

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
IBT RAIL CONFERENCE**

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY)**

Case No. 287

Award No. 261

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

1. The dismissal of Foreman Robert A. Lucansky for violation of GCOR Rule 1.6 in connection with a verbal altercation with Foreman Steve Duda between the dates of April 9 and April 12, 2007 and being quarrelsome and discourteous with Mr. Rene Fonseca sometime within the prior three (3) weeks is unjust, unwarranted, based on unproven charges and in violation of the Agreement (System File B-0719C-102/1479953 CNW).
2. As a consequence of Part 1 above, Mr. Lucansky shall be immediately reinstated and have his record cleared of the alleged offense and must be compensated at his applicable rate for all time lost as a result of the discipline assessed."

FINDINGS:

By notice dated April 18, 2007, the Claimant was directed to attend a formal hearing and investigation to develop the facts and place responsibility, if any, in connection with allegations that the Claimant allegedly had been quarrelsome and discourteous in connection with a verbal altercation involving Foreman Duda, and had been quarrelsome and discourteous toward Rene Fonseca. The investigation was conducted, as scheduled, on April 23, 2007. By letter dated May 3, 2007, the Claimant was notified that as a result of the hearing, he had been found guilty as charged and was

being assessed Level 5 discipline, which is dismissal from the Carrier's service. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discharge him. The Carrier denied the claim.

The Carrier initially contends that it has met its burden of proving, through substantial evidence, that the Claimant was in violation of Carrier rules. The Carrier asserts that the transcript convincingly shows that the Claimant was quarrelsome and made threatening remarks to another employee. The Carrier argues that this conduct was in violation of Rules 1.6 and 1.7, demonstrating hostility and misconduct and including a verbal threat of violence. The Carrier emphasizes that this conduct constitutes cause for dismissal.

The Carrier maintains that the Organization's assertion that the Carrier committed a procedural violation, by failing to provide the General Chairman with a copy of the hearing transcript and exhibits, is no more than a red herring. The Carrier points out that the Vice Chairman who handled the claim and the appeal was provided with these documents in a timely manner. Moreover, the Carrier provided these documents to another Vice Chairman who previously had been General Chairman of the CNW Federation until it merged with the Union Pacific Federation. The Carrier contends that when it learned of this, it immediately arranged for the General Chairman to receive the documents and offered him additional time for any appeal if he needed it. The Carrier points out that it did not receive any response to this offer. The Carrier insists that this was no more than a clerical oversight.

The Carrier argues that it did not commit any procedural violations egregious

enough to warrant the overturning of the discipline. The Carrier additionally asserts that it did not commit any violations that would unduly prejudice the Claimant. The Carrier contends that it has ensured that the Claimant receive all of the rights granted under the hearing; the Claimant had a hearing even though he did not pick up the initial Notice. The Carrier emphasizes that it did not commit any procedural errors during the handling of this claim, so the assessment of discipline should not be disturbed.

The Carrier goes on to assert that once an arbitral panel has substantiated that the Carrier has presented substantial evidence at the hearing, the panel lacks the authority to overturn the discipline unless it is found to be arbitrary, capricious, or an abuse of the Carrier's discretion. The Carrier insists that it has met its burden of proof, and it duly assessed Level 5 discipline because of the Claimant's actions.

The Carrier points out that the Claimant's record shows a clear pattern of quarrelsome behavior and entering into verbal altercations. The Carrier emphasizes the evidence in the record of such incidents from September 2002, January 2004, December 2004, and August 2005. The Carrier contends that after the August 2005 incident, the Grievant was reinstated pursuant to a leniency agreement that included a probationary period. The Carrier argues that less than two months after completing that probation, the Claimant was "up to his old tricks."

The Carrier insists that under the circumstances, dismissal certainly was not arbitrary or capricious in that the Claimant appears unable to get along with his peers at the Railroad. The Carrier argues that the Claimant's violations were serious, and the discipline should remain intact.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

Pointing to prior Board Awards, the Organization initially contends that in discipline cases where the Carrier violates the clear and unambiguous language of the Agreement, the Board typically sets aside the discipline without consideration of the merits of the dispute. The Organization asserts that because the alleged incident with Fonseca occurred on March 1, 2007, the April 23, 2007, hearing clearly was outside the time limits specified by Rule 19. Moreover, the Carrier was immediately made aware of the alleged April 9, 2007, altercation, but did not conduct the hearing until April 23, 2007, again in violation of Rule 19. The Organization argues that the Board repeatedly has held that where the time limit for holding a hearing has been breached, the Board need not consider the merits of the dispute and the decision must be set aside.

