

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 45622
Docket No. MW-48082
26-3-NRAB-00003-230604

The Third Division consisted of the regular members and in addition Referee Michael Capone when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The discipline [forty (40) calendar day suspension served without pay as a second (2nd) major – life threatening and conduct unbecoming offense] imposed upon Mr. E. Carrier, by letter dated June 1, 2022, in connection with alleged violations of US Rulebook for Engineering Employees 1.6 – Conduct and US Rulebook for Engineering Employees 1.15 – Duty-Reporting or Absence on Thursday, May 5, 2022 was on the basis of unproven charges, arbitrary, capricious and excessive and in violation of the Agreement (System File D-24-22-620-01/2022-00029674 CMP).

(2) As a consequence of the violation referred to in Part (1) above, the suspension imposed upon Claimant E. Carrier:

“*** shall be set aside, and the Claimant be made whole for all financial and benefit losses incurred as a result of the violation. Such remedy includes:

1) Straight-time compensation for each regular workday lost, and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of his suspension from service. This amount shall not be reduced by

any outside earnings obtained by the Claimant while wrongfully suspended.

- 2) Any general lump-sum payment and retroactive and/or periodic general wage increases provided in any applicable agreement that became effective for the period Claimant was out of service.
- 3) Overtime pay for lost opportunities based on overtime pay for any position the Claimant could have held during the time he was suspended, or on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been suspended from service.
- 4) Health & Welfare, dental, vision, supplemental insurance premiums, deductibles, and co-pays that Claimant would not have paid had he not been unjustly suspended from service.
- 5) Any and all other benefits to which entitled, but lost as a result of the Carrier's arbitrary, capricious, and excessive discipline in suspending the Claimant from service beginning May 11, 2022 and continuing through and including June 19, 2022.

* * *

As a remedy, this discipline shall be set aside, all notations of this discipline be expunged from all Carrier records, including the Claimant's personal record, and the Claimant shall be made whole for all time, compensation, and/or other benefits lost as set forth herein as a result of this assessment of discipline and attendance at the investigation hearing.”

FINDINGS:

The Third Division of the Adjustment 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 June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant, Eric Currier, is an Assistant Steel Director Foreman employed by the Carrier for approximately 14 years when on May 10, 2022, he was notified of a hearing and investigation to be held on May 19, 2022 for leaving his assignment without authorization and received pay for time not worked on May 5, 2022. The Claimant's May 19th investigation was held in conjunction with 3 other employees similarly charged. The Claimant was notified on June 1, 2022 that he was found guilty and assessed a 40-calendar day suspension beginning May 11 through June 19, 2022. The Organization filed a claim on July 29, 2022, alleging that the Carrier's hearing officer failed to provide the Claimant with a fair and impartial investigation. It also claimed the Carrier did not meet its burden of proof and that the discipline was arbitrary and capricious. The Carrier denied the claim and subsequent appeals by the Organization.

The Organization filed its notice of intent with the Third Division. The claim is now properly before the Board for adjudication.

Upon a review of the entire record, the Board finds the Carrier failed to provide the Claimant a fair and impartial investigation. In doing so, we do not reach the merits of the dispute.

The following contract language from RULE 18 - DISCIPLINE AND GRIEVANCES, in pertinent part, reads as follows:

(a) An employe who has been in the service of the Soo Line for sixty (60) days or more, and whose application has been approved will not be disciplined or dismissed without a fair and impartial hearing and shall be advised in writing of the specific charges. This will not preclude an employe being held out of service pending a hearing for serious rules

infractions. An employe who considers himself unjustly treated shall be given a fair and impartial hearing provided that the request for a hearing is made in writing to the Regional/Divisional Engineer within twenty (20) days from the date of the incident.

* * *

(e) At the hearing the aggrieved employe shall have the right to be represented by an employe or duly accredited representative of his choice and to call witnesses to testify in his behalf. The parties recognize their joint responsibility in developing all fact [sic] related to the notice of charges during the investigation and will make all efforts to facilitate the process agreed upon in (a) of this rule. Witnesses will be sequestered upon request of either party.

(f) If the final decision decrees that the charges against the employe were not sustained the record shall be cleared and the employe reinstated and paid for the actual wage loss, if any.”

* * *

The record establishes that the Hearing Officer engaged in improper communication with the Carrier’s witnesses during the hearing and investigation on May 19, 2022. During the hearing, the Organization objected after the Hearing Officer was seen speaking with witnesses after the proceeding had started and testimony was heard. The Hearing Officer did not deny he conversed with witnesses and responded that “The conversation I had with Mr. Lund outside the room had nothing to do with what was going on inside these proceedings.”

In accordance with Rule 18, the Hearing Officer specifically instructed all witnesses at the outset of the hearing that they were “. . . prohibited from discussing testimony, charged employe or conduct, any other conversations regarding the proceedings while sequestered.” The Hearing Officer then proceeded to sequester Mr. Lund and other witnesses reminding them again “not to discuss anything with each other or anyone else regarding the hearing today.” He specifically addressed Mr. Lund and another Carrier witness, Michael Brummer, “not to discuss anything with each other or anyone else regarding this hearing today.” The record indicates that following

Mr. Brummer's testimony and during a recess, the Hearing Officer had an off-the-record conversation with other Carrier witnesses and Mr. Lund, who had already begun testifying. While the Hearing Officer claimed the conversation with Lund had nothing to do with the investigation, he did not make any effort to support his assertion.

There is ample arbitral authority to conclude that once the investigation has commenced, private conversations between a hearing officer and a sequestered witness can prejudice the impartiality of the proceedings even where there may not be an impact to the outcome. See Third Division Award Nos. 42699, 44577, and 44614.

Faced with an objection pertaining to a hearing officer's conduct, more than a mere denial is required. Throughout the industry, it is customary for a hearing officer to be a Carrier official and, as part of those duties, it can become necessary to engage in other activities during the investigation. However, the hearing officer must also ensure that the integrity of the process not be tainted with the appearance of impropriety. It is worth noting that the Hearing Officer did not call witnesses to testify about what was discussed and therefore did not establish any reliable evidence in response to the Organization's objection.

Based on the foregoing, the charge shall be removed from the Claimant's record and shall be compensated with "actual wage loss" as provided for in Rule 18(f) of the Agreement. No other compensation is awarded.

The Board rejects the Carrier's reliance on past awards regarding the issue of offsets to outside earnings, which it claims should be imposed here. The awards address employees who were terminated and do not provide guidance on whether offsets are applicable to suspensions.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) 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.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 20th day of March 2026.