

PUBLIC LAW BOARD 7660
Organization File No JN-2148U-401
Carrier's File No 1752753
Docket No. 213

PARTIES)	UNION PACIFIC RAILROAD COMPANY
)	
TO)	VS.
)	
DISPUTE)	BROTHERHOOD OF MAINTENANCE
)	OF WAYEMPLOYES DIVISION -IBT
)	RAIL CONFERENCE

Public Law Board consisted of the regular members and, in addition, Referee Meeta A. Bass when this Award was rendered.

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) imposed upon Mr. P. Upshaw, by letter dated February 23, 2021, in connection with allegations that he failed to comply with EEO Policy – Dismissal; Rule 1.6: Conduct – Immoral; Item 10-I: Union Pacific Railroad Policies - Statement of Policy on Ethics and Business Conduct - Critical; POLICY – WRK VLNC: Workplace Violence Policy; The How Matters Policy; and additionally Rule 1.6: Conduct stipulates that ‘... any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company, or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.’ was excessive; arbitrary; disparate; imposed without due process; without the Carrier having met its burden of proof; and, in violation of the Agreement (System File JN-2148U-401/1752753 UPS).

2. As a consequence of the violation referred to in Part 1 above, Claimant P. Upshaw shall now have the:

‘... Dismissal is expunged from his personal record. Claimant be immediately reinstated to service and compensated for all wages lost, straight time and overtime,

beginning with the day he was removed from service and ending with his reinstatement to service excluding all outside wage earnings. Claimant be compensated for any and all losses related to the loss of fringe benefits that can result from dismissal from service, i.e., Health benefits for himself and his dependents, Dental benefits for himself and his dependents, Vision benefits for himself and his dependents, Vacation benefits, Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of the Union Pacific Railroad and a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters. Claimant to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has been taken from him. Such losses can be his house, his car, his land, and any other personal items that may be garnished from him for lack of income related to this dismissal.

In short, we herein make the demand that the Claimant be made "whole" for any and all losses related to his dismissal from service.' (Employee's Exhibit 'A-2')."

FINDINGS:

The Board, upon the whole record and all the evidence, finds that:

The Carrier or Carriers and the Employee or Employees involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act, as approved on June 21, 1934. The Board has jurisdiction over the dispute involved herein. Parties to said dispute were given due notice of hearing thereon.

The Claimant was employed as a Spike Gauger Operator and had approximately twenty-nine and one-half years of service at the time of his removal. On January 14, 2021, while staying at the motel as part of a Carrier System Consolidated traveling group, the Claimant's interaction with a hotel staff member was called into question. The hotel manager contacted the Carrier's management representative regarding the incident.

A Special Agent was assigned to investigate the claim. The Special Agent conducted a telephone interview with the manager and staff member involved in the incident; he did not record the interview. There was a video of the parking lot, but the Special Agent did not view it or request a copy. The Special Agent did not obtain written statements were obtained. According to the Agent, it was reported the Claimant

approached the hotel staff member in her car for a cigarette. The staff member was concerned that he was too close to her without wearing a mask. While smoking at the vehicle, the Claimant made improper comments, i.e., Are you married? Do you have any children? There was no allegation of sexual comments. The staff stated she attempted to leave a few times, but the Claimant blocked her access. The staff worker felt uncomfortable. The next day, the Claimant followed her around.

The Carrier issued a Notice of Investigation letter dated February 1, 2021, stating: "...to develop the facts and determine your responsibility, if any, in connection with the below charge: On the evening of 01/14/2021, at the location of the Quality Inn In Chandler, AZ, while employed as a System Spk Dr/Gage, you allegedly inappropriately touched and made improper comments to a hotel staff member. If proven, this harassing conduct is a possible violation of the following rule(s) and/or policy:..."

The investigation hearing occurred on February 9, 2021. Following the investigation hearing, the Claimant received a discipline notice dated February 23, 2021, finding a violation of the EEO Policy - Dismissal. 1.6: Conduct – Immoral, Item 10-I: Union Pacific Railroad Policies – Statement of Policy on Ethics and Business Conduct – Critical, POLICY-WRK VLNC: Workplace Violence Policy The How Matters Policy. The Carrier dismissed the Claimant.

