

PUBLIC LAW BOARD NO. 7633

Case No.: 41/ Award No.: 41
System File No.: UP438WF13/1594357 MPR
Claimant: M. Wyrick

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 M. Wyrick, by letter dated October 21, 2013, for alleged violation of General code of Operating Rules (GCOR) Rule 1.6, Conduct, (3) Insubordination, (4) Dishonest was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP438WF143/1594357 MPR).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall now return Claimant to service immediately and grant all other relief as contemplated under Rule 22(f).

Facts:

By letter dated October 2, 2013 the Claimant was directed to attend an October 10, 2013 "investigation and hearing on charges to develop the facts and place responsibility, if any, that allegedly (sic) were dishonest during your interview on September 24, 2013 with Corporate Audit regarding instances when you stated you did not claim travel allowance but did. Additionally, you allegedly were dishonest and insubordinate when you claimed and received mileage above that you were entitled. The letter further noted that proven charges would indicate a violation of Rule 1.6 Conduct (3) Insubordination and (4) dishonesty and would subject the claimant to possible Level 5 discipline, permanent dismissal. The letter also informed the Claimant that he was being withheld from service pending the outcome of the investigation.

Carrier Position:

The charges have been proven by more than the required substantial evidence. The Claimant admitted using the odometer rather than MapQuest for trips home in violation of the Carrier's Travel Policy, which was explained by Supervisor Monge. Additionally, the Claimant admitted not using the required most direct route. This constituted insubordination, as did his failure to provide travel receipts. He dishonestly claimed travel for weekend when he worked. The Level 5 discipline is appropriate as a deterrent to such actions. The Board cannot ignore the substantial evidence and overturn the discipline. The reduction of Level 5 to Level 3 discipline, a lengthy suspension, can hardly be considered arbitrary and capricious in view of the Claimant's insubordination and dishonesty.

The Claimant's procedural and due process rights were respected. His interview with Corporate Audit was not an investigation and did not require a duly accredited representative. Conversations between Corporate Audit and employees are common following anonymous tips in order to ascertain if such tips have merit. The interview involved fact finding, not potential discipline. The Claimant's due process rights were not violated because at the investigation he had the right to question Manager Shield, who was then his accuser.

Organization Position:

The Claimant's Rule 22 due process rights were not respected as Organization representation was denied during the recorded September 24, 2013 investigation into allegations against the claimant. The farcical disciplinary process lacked fairness and impartiality, negating the imposed discipline. Furthermore, the Carrier has not met the higher burden of proof required in cases involving alleged dishonesty. In particular, there is no showing of an intent to be dishonest. Moreover, failure to carry out supervisory instructions has not been established. Discipline was excessive as it was punitive and not corrective. The claimant believed his actions were appropriate and in line with Carrier expectations.

Findings:

With regard to the Organization's contention that the investigation by Corporate Audit violated the Claimant's Rule 22 due process rights, Rule 22(a)(1) states:

An employee who has been in service more than sixty calendar (60) days whose application has not been disapproved will not be dismissed or otherwise disciplined until after being accorded a fair and impartial hearing. The Carrier will make every effort to schedule and hold a formal investigation under this rule within thirty (30) calendar days from the date of occurrence to be investigated except as herein provided or from the date the Carrier has knowledge of the occurrence to be investigated.

The second sentence is particularly critical. The inquiry by Corporate Audit was for the purpose of determining whether the Claimant requested mileage to which he was

not entitled. If Corporate Audit had concluded that the Claimant was entitled to the mileage, there would have been no reason for a formal investigation within the meaning of Rule 22(a)(1). Conversely, when Corporate Audit concluded that the Claimant was not entitled to the mileage he claimed, that conclusion became the “occurrence to be investigated” or, more accurately, the Carrier’s “knowledge of the occurrence to be investigated.” Furthermore, Rule 22 (c)(1) requires that the affected employee be appraised of the charges in writing prior to the investigation. Whether Corporate Audit’s discussion with an employee is called an inquiry or an investigation, there is a reason for concern but no “precise charges” until Corporate Audit’s inquiry has taken place and Corporate Audit concludes that charges are warranted. Even then, the “precise charges” are not made by Corporate Audit but by a Charging Officer. In light of the above, in the absence of any bargaining history or prior awards that would indicate otherwise, the Board concludes that Rule 22 is not intended and cannot be read to include investigations by Corporate Audit. Therefore the Claimant was not authorized a duly accredited representative when questioned by Corporate Audit.

The charge itself requires little discussion. The exhibits developed by Corporate Audit and included in the formal investigation record establish that the Claimant put in for mileage on four weekends when he was also shown as working. A careful reading of the transcript reveals no explicit denial of the evidence and no explanation offered for the obvious discrepancy. Furthermore, the transcript of the Claimant’s session with Corporate Audit indicates that he said that he had never charged mileage on weekends when he worked. The only conclusion the Board can draw is that the Claimant was not honest in his responses to Corporate Audit. Moreover, the implicit conclusion that MTM Monge testified credibly that he both asked the Claimant for travel receipts and that he told the Claimant and others in Gang 4140 that the policy was to use MapQuest to calculate mileage is accepted by the Board. Thus Claimant’s testimony during the investigation that MTM Monge said to use odometer mileage is found to be deceitful, as is Claimant’s investigation statement that MTM Monge never asked for receipts. If MTM Monge had not asked for receipt, there would have been no reason for the Claimant to have explained that he kept receipts but that they were lost in the accident that caused his hospitalization. The Claimant’s lack of candor about these matters reinforces the conclusion that his statement that he never claimed mileage for weekends when he worked is also untrue.

There is substantial evidence proving the allegation and the violation of GCOR 1.6 Conduct (3) Insubordination and (4) Dishonest. The Board notes that the Carrier exercised leniency when it unilaterally reduced the Level 5 permanent dismissal to a Level 3 lengthy suspension. The Claimant should be thankful that he has maintained his job. It would be folly for the Board to disturb the reduced discipline.

Award:

Claim denied.

Order:

The Board, after considering 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