PUBLIC LAW BOARD NO. 7633

Case No.: 42/Award 42
System File No.:UP617BT143/1595842 MPR
Claimant: D. R. Ruark

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 Mr. D. Ruark for the alleged violation of the General Code of Operating Rules (GCOR) 1.6, 1.6.2 and 1.13 in conjunction with allegedly failing to report a felony conviction just and sufficient cause (sic), unwarranted and in violation of the Agreement (System File UP617BT143/1595842 MPR).

2. As a consequence of the violation referred to in Part 1 above, Mr. D. Ruark 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).

Facts:

By letter dated September 26, 2013 the Claimant was directed to report on October 18, 2013 "for investigation and hearing on charges to develop the facts and place responsibility, if any, for the charge that while employed as a Machine Operator you allegedly were convicted of a felony charge. Additionally, you failed to report the conviction of a felony charge as required by Company rules. Knowledge of the conviction was learned on September 19, 2013." The letter further indicated that proven charges would place the Claimant in violation of Rule 1.6 Conduct, Rule 1.6.2 Notification of Felony Convictions and Rule 1.13 Reporting and Complying with Instructions and that a Rule 1.6 violation would subject the Claimant to possible dismissal. He was also informed that he was being withheld from service pending the results of the investigation.

Carrier Position:

Court documents and the Claimant's admission establish his acceptance of a plea bargain regarding his felony domestic violence charges. Acceptance of the plea bargain is the equivalent of a felony conviction under the UPGRADE discipline policy. In addition, substantial evidence

shows that the claimant did not report the plea bargain as required by Rule 1.6.2. His admissions provide substantial evidence of guilt and, in essence, require the Board to accept the Level 5 permanent dismissal levied by the Carrier. The Claimant was afforded all due process rights. He was not disciplined because of the plea bargain but because employees are required to report all felony convictions and he did not report the plea bargain. Therefore the Organizations argument that the Carrier has not shown nexus is irrelevant.

Organization Position:

The investigation was not fair and impartial because the Carrier did not call Supervisors Andresen and Johnson, relying instead on the hearsay testimony of Supervisor Farrar. Also, the Organization was not allowed to enter exculpatory evidence into the record after the letter from the Claimant's attorney was read into the transcript, despite the fact that Carrier documents were read into the transcript and entered as exhibits. A statement from the Claimant's Foreman Roberts also was rejected as an exhibit. Finally, Conducting Manager White did not issue the discipline, which prejudiced the Claimant.

The Carrier has not met the burden of proof in part because a nexus has not been established. The Claimant's off-duty conduct has not been shown to have harmed the Carrier's business interests as there is no evidence of loss of good will and the Claimant was never publically identified as a Carrier employee. Even assuming nexus, Rule 1.6 is not in evidence, thus the Carrier cannot prove a violation. Furthermore, Rule 1.6 concerns job-related behavior, not off-duty conduct. There is no proof of a Rule1.6.2 violation because the Conducting Officer refused to allow the letter from the Claimant's attorney and the statement from Foreman Roberts, both exculpatory, as exhibits. Failure to call Supervisor Johnson, a material witness, leaves the Carrier without sufficient evidence. Rule 1.143 is inapplicable because the Carrier never alleged a failure to comply with a supervisor's instructions. The alleged violation was never explained.

The permanent dismissal was excessive because it was solely punitive and not corrective. The presumption that employees cannot be disciplined for off-duty conduct was ignored and no showing of harm to the Carrier's business interests was provided. Moreover, the Claimant had 18 years' tenure with no prior disciplinary history and was a contributing member of his community. He was prepared to fight the charges but accepted the plea bargain to regain custody of his children and avoid a felony conviction.

Findings:

For several reasons, the Rule 22(a)(1) "fair and impartial" requirement has not been met and moreover, the Carrier's proof falls short of the substantial evidence standard. The Board is not troubled by the Conducting Officer's refusal to allow Vice Chairman Thies' letter requesting documents, exhibits and a list of witnesses prior to the hearing. As this Board has previously written and as the Organization is surely aware, the parties have not negotiated contractual language that mandates discovery, which is what the Vice Chairman requested. Therefore the Conducting Officer properly rejected the letter as an exhibit. There is no reason to clutter the record of investigation with documents that will have no bearing on the outcome. What is critical is that the Organization be allowed recesses to review documents accepted as evidence

during the investigation, when requests for recesses are made.

The Conducting Officer's refusal to allow letters from the Claimant's attorney and from Foreman Roberts as exhibits, even though the letters were read into the record, was prejudicial to the Claimant. While the letters are hearsay because the authors were not present at the investigation to testify and be cross examined, it is not usual to include such statements in the investigation record. The hearsay nature of the documents might affect the weight attached to them, but not necessarily their relevance. Moreover, the Board notes that Manager Farrar's testimony that he spoke with Supervisors Andresen and Johnson and that both "said they had no knowledge of any felonies or any serious stuff going on" is also hearsay, since neither Supervisor was called to testify (TR, p. 27, ll. 30-32).

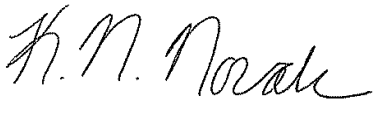
When the Claimant testified, he was asked directly if he reported the guilty plea and the resulting probation to his supervisor. He responded that he had reported the matter and identified Derek Johnson as the Supervisor. Support for the Claimant's testimony is found in the hearsay statement of Foreman Roberts. Under the definition promulgated by the Carrier, "(g)uilty pleas, diversion programs, deferred decisions or adjudication, and other alternative sentencing or adjudication procedures, regardless of local nomenclature, are considered [felony] convictions" (Carrier Exhibit B3). Therefore, in accordance with CGOR 1.6.2 the Claimant was required to report the conviction. The Carrier has the burden to show by substantial evidence that he did not so report. The Board is faced with the Claimant's direct testimony that he reported the conviction to Supervisor Johnson, with hearsay support from Foreman Roberts and Manager Farrar's hearsay testimony that the Claimant did not report the conviction. Supervisor Johnson, with possible material, first-hand evidence to provide, was not called as a witness. It is not the Claimant's burden to show that he did not report the conviction. Rather, it is the Carrier's burden to show that he did. The use of hearsay evidence in place of direct, first-hand evidence does not, in this instance, meet the substantial evidence burden.

Award:

Claim sustained.

Order:

The Board, having considered the dispute identified above, hereby orders that within thirty (30) days after the award becomes final the Claimant will be reinstated and afforded the remedy provided in Rule 22(f).



Andrew Mulford, Organization Member

Katherine N. Novak, Carrier Member

I. B. Helburn, Neutral Referee

Austin, Texas
December 16, 2015