PUBLIC LAW BOARD NO. 7633

Case No.: 45/ Award No.: 45
System File No.: UP411RR14D/1611678 MPR
Claimant: J. McElwain

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. McElwain by letter dated July 28, 2014 for alleged violation of General Code of Operating Rules (GCOR) Rule 1.6 Conduct (4) Dishonest, in conjunction with allegations that he falsified Company documents and claimed per diem he was not entitled to was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP411RR14D/1611678 MPR).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall remove the discipline from Claimant J. McElwain's record and compensate him for all losses suffered as a result of the Carrier's unjust and improper discipline.

Facts:

By letter dated July 11, 2014 the Claimant was directed to attend a July 22, 2014 "investigation and hearing on charges to develop the facts and place responsibility, if any, while employed as MOW Assistant Foreman on Gang 9101 at Bryan, Texas, near Milepost 83.5 you were allegedly dishonest in the reporting of your residence in order to gain per diem. This information was discovered after an internal investigation completed on June 23, 2014." The Notice of Investigation (NOI) further stated that the Claimant was being withheld from service pending the results of the investigation and that, should a violation be found, it would involve GCOR 1.5 Conduct (4) Dishonest and could result in Level 5 discipline, permanent dismissal, under the Carrier's UPGRADE discipline policy.

Carrier Position:

More than the required substantial evidence shows that the Claimant was guilty as charged and that permanent dismissal was warranted. He dishonestly claimed a Fort Worth residence, but no evidence establishes the claim. He admitted staying in a residence that he owns in Elk city, KS when working in Coffeyville, KS and Independence, KS, both within 50 miles of his Elk City residence, yet he claimed per diem for those days. This dishonesty violated the trust the Carrier placed in him. The Carrier cannot have employees who abuse the per diem system. The undisputed facts prove the Claimant's dishonesty, which involved theft and justified the dismissal. The discipline was not arbitrary or capricious and should be sustained by the Board. The Claimant was properly notified of the hearing and could have presented evidenced and questioned and cross-examined witnesses had he attended. His representative did attend; thus the Claimant was offered a fair and impartial investigation.

Organization Position:

The Carrier violated Rule 22 by not comply with procedural requirements. The Claimant received notice three days before the investigation. The Carrier refused to reschedule so that the C laimant could attend and face his accusers. This was after an audit investigation conducted outside of the bounds of Rule 22. The Carrier has not met the higher burden of proof required in cases of dishonesty, nor is there clear and convincing evidence that the Claimant intended to deceive the Carrier or to be dishonest. The discipline was excessive because it served only to punish and not to rehabilitate.

Findings:

It is a matter of record that the Claimant took delivery of the NOI three days before the scheduled hearing, thus it is established that the NOI was mailed to the correct address of record. The Carrier cannot dictate to its employees when they will take delivery of and open their mail. The NOI was available eight days before the investigation was scheduled, which was sufficient time to allow the Claimant to make plans to attend if he elected to do so and to participate in planning his defense. The Organization offered no reason, let alone a persuasive reason, for the Claimant's delay in obtaining and opening the NOI. The delay cannot serve as the basis for a finding that GCOR Rule 22 was violated. Finding a violation based on the above-noted set of facts could possibly create precedent that might allow future claimants to frustrate the long-standing investigation and discipline process in the industry simply by refusing or ignoring delivery of a NOI. The Board will have no part of such a possible precedent and considers that the Claimant has waived his right to attend. Moreover, while General Chairman Albers wrote in his August 6, 2014 appeal to Director Katie Novak that "at the beginning of this investigation I requested that the investigation be postponed, Vice Chairman Richard took exception to the investigation at the outset but did not explicitly request a postponement until his closing statement. This was after the Vice Chairman indicated that he was ready to proceed at the start of the investigation (TR, p. 10, l. 14). The Board does not consider the lone documented postponement request to be timely.

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.

Little else needs to be written. The Carrier's evidence that the Claimant requested and received per diem to which he was not entitled stands unrebutted. The Board considers this to be substantial evidence that meets the required quantum of proof, even when dishonesty is alleged. Moreover, given the circumstances of this particular case, the falsification of Company documents must be considered intentional. As the Organization is well aware, dishonesty that amounts to theft clearly shatters the trust placed in the employee by the Carrier. Certain infractions justify dismissal without the opportunity to correct the offensive behavior and there is ample on-property and off-property precedent for leaving the permanent dismissal undisturbed.

Award:

Claim denied.

Order:

The Board, having considered the dispute identified above, 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