PUBLIC LAW BOARD NO. 7633

Case No.: 12/Award No. 12
System File No.: 000712/1571897
Claimant: Ryan P. Lavin

UNION PACIFIC RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION)

Organization's Statement of Claim:

1. The discipline (dismissal) imposed on R. Lavin by letter dated July 19, 2012 for alleged violation of Rule 1.6 Conduct (Discourteous) and the Violence in the Workplace Policy in connection with allegations that the Claimant called a supervisor and made threatening remarks was without just and sufficient cause, unwarranted and in violation of the Agreement (System File 000712/1571897).

2. As a consequence of the violation referred to in Part 1 above, Claimant R. Lavin must now be afforded a remedy as prescribed by Rule 22(f).

Facts:

By letter dated May 11, 2012, the Claimant was directed to appear on May 30, 2012 for "an investigation and hearing on charges to develop the fact (sic) and place responsibility, if any, that at approximately 2300 hours, on April 23, 2012, you allegedly called a supervisor and made threatening remarks."

The Notice further stated that substantiated allegations would constitute a violation of Rule 1.6 Conduct (7) Discourteous and could result in the assessment of Level 5 UPGRADE discipline and permanent dismissal. The Claimant was also notified that he was being withheld from service pending the outcome of the hearing. After two postponements that were agreed to by the Organization, the investigation was held on July 13, 2012.

Carrier Position:

The Carrier has complied with contractual due process requirements. The Organization's procedural objections are not supported by contractual language and should be rejected by the Board.

The Carrier has proven the charge by the necessary substantial evidence. Manager Parker testified to the reasons that he was certain that the Claimant had called and threatened him. This was not the first hostile call the Claimant had made according to Director Rea's testimony. The Carrier cannot and does not take threatening calls lightly.

The evidence demonstrates that the Claimant has committed a serious violation and the Board is without authority to overturn the Carrier's appropriate response, which was consistent with the UPGRADE policy that previously has been upheld and with the Carrier's previously demonstrated zero tolerance policy in response to hostile and threatening behavior.

Organization Position:

The Carrier violated Rule 22 by unilaterally postponing the investigation, which was not held within 30 days of the date of occurrence as required by Rule 22(a). The Organization agreed to the postponements, but such agreement did not constitute a waiver of the 30-day requirement. The Claimant did not receive a fair and impartial investigation because a uniformed, armed special agent was in the hearing room throughout the proceedings, because Director Rea previously had not been listed as a witness and his telephonic testimony negated the Claimant's opportunity to properly face and cross examine the witness, who provided testimony that was irrelevant to the current charge. The Hearing Officer, who extracted the irrelevant testimony from Director Rea, had already made up his mind that the Claimant was guilty, as demonstrated by the transcript.

The Carrier has not shown that the Claimant violated any rule. Director Rea's testimony, based on his recollection of a two-year old phone call, does not prove the current charge, particularly because the Claimant denied ever making such a call. Nor is there evidence that Manager Parker received a call from the Claimant, let alone a threatening call. The Claimant also denies making a call to Manager Parker. The e-mail document from Director Novak is inadmissible because it was not provided until after the investigation, it is irrelevant and does not support the current charge and the supposed call did not result in a charge against the Claimant at the time. The police report, which simply contains a charge, is also inadmissible because it was not provided during the investigation. Even if the charge is proven, dismissal was unwarranted because it is punitive rather than rehabilitative or corrective.

Findings:

The Organization has raised a number of procedural contentions that the Board will respond to prior to consideration of the merits of the case. A fair and impartial hearing requires, among other things, that the Claimant have an opportunity to respond to evidence presented by the Carrier in support of the charge(s), even if the evidence is documentary and not testimonial. Thus the Board will not consider the May 1, 2012 e-mail from Director Novak and the April 24, 2012 police report, both dated before the investigation and thus available at the time of the July 13, 2012 investigation. This Board has elected to address the defect by omitting consideration of the post-investigation documents but not by dismissing the entire investigation as unfair and partial.

Neither the timing of the original investigation nor the postponements violated Rule 22. Rule 22(a) states that "The Carrier will make every effort to schedule and hold a formal investigation under this rule within thirty (30) calendar days from date of occurrence to be investigated." The investigation was initially scheduled for May 30, 2012, which was 27 calendar days after April 23 and thus clearly within the "every effort" parameters of Rule 22(a).

Rule 22(b) allows the postponement of formal investigations or the extension of time limits "by mutual agreement between the Carrier and the employee or his representative." The record establishes the agreement of former General Chairman Riley for the first postponement and General Chairman Cartwright for the second postponement. The Board must conclude that there was mutual agreement. The Organization is not at liberty to withdraw such mutual agreement after the fact.

The presence of the uniformed, armed special agent during the investigation did not serve to eliminate any of the claimant's due process rights. In the final analysis, it is the evidence adduced during the investigation and not the agent's presence that must determine the outcome.

Director Rea's testimony did not make the investigation other than fair and impartial. Nothing in Rule 22 requires pre-hearing discovery or the sharing of lists of likely witnesses. While the Claimant did not have the opportunity to face Director Rea in the literal sense, the Claimant and his representative were able to listen to Director Rea's testimony and to cross-examine him. Particularly in an investigation process that is not intended to mirror the formality of the usual courtroom trial, telephonic testimony, which the Organization has requested in other cases, preserved the Claimant's due process right. The Organization correctly asserts that Director Rea's testimony about the call he allegedly received from the Claimant two years ago does not prove the current charge. Nonetheless, particularly in a case in which there is a significant credibility issue, the Carrier has a right during the investigation to present testimony and documentation that may bear on the ultimate credibility determination. Therefore, Director Rea's testimony cannot be considered irrelevant. Finally, so far as procedural matters are concerned, the Board has read the transcript and does not conclude that the Hearing Officer prejudged the Claimant's guilt.

As to the call that resulted in the charge against the Claimant, neither he nor his Organization has offered any reason why Manager Parker would manufacture an untrue story knowing that, if accepted, that story would likely result in the dismissal of a 15-year employee. Nothing in the record indicates "bad blood" or an ongoing strained relationship between the two. Furthermore, Manager Parker stated that the call came on his Carrier cell phone—presumably a number that was easier for the Claimant to access than Manager Parker's personal phone number. The Manager was specific about the threat made and specific that the Claimant referred to him by name and said that Manager Parker knew who the caller was, having terminated him. On cross examination, Manager Parker repeated that he was certain of the identity of the caller because he recognized the Claimant's voice. Manager Parker provided a convincing level of detail and certainty. The Claimant's denial is viewed as self-serving and lacking credibility. Standing alone, Manager Parker's testimony provides substantial evidence of the Rule 1.6 violation.

The Claimant was aware of the relevant rules and policies. Rule 1.6 (7) Discqurteous states that "Any act of hostility, misconduct. . .is cause for dismissal. . ." The Carrier's Policy to Address Violence & Abusive Behavior in the Work Place states that "The Company has a zero tolerance policy with regard to all forms of violence in the workplace." No employer can afford to conduct business in an atmosphere where even implied threats are tolerated. And, except for very rare and unusual circumstances, an employee who threatens physical violence against another employee, whether the target is a member of supervision or a member of the represented group, does not deserve the benefit of corrective discipline, particularly when the consequences of a violation of Rule 1.6 are well known and of long standing.

Award:

Claim denied.

Order:

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.

Kevin D. Evanski, Organization Member

Katherine N. Novak, Carrier Member

written dissent to follow.

I. B. Helburn, Neutral Referee

Austin, Texas
March 10, 2014