, Award 178; Public Law Board No. 6045, Award 8; Public Law Board No. 7043, Award 7.

The Organization also argues that Carrier failed to meet its burden of proving that Claimant was guilty of the charges. It asserts that the record does not support the conclusion that Claimant engaged in a willful rule violation, rather than a mistake, noting

that Claimant stated that he was pressured not to allow certain tracks to go out of service and had insufficient manpower to properly do his job. The Organization maintains that, in any event, the discipline assessed was excessive and disparate. It contends that the General Chairman's statements at the Investigation that other managers engaging in similar conduct were permitted to exercise their seniority rather than being dismissed went unrefuted, since the Hearing Officer foreclosed him from asking questions about specific instances of disparate treatment, and would not allow any contrary evidence. The Organization avers that Claimant received harsh and disparate discipline, and requests that he be permitted to exercise his seniority into an Agreement position and be made whole.

Carrier initially contends that Claimant was afforded all the due process rights required under the Agreement, and there were no procedural defects serious enough to void the assessed discipline. It points out that although non-agreement employees have no right to a hearing before being terminated, it provided Claimant with such a hearing to develop facts, and place responsibility, on the charges. Carrier notes that Rule 22(i) specifically permits it to suspend an employee from service pending a formal investigation where serious violations are alleged, as in this case where the charges were dishonesty and lying on a federal report, and that doing so does not indicate evidence of prejudgment of guilt.

With respect to the fact that Claimant's Notice of Investigation was mailed to his former office rather than his home, and that he did not actually receive a copy in the mail prior to the hearing, at which he and his representative were present, Carrier points out that when the Hearing Officer learned of this fact, he offered to give Claimant and the Organization more time to prepare and to grant a postponement, but both indicated that they were ready to proceed and did not wish to postpone the hearing. Carrier argues that since the purpose of Rule 22(c)(1) expressed therein is "to allow reasonable opportunity to secure a representative of his choice and the presence of necessary witnesses," and the Organization admittedly received prior notice of the investigation and had an opportunity

to confer with Claimant previous to their appearance at the hearing, that purpose was served in this case and the mistake of mailing the Notice to the office rather than Claimant's home had no adverse impact on Claimant, and the defect was not so egregious and to warrant voiding the discipline, citing Third Division Award 28330.

Carrier asserts that the hearing was held timely under the provisions of Rule 22. It notes that the Organization never established with certainty the date that Claimant attempted to exercise seniority, and states that it held the hearing within 30 days of when it had knowledge of Claimant's intent to return to the craft. Carrier maintains that even if the hearing was held outside the 30 day period, Rule 22(a)(1) and (i) make clear that the time limits are permissive, rather than mandatory, by requiring Carrier to "make every effort" to schedule the hearing within the specified time frame, citing Public Law Board No. 6402, Award 108. Carrier points out that Claimant maintained his non-agreement status by receiving pay and benefits until May 31, and that holding the hearing on June 11 met the Rule 22 requirements that it make every effort to schedule the hearing within the 20 or 30 day time limits mentioned.

With respect to the merits, Carrier argues that there was substantial evidence in the record to prove that Claimant violated the cited rules, pointing not only to the testimony of Charging Officer Gilsdorf, but also to Claimant's admissions that he did not check first to see if they were remedied before closing out some of the listed defects, and that he should have done so. It asserts that there was no proof offered to support a contention that Claimant was coerced to keep tracks running regardless of the safety implications. Carrier points out that the serious nature of Claimant's conduct - falsifying FRA reports by not checking to see that defects were remedied before indicating that they were - and its potentially catastrophic consequences to the safety of the public and other employees, exhibit an extreme lack of trust that justifies the Level 5 penalty assessed. Carrier notes that its dismissal of others for acts of dishonesty involving reporting has been upheld, relying on Special Board of Adjustment No. 1132, Award 12; Public Law Board No. 6459, Award 68, and that a manager's dishonesty justifies Carrier's refusal to allow him

to exercise seniority, citing Special Board of Adjustment No. 920, Award 279. It asserts that, once the charges have been proven by substantial evidence, the inquiry of the Board is limited to whether the penalty assessed is arbitrary, capricious or an abuse of discretion, citing Fourth Division Award 4665.

A careful review of the record convinces the Board that the Organization's Rule 22 objections do not provide a basis for finding a due process violation sufficient to void the discipline assessed in this case or support the conclusion that Claimant was denied a full and fair hearing. Unlike Public Law Board No. 5454, Award 2, Third Division Awards 4808, 6250, 2941, and other cases cited by the Organization, Carrier did grant Claimant his right to an investigation under the Agreement after he expressed his desire to exercise his seniority into a craft position and prior to dismissing him from employment.

With respect to Carrier's failure to send Claimant a Notice of Investigation at his home address, rather than his prior office, the record is clear that the General Chairman was properly served with a copy of the Notice, made a written request that Carrier furnish the documentation it intended to rely upon at the hearing (which was denied), and admittedly met with Claimant to prepare prior to the commencement of the investigation on June 11, 2013. Claimant was well aware of the charges, as he had been questioned about his involvement with the allegations prior to being placed on Administrative Leave as a Manager. When the Hearing Officer learned that Claimant had not received a copy of the Notice of Investigation at the commencement of the hearing, he offered both Claimant and the Organization an opportunity to further consult and indicated he would grant a postponement if they desired. Both Claimant and the Organization indicated that they were ready to proceed and did not desire a postponement. As noted by Carrier, Rule 22(c)(1) sets out the purpose of prior written notice as apprising the employee of the precise charges in advance of the investigation "to allow reasonable opportunity to secure a representative of his choice and the presence of necessary witnesses." This language and the underlying facts are distinguishable from the cases relied upon by the Organization. We agree with the finding of the Board in Third Division Award 28330,

that such circumstances reveal compliance with the intent of the Rule and that Claimant's rights to due process were met with no fatal or prejudicial error.

