

PUBLIC LAW BOARD NO. 7633

Case No.: 44/ Award No.: 44
System File No.: UP446WF14/1598189 MPR
Claimant: J. Baker

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 J. Baker by letter dated December 27, 2013 for alleged violation of Rule 1.6 Conduct (2) Negligent and (4) Dishonest was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP446WF14/1598189D MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Baker must now be afforded a remedy as prescribed by Rule 22(f).

Facts:

By letter dated November 25, 2013 the Claimant was directed to appear on November 29, 2013 "for investigation and hearing on charges to develop the facts and place responsibility, if any, for the charge that while employed as Manager M/W Equipment on multiple occasions in 2013, you allegedly misused purchasing authority. The Company removed you from Non-Agreement status on October 17, 2013. You attempted to place yourself on a BMWED position on November 1, 2013." The letter further informed the Claimant that proven charged would result in a violation of Rule 1.6 Conduct (2) Negligent and (4) Dishonest and would subject him to possible dismissal. The letter also noted that the Claimant was being withheld from service pending the outcome of the investigation.

Carrier Position:

The Carrier has proven the charges with more than the required substantial evidence. The Claimant acknowledged his awareness of relevant policies and rule but applied his own incorrect interpretation. His negligence risked financial harm to the

Carrier's assets. He disregarded instructions to cease doing business with Dillinger Multi-Systems (DMS), which could have reflected negatively on the Carrier and he was dishonest when deceiving the Supply Department and his superiors by avoiding the formal contract threshold of \$30,000. The Claimant's negligence and dishonest cannot be tolerated and justify the Level 5 discipline, permanent dismissal. Because the discipline was not arbitrary or capricious, the Board must sustain the Carrier's action. Either negligence or dishonesty warrants Level 5 discipline. The Claimant was afforded a fair and impartial investigation. Witnesses that the Organization wished to call and who the Conducting Officer would not allow had no knowledge of the Claimant's behavior at issue. The Organization has not shown that relevant information was excluded. Nor can the Organization show that exclusion of a one (1)-page document, one (1) page of a five (5)-page internal Purchasing Policy, prejudiced the Claimant. The Organization argues that because the claimant was allowed to exercise his seniority and worked for three days as a represented employee, he could not have violated the rules, thus dismissal was improper. The administrative error that allowed the exercise of seniority did not eliminate the Carrier's belief that the claimant had violated rules.

Organization Position:

The Claimant was not afforded a fair and impartial investigation because he was not allowed to present certain evidence and testimony in his defense. A Carrier witness was allowed via teleconference, but not some Organization witnesses. Some of the Claimant's testimony was also excluded. Therefore the Board must set aside the discipline. In addition, the Carrier has not met its burden of proof as the evidence shows that the Claimant performed his duties in accordance with Carrier rules and regulations and was neither negligent nor dishonest. Rejected evidence would have supported this contention. There is no clear and convincing evidence—the appropriate quantum of proof in a dishonesty case—that the Claimant acted with dishonest intent. Finally, dismissal was unwarranted because it was punitive and not rehabilitative. The Claimant had 25 years' tenure with an unblemished record. Even assuming guilt, the Carrier has not shown the Claimant incapable of working within the Maintenance of Way and Structures department and thus finishing his career, even if he might have made poor decisions.

Findings:

After a careful study of the investigation transcript, the Board is compelled to find that the Claimant did not receive the fair and impartial hearing required by Rule 22(a)(1). There are several reasons for the finding. The first is that the Conducting Officer denied the Organization the right to call three witnesses on the Claimant's behalf. The Board is not concerned that Carrier witnesses were allowed to testify via telephone. Rather, the Board is concerned that the three were not allowed to testify at all. Local Chairman Foehr, the Claimant's representative, stated that the three witnesses had "pertinent information" . . . "knowledge of incidents alleged incidents at—in the case" (TR, p. 12, ll. 29-33). Knowing only that the three were supervisors at the time the Claimant wished to bump into the represented unit, the Conducting Officer excluded them knowing nothing

more. He could have asked the Local Chairman for an offer of proof, in other words, an indication of what the testimony would entail, but he did not. The Board acknowledges the right of the Conducting Officer to exclude testimony that is obviously irrelevant and the right of the manager who issues the discipline to reject testimony in the record that, in retrospect, is irrelevant. But the Board believes that the requirement to conduct a fair and impartial investigation is not met when witnesses are excluded from testifying without sufficient information to make a truly informed judgment. Under such circumstances, “fair and impartial” requires that the Organization and the represented Claimant receive the benefit of any doubt.

Second, the Conducting Officer refused to allow in evidence a document offered by the Claimant titled Supply Policies and Procedures. The basis for the ruling was that this was an internal document, “not the user’s document to – to follow and go by” (TR, p. 102, ll. 23-24). Part of the thrust of the Claimant’s case was that he went through proper channels and that Supply approved what he had done. The Board fails to see why an internal document might be any less probative and thus any less supportive of the Claimant’s defense than a document intended for an end user. The Board makes no judgment about the value of the document, but concludes that the basis for excluding the document is inconsistent with the obligation to provide a fair and impartial investigation that allows the Claimant a reasonable opportunity to defend against the Carrier’s allegations.

Finally, the Conducting Officer, during his questioning of the Claimant about a document containing a Dillinger Multi-Services quote to build six trailers (Exhibit K) told the Claimant, “I think you’re cherry-picking the policy-- . . .to serve your own purpose” (TR., p. 96, ll. 26 and 39). When explaining why the internal Supply Department document would not be admitted, the Conducting Officer told the Claimant, “So I won’t allow it. I think you’ve misinterpreted the meaning of this and you’ve twisted it for your own use” (TR, p. 102, ll. 26-27). The Board finds these observations and even the words particularly ill-chosen. The obligation of the Conducting Officer, who issued the discipline in this case, was to conduct a fair and impartial investigation and then to review the record with as much consideration given to the Claimant’s defense as to the Carrier’s proof of the allegations. The Conducting Officer’s exclusion of witnesses and documents and the ill-chosen and conclusionary observations made during the investigation establish a violation of Rule 22(a)(1). Therefore, consideration of the charges themselves is unnecessary to reach the award set forth below.

Award:

Claim sustained.

Order:

After consideration of the dispute identified above, the Board hereby orders that within thirty (30) days of the date the Award becomes final, the Claimant be afforded a remedy as prescribed by Rule 22(f).



Andrew Mulford, Organization Member



Katherine N. Novak, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
December 14, 2015