The Organization filed a claim by letter dated February 25, 2021, and the Carrier denied the same on April 23 2021. The Organization advanced the appeal by letter dated April 27, 2021, and the Carrier denied the same by letter dated June 17, 2021. A formal conference was held with no resolution of the claim on September 14, 2021. The Organization submitted a post-conference letter on December 2, 2021, requesting the Carrier re-evaluate their position or the matter would be progressed to the National Railroad Adjustment Board. There was no change in the Carrier's position in its letter dated January 10, 2022. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property and considered evidence related to the following to make its determination of this claim:

- 1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?

- 2) If so, did the Carrier establish by substantial evidence the Claimant was culpable of the charged misconduct or dereliction of duty?**
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?**

The Carrier contends management provided the Claimant with a full, fair, and impartial hearing in which he was afforded all of his due process rights as required by the Collective Bargaining Agreement. The Carrier argues that substantial evidence was provided in the testimony of Carrier witnesses that the Claimant engaged in the prohibited conduct for which he was properly charged. The Carrier claims the facts established the Claimant engaged in immoral and discourteous offensive conduct when he approached the hotel staff member at her vehicle in the parking lot, proceeded not to allow her to leave, and inappropriately made physical contact with her. The Carrier asserts the evidence establishes the hotel staff member was affected by the Claimant's actions to the point where she reported it to her manager, who was concerned enough with her allegation to assist in reporting this to the Carrier Special Agent and local police. The Carrier opines the Claimant's (verbal and non-verbal) actions are unacceptable in violation of the cited rules, and the discipline was warranted.

The Organization alleges that the Carrier violated the Agreement by not providing the Claimant with a specific charge as required by Rule 48(c), introducing outdated allegations, and denying the right to confront accusers. The Organization points out the Claimant only received verbal notification from the Organization, contrary to Rule 48(c). The Organization asserts the hearing officer's denial of the recess to obtain potentially exonerating video evidence of the incident, which the Special Agent did not watch or procure, deprived the Claimant of due process. Furthermore, the Organization argues the record lacked direct evidence and relied on hearsay testimony, preventing cross-examination. The Organization argues the record was based solely on conclusory summarizations and characterizations from the Special Agent, and as such, cannot establish the Claimant's guilt. The Organization opines there was a clear dispute of fact, and the Carrier failed to prove the Claimant's rule violation.

After a review of the transcript, on-property correspondence, and submissions of the advocates, the Board finds no procedural errors that would have prejudiced the Claimant. The Board finds the Claimant appeared with his representative and defended these charges; thus, Organization's arguments about notice are waived.

The Board finds the admissions of the prior allegations should not have been admitted but was not prejudicial. The denial of the recess to obtain the video evidence is problematic, as set forth below.

It is well settled in discipline cases the Carrier bears the burden of proof by substantial evidence. Equally important is the Claimant's right to confront the witnesses. In arbitration, the right to confront witnesses may look different from that of a court of law. In the rail industry, providing witness statements from non-railroad employees who may not appear at these proceedings is an accepted practice. In this instance, no statements were obtained. Instead, the Special Investigator provided a summary of his interviews. Summations of an interview do not establish the underlying facts or evidence because summations do not provide a verbatim record of what was said during the interview. Summations represent only one person's interpretation or summary of the conversation, which may be biased, incomplete, or distorted. This is evident in the Board's review of the Agent's testimony. Therefore, to ensure fairness and accuracy in these proceedings, at a minimum a written statement should have been obtained or a recorded interview to provide direct evidence of events rather than relying on summaries or interpretations of interviews, which increase the risk of misrepresentation or misunderstanding of the statements made by the interviewee. The Board finds the Carrier has not met its burden of proof.

AWARD

Claim sustained. The Award is in accordance with Rule 48(h), which states if the charge(s) against the employee is not sustained, the record of the employee will be cleared and if suspended or dismissed, the employee will be returned to former position and compensated for net wage loss, if any, which may have been incurred by the employee.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

/s/ Meeta A. Bass

Meeta A. Bass
Neutral Chairperson

Jennifer McNeil

Jennifer McNeil
Carrier Member
Dated: April 17, 2024

John Schlismann

John Schlismann
Organization Member
Dated: April 17, 2024