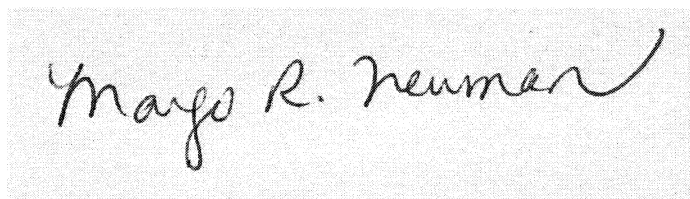
Finally, with respect to the Organization's assertion that the June 11, 2013 hearing was untimely since it did not meet either the 20 or 30 day time limit set forth in the Agreement, based upon the date that Claimant was placed on Administrative Leave or attempted to exercise his seniority, the Board cannot accept the position that this Agreement contains mandatory time limits for the scheduling and holding of an investigation. The same Agreement language - "Carrier will make every effort..." - has been held to be permissive, see Public Law Board No. 6402, Award 109, and is clearly distinguishable from the mandatory language relied upon by the Board when it upholds strict enforcement of time limits in overturning resulting discipline. See., e.g. Second Division Award 11186. Based upon the fact that there was no firm date established by the Organization or Claimant as to when he made his request to exercise his seniority to commence the running of the time period, as well as that Claimant was still on Carrier's pay rolls as an exempt employee for purposes of pay and benefits until May 31, 2013 despite being placed on Administrative Leave and subsequently terminated from such position, the Board is unable to find that the Organization met its burden of showing that Carrier failed to make every effort to schedule the Investigation within the time periods noted in Rule 22(a)(1) and (i) when it scheduled and held the hearing on June 11, 2013.

We also conclude that there is substantial evidence in the record to support the charges that Claimant knowingly falsified FRA documents by closing out noted defects without checking to make sure they had been repaired, the type of dishonesty and falsification that may have had extreme safety implications. The testimony does not establish that Claimant committed an inadvertent error, or was unaware of the requirement that he check to make sure the defects were repaired before so indicating on the FRA form. In fact, Claimant admitted that he should have checked before closing out the entries. Similarly, Claimant did not state that he was under any undue pressure from Carrier to make false entries in order to keep the track in operation or was prevented from

having his gang members make the required repairs. The fact that Claimant assumed that the repairs had, or would be, completed does not mitigate his responsibility to assure the accuracy of the reports he filed. Due to the serious nature of the infraction, and in line with Carrier's UPGRADE discipline policy, we are unable to find that Carrier's assessment of the dismissal penalty for the cited Rule violations was arbitrary, capricious or an abuse of discretion. Neither do we find that the Organization established the necessary elements to show that Claimant was treated disparately from those similarly situated. Under these circumstances, the discipline must be upheld.

AWARD:

The claim is denied.



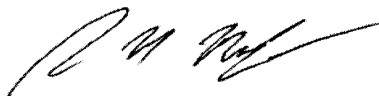
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Margo R. Newman  
Neutral Chairperson



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K. N. Novak  
Carrier Member



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Andrew Mulford  
Employee Member

Dated: 09/01/2015

Dated: 09/01/2015

LABOR MEMBER'S DISSENT  
TO  
AWARD 35 OF PUBLIC LAW BOARD NO. 7633  
(Referee Newman)

The Majority erred in this case by upholding the Carrier's dismissal of the Claimant and thus this dissent is required.

This Board member is at a loss to understand or accept the Majority's attempt to insert new language into the collective bargaining agreement. Rule 22 of the Agreement requires that the Carrier will provide both the Claimant and the Organization with advance written notice of the precise charges. A review of the record finds that there is no dispute that the Carrier failed to provide the Claimant with advance written notice. In fact, he was never provided any type of proper notice by the Carrier. Per the longstanding norms in railroad arbitration, such fact should have resulted in a sustained claim. However, the Majority has crafted the award to say that as long as an employee finds out about the charges and hearing and appears, the Carrier is somehow excused from its contractual obligation under Rule 22 to provide notice. Rule 22 does not contain any exceptions or safe harbor for the Carrier. Rather, in a straight forward and unambiguous manner it requires proper notice to be provided. It admittedly failed to do so here and thus, the discipline should have been overturned. Without question the Majority is in serious error such as to render this award palpably erroneous.

Next, it is a longstanding principle in railroad arbitration that discipline may not be disparate or arbitrary. Yet, in the instant case the Majority has allowed the dismissal of Claimant to stand, while there is evidence in the record which establishes that other similar situated employees - working nearly the same jobs and facing the exact same charges - were allowed to continue working without any discipline whatsoever. During the course of the on-property handling the Carrier did not dispute or rebut such disparate treatment. And yet, the Majority has now upheld the dismissal of Claimant. Such disparate treatment serves as clear grounds to overturn the discipline. Based on the faulty reason described above and the Majority's failure to recognize or discuss the other procedural and merit-based issues in this case, I respectfully dissent.

Respectfully submitted,



Andrew M. Mulford  
Employee Member