

PUBLIC LAW BOARD NO. 7633

Case No.: 37/ Award No.: 37
System File No.: UP612BT13/159114 MPR
Claimant: D. McKernan

UNION PACIFIC RAILWAY COMPANY)
(Former Missouri Pacific Railroad))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Organization’s Statement of Claim:

1. The discipline (dismissal) imposed on Claimant D. McKernan by letter dated July 22, 2013 for alleged violation of Rule 1.6 and Rule 1.13 in connection with allegations that he repeatedly acted contrary to supervisor instruction and company policies was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP612BT13/1591144 MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. McKernan must now be afforded a remedy a prescribed by Rule 22(f).

Facts:

By letter dated June 26, 2013 the Claimant was directed to report for a July 8, 2013 “investigation and hearing to develop the facts and place individual responsibility, if any, that while employed as Manager Industry and Public Projects from July 2012, through May 2013, on multiple occasions you allegedly acted contrary to supervisor instructions and Company policies.”

The letter further stated that substantiated allegations would constitute a violation of Rule 1.6 Conduct (3) Insubordinate and (6) Dishonest as well as Rule 1.13 Reporting and Complying with Instructions and subject Manager McKernan to possible permanent dismissal. The decision to withhold Manager McKernan from service pending the outcome of the investigation was also indicated in the letter.

Carrier Position:

The Claimant's guilt has been established with more than the required substantial evidence, which shows that he failed to ensure timely installation of temporary stop signs, opening the Carrier to liability, that he negotiated with Granite City, IL contrary to instructions, that he falsely claimed that he had read an agreement when he had not read the entire document and that he violated written policy when granting a new, private crossing without a written agreement or authority to do so. The Claimant is guilty of dishonest, negligent and insubordinate behavior.

The Claimant's proven violations of Rule 1.6 and Rule 1.13 were extremely serious and breached the trust the Carrier placed in him. The Level 5 permanent dismissal clearly was warranted and should not be disturbed by the Board. Awards support the Carrier's contention that the Board should not substitute its judgment for that of the Carrier.

There were no due process or other procedural violations that would require the discipline to be set aside. The Claimant did not simply make an honest mistake as he knew that he violated policy.

Organization Position:

Rule 22 was violated because the Carrier removed the Claimant from service prior to the investigation. Effectively, he was disciplined with his guilt predetermined.

The Carrier failed to meet its burden of proof. Possible good faith error does not rise to unethical or negligent behavior. The Carrier prevented the timely installation of temporary stop signs by denying necessary overtime despite the Claimant's attempt to have the work completed. Allegations that he improperly negotiated with Granite City are based on inference, not evidence. The Claimant completed a preliminary review of a project document, as tasked, unaware of changes made to the labor additives. His actions may have been untimely but they were not unethical. Finally, the Claimant may have made a bad decision, but not an unethical one, when he approved a private crossing when trying to accommodate two of the Carrier's important customers. He always kept business principles in mind and tried to protect the Carrier's best interests.

In any event, the permanent dismissal was excessive because it was solely punitive and not corrective, particularly in view of the Claimant's 35 unblemished years of service. He should be allowed to finish his career within the Maintenance of Way and Structures Department.

Findings:

The Board rejects the Organization's contention that the Claimant's culpability was prejudged and that he was disciplined prior to the investigation because he was withheld from service. Rule 22(i) allows the Carrier to withhold an employee from service pending an investigation "Where serious or flagrant violations of Carrier rules or instructions are apparent." The decision to withhold the Claimant from service was justified because proven allegations could result in permanent dismissal. Moreover, since the Organization negotiated and agreed to

Rule 22(i) it cannot reasonably expect to nullify the rule with a “prejudgment” argument. In addition, since the Claimant was a manager when initially withheld from service, that decision to withhold was not governed by Rule 22 (i). Likewise, when the Claimant attempted to exercise seniority and enter an Agreement represented position, Rule 22 (i) did attach. However, the Carrier’s continued withholding did not violated Rule 22 (i).

The Board considers in turn each of the four alleged failings covered by the charges. The first so-called failing occurred when, in the face of instructions from his supervisors to install temporary stop signs by July 6, 2013 in order to comply with the order of the Illinois Commerce Commission (ICC), the Claimant failed to do so. It is a matter of record that two temporary stop signs had not been installed by the time of the quarterly ICC meeting on July 20, 2013, 14 days after the deadline. The Carrier’s submission indicates violations of GCOR 1.6 Conduct (Negligence) and GCOR 1.13 Reporting and Complying with Instructions. The Claimant acknowledged awareness of the deadline and that failure to meet the deadline could subject the Carrier to liability. The Claimant further noted that after the deadline had passed, he put out an XI order for both temporary signs. The Board is aware of the Claimant’s testimony that he had been told that the temporary stops signs had been installed when they were not. The Board finds that explanation insufficient, as the Claimant had a greater responsibility than simply relying on the assurances of others that his instructions were carried out. No explanation was provided for why the XI orders were not issued in a far more timely fashion if that was needed to obtain compliance. The Board therefore finds substantial evidence of a violation of the above-noted rules.