The Organization goes on to maintain that Rule 19 also requires that the Carrier provide the employee with written notice of the precise charge against him. The Organization argues that the charge in this case, referencing an incident that occurred between April 9 and April 12 and another incident that occurred within “the prior three weeks,” is not precise. Moreover, there is no dispute that the Carrier never supplied the General Chairman with a copy of the charge letter. The Organization additionally points out that the Carrier did not provide the General Chairman with a copy of the transcript of the investigation.

The Organization then asserts that although the decision letter is dated May 3, 2007, which would render it timely, the envelope reveals that it was not mailed until May

4, 2007, eleven days after the conclusion of the hearing. The Organization contends that this mailing date renders the decision notice untimely and in violation of Rule 19. The Organization asserts that numerous Board Awards have held that Agreement time limits shall be strictly enforced, and that discipline must be set aside when the time limits for rendering decisions are breached. The Organization argues that there can be no doubt that the Carrier's failure to render a timely decision requires that the Claimant's dismissal be overturned.

The Organization then maintains that the Hearing Officer was not a disinterested solicitor of facts in this matter. Among other things, the Hearing Officer asked questions about the Claimant's past record, over the Organization's strenuous objections. The Organization points out that it is well established that an employee's past record may be used only for review in determining the quantum of discipline once guilt has been proven. The Organization asserts that to have such testimony elicited at the outset of an investigation can be viewed only as prejudicial to the Claimant, especially because the hearing officer did not render the decision in this matter. The Organization suggests that the obvious reason for insisting on the inclusion of such information would be to influence subsequent readers of the record. The Organization argues that the hearing officer's conduct deprived the Claimant of a fair and impartial investigation.

The Organization contends that each of these procedural violations standing alone requires a sustaining award, and the Carrier's cavalier approach to the entire discipline process cannot be ignored. Citing prior Board Awards, the Organization asserts that the Board need not consider the merits of the dispute to sustain the instant claim.

As for the merits, the Organization insists that the Carrier failed to prove the charges against the Claimant. The Organization contends that the charges stem from incidents that occurred when the Claimant was off duty, off Carrier property, and while the Claimant was with his son in the hospital. The Organization asserts that the Carrier did not solicit a statement from Fonseca until more than six weeks after his conversation with the Claimant, and it is nothing more than a blatant attempt to bolster the weak, trumped-up charges level against the Claimant in connection with the April conversations with Duda.

As for the incidents involving Duda, the Organization points to the Claimant's testimony about Duda's repeated phone calls while the Claimant was at the hospital with his son. The Organization asserts that because there are no corroborating witnesses about these conversations, only the hearing officer may render a credibility determination that resolves the dispute between the testimony offered by Duda and the Claimant on their conversations. The Organization argues that because the hearing officer never made such a determination, the Claimant was dismissed solely on Duda's unsupported testimony. The Organization maintains that the Board consistently has held, an employee cannot be found guilty on the uncorroborated testimony of a single witness.

The Organization insists that there is not a single shred of corroborating evidence in this matter, and it therefore is clear that the Carrier failed to prove the charges leveled against the Claimant.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. Although the Organization charges that the Carrier did not meet the time limit set forth in the Agreement, a review at the very beginning of the transcript reveals that the Claimant testified that he received the proper notice to report for the investigation, the notice was sent to the Claimant within the prescribed time limits of the Agreement, and that the Claimant was ready to proceed on the charges. Moreover, although the conduct of the hearing officer left a great deal to be desired in terms of fundamental fairness, this Board finds that the hearing officer did not engage in such outrageous behavior as to require the sustaining of this award. Finally, with respect to the rest of the procedural charges raised by the Organization, after reviewing the facts and the testimony and the documents in the record, we find them to be without merit.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was quarrelsome and discourteous with other Carrier employees, which was a violation of Carrier rules. The Claimant did not conduct himself in a proper manner when dealing with Foreman Duda and Mr. Fonseca.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant's record in this case is terrible. The personnel file reveals that the Claimant had previously been dismissed and then reinstated on a leniency basis and put on eighteen months' probation because of previous quarrelsome behavior. The Claimant had only been off probation for two months when the incidents involved in this proceeding occurred. His record also shows that there was an incident in 2002, another incident in 2004, and then the incident in 2005 that led to his earlier dismissal.

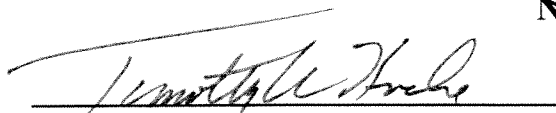
Given the previous disciplinary background of this Claimant and the numerous chances that he has been afforded by the Carrier, this Board cannot find that the Carrier's action in terminating his employment was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: Sept 9, 2009



CARRIER MEMBER

DATED: Sept 9, 2009