

PUBLIC LAW BOARD NO. 7633

Case No.: 38/Award No.: 38

System File No.: UP519JF143/1595078 MPR

Claimant: D. Cooksey

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

Organization's Statement of Claim:

1. The Carrier's dismissal of Mr. D. Cooksey by letter dated October 9, 2013 for alleged violation of Rule 1.6 Conduct (4) Dishonest and the part reading "... *Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees....*" (emphasis in original) (Transcript Exhibit 1) was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP519JF143/159078 MPR).
2. As a consequence of the Carrier's violation referred to in Part 1 above, the Carrier must remove the discipline from Claimant Cooksey's record and compensate him for all losses suffered as a result of the Carrier's unjust and improper discipline.

Facts:

By letter dated September 6, 2013 the Claimant was direct to appear for a September 12, 2014 "investigation and hearing on charges to develop the facts and place responsibility, if any, that while employed as a Welder on Gang 9833, you allegedly claimed time that that you did not work on August 21, 2013. By mutual agreement the investigation was postponed until September 19, 2013. The letter further stated that because of a prior leniency agreement, should the Claimant be found guilty of a violation of Rule 1.6, he would revert to the prior dismissed status. Additionally, the Claimant was informed that he was being withheld from service pending the results of the investigation.

Carrier Position:

Statements of the charging officer, members of the Claimant's welding crew and others provide substantial evidence that the Claimant claimed two hours on August 21,

2013 during which he performed no compensable work. Whether he was visiting his ill mother or spending non-compensable sick time in a washroom, the outcome is the same. The Claimant's dishonesty violated the Carrier's trust and placed an added burden on others. The Rule 1.6 violation is serious enough to justify permanent dismissal because the Claimant engaged in a form of fraud. He received a fair and impartial hearing, which the Carrier was not obligated to provide because the Claimant was on six months' probation in accordance with a leniency agreement following an earlier Rule 1.6 violation. There is no reason for the Board to overturn the recent discipline.

Organization Position:

The Carrier failed to meet the higher standard of proof required, therefore there is no clear and convincing evidence of dishonest behavior. The Carrier has not shown an intent to deceive. Even if the Claimant is found guilty, the permanent dismissal was excessive because it was punitive and not corrective.

Findings:

The Board finds that the Claimant has provided no persuasive justification for gang members Rackley and Pasket to give untrue reports to MTM Shields. Even if Welder Rackley and Welder Helper Pasket were afraid and confused when asked about productivity on August 21, 2013, the investigation was held on September 19, 2013, almost a month after the two were questioned by MTM Shields. Neither Welder Rackley nor Welder Helper Pasket had been alleged to have been dishonest, yet Welder Rackley did not disavow his earlier statement and Welder Helper Pasket noted that the Claimant said that he had to leave early on family business. At the investigation, the Claimant said that he trusted the honesty of the other two gang members.

The evidence establishes that the Claimant told Welder Rackley and Welder Helper Pasket that he was going to leave early. The Board concludes that it is more likely than not that the Claimant did leave early on the afternoon of August 21, 2013. While nobody witnessed his leaving, nobody saw him engaged in any productive work after 3 PM that day. Even if the Board takes the Claimant at his word, he stands convicted by his own explanation for his absence, which is that because of a stomach disorder he spent the entire two hours in the restroom in the Safety Building. Even if the Claimant did not leave the Englewood Yard, by his own admission he spent up to two hours of non-productive time, yet claimed the time for pay purposes. Other than the assertion that he did not leave the yard early, the Claimant has provided no insight into his decision to claim time when he was unproductive. Because the Claimant himself entered the time the following day, the Board can only conclude that the claim was dishonest as it resulted in theft of time, and therefore money. Standing alone, this dishonesty might well justify permanent dismissal under the UPGRADE policy. Because the Claimant was on six months' probation at the time as the result of a leniency agreement, there is no justification for the Board to do other than agree with the decision to return him to a dismissed status.

Award:

Claim denied.

Order:

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



Andrew Mulford, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
December 14, 2015