The second alleged failing stems from the Carrier’s contention that contrary to instructions, the Claimant participated in negotiations with Granite City, IL involving the closure of Morrison Road. He was instructed “only to listen and provide feedback to the Union Pacific team leaders” and not to become involved in negotiations, offer suggestions or provide feedback. . .” (TR, p. 29, ll. 26-30). Claimant acknowledged the instructions. Thereafter, the Granite City consultant offered a proposal that apparently mirrored the proposal that the Claimant had made to railroad personnel and that he had been told not to share. Assistant Vice President Lujan testified that because of the similarity between the suggestions the Claimant had made to railroad officials and the Granite City presentation, he concluded that the Claimant had negotiated with the City. Assistant Vice President Lujan acknowledged that “I don’t know if he drew—drafted that up or they did” (TR, p. 43, l. 37). The Claimant stated that he “never intended to negotiate with Granite City” (TR, p. 85, l. 7), that “technically” he did not provide suggestions (TR, p. 85, l. 24) and that he “didn’t have anything to do with that proposal that was submitted to Wes Lujan” (TR, p. 86, ll. 2-3). The Carrier’s evidence of the Claimant’s participation in negotiations is circumstantial and does not outweigh the Claimant’s denials and his direct testimony that he was not responsible for the proposals submitted to Assistant Vice President Lujan. Therefore the Carrier has not provided substantial proof of violations of Rule 1.13 Reporting and Complying with Instructions.

The third alleged violation involved GCOR 1.6 Conduct (4) Dishonest, with the Carrier contending that the Claimant certified that he had read an entire “agreement with the state of Illinois concerning the amount to paid on an upcoming project” (Carrier Submission, p. 8). Sr. Manager Industry and Public Projects Peterson explained that the Claimant was responsible as

part of his normal job duties for processing a signal upgrade agreement, that he was aware of a specific labor additive rate negotiated by the Carrier with the Illinois DOT and that when he submitted the agreement for executive level execution, he noted that he had read it and was approving a lower federal additive rate that would have excluded \$759,530 in reimbursement to the Carrier. Sr. Manager Peterson testified that “When questioned, Mr. McKernan stated that he had not read the agreement and he had falsely indicated on the transmission document that he had” (TR, p. 48, ll. 23-25). The Claimant testified that when he received the agreement he did not know there were different labor additive rates and did not have the revised Division of Cost Table. The testimony of Sr. Manager Peterson that the Claimant had the necessary information to know that the Division of Cost Table that the Claimant certified was wrong is found credible. So is the Claimant’s testimony that the agreement that he said that he read did not contain the revised cost table. For that reason, the Board concludes that the Claimant was not dishonest when he certified that he had read the entire agreement. However, the Board also finds that because the Claimant had sufficient knowledge to know the correct labor additive rate, he was negligent in not applying that information when he certified the agreement to his superiors. This is still a violation of GCOR 1.6 Conduct.

The final allegation involves the Claimant’s granting of the “installation of a new private crossing without authority or a written agreement” (Carrier Submission, p. 9), a violation of GCOR 1.6 Conduct and CGOR 1.13 Reporting and Complying with Instructions. The Claimant has admitted violating the relevant Carrier policies in this case. While the Board acknowledges the Claimant’s stated belief that he did what he thought was best for the Carrier because two major customers were involved, he was without authority to use his judgment to negate Carrier policy. He was not dishonest in the same way as somebody who steals, but his actions involved an element of dishonesty when he withheld information about what he had done. The Claimant’s admission of the policy violation provides substantial evidence to prove the allegation.

The Board notes that the Claimant’s prior 35 years with the Carrier were unblemished. However, three of the four allegations that comprise the charges have been proven. Thus, while the Board believes that the Claimant’s long, unblemished service is impressive and worthy of note, the Board defers to the Carrier’s assessment of an outright dismissal as the Carrier provided substantial evidence to prove three of the four allegations.

Award:

Claim denied.

Order:

The Board, having considered the dispute indicated above, hereby orders that no award favorable to the Claimant be made.



Andrew Mulford, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
December 14, 2015