NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6082

Parties to Dispute:	)	
	)	
UNITED TRANSPORTATION UNION	)	**OPINION AND AWARD**
	)	
and	)	**Case No. 2**
	)	**Claimant John F. McAlpine**
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY CORPORATION	)	

EMPLOYEE'S STATEMENT OF CLAIM:

> **"Appeal discipline assessed Yardmaster John McAlpine on January 29, 1998 as a result of an investigation held on January 15, 1998 in Everett, Washington. This claim also demands that the claimant be paid for all lost wages as a result of time lost due to this investigation as well as full service record clearance."**

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

On December 12, 1997, when this dispute arose, Claimant held a Yardmaster position at Everett, WA, where he supervised a number of employees in the yard. According to Carrier, on that date he engaged in conduct it characterizes as "quarrelsome," "discourteous," "abusive" and "threatening." Following investigation and hearing on January 15, 1998, it assessed him a "Level S" conditional suspension on January 29, 1998 for violating General Code of Operating Rule 1.6 prohibiting quarrelsome and discourteous behavior. A timely Claim was submitted by the Organization, handled in regular fashion on the property and is now before the Board for consideration.

According to Carrier, on Friday evening, December 12, 1997, while clerk Ms. McNair attempted to respond to a telephone call from a crew caller in Carrier's headquarters, Claimant repeatedly yelled at both her and her caller, and ultimately "lunged at her, grabbing documents from her hand as he shouted at her." McNair testified that she was

intimidated by Claimant's actions: "Personally I felt fear. I mean I thought he was gonna come after me." Carrier's subsequent investigation of the incident included conversations with McNair, the trainmaster who took the initial complaint from her, and McNair's caller, but not Claimant himself because Carrier was concerned for what it considered his "propensity to react angrily to questions or criticism."

The Organization initially raises several procedural issues. It contends that Carrier failed to give Claimant a fair and impartial hearing by (i) introducing his personnel file into evidence at the hearing in violation of the rules; (ii) prejudging him by failing to even interview him prior to serving notice of investigation and hearing; (iii) further prejudging him by not listing McNair as a principal in the investigation; (iii) utilizing the same official who investigated the matter and issued the notice of investigation as a witness against him in the hearing; and (iv) basing its findings of guilt at least in part upon the testimony of McNair's caller, who was not made available at the hearing. [1]

On the merits, it would be understatement to say that the Carrier and the Organization do not share the same frame of reference. The Organization's position is that Claimant never raised his voice or made threatening movements toward his fellow employee. Instead, he simply directed clerk McNair to stop what she was doing, leave the Yard Office, pick up the crew on another job at one end of the Delta Yard and transport them to the other end to check out an air leak in a train blocking the main line, and return to her work. When Claimant looked in on her again a "ten or fifteen minutes later," he found that she had not yet moved and was on a personal phone call. When he reissued his instructions, the Organization says McNair became upset, uttered some "heated words," accused Claimant of harassment, and then left to pick up the other crew as ordered. In short, the Yardmaster asked the clerk to do a simple ten-minute run and got for his efforts in serving the Carrier efficiently an insubordinate response. After finishing his turnover, Claimant attempted to call Trainmaster Linda Braden to suggest that she speak with Ms. McNair, but failed to reach her and left a message on her voice mail to that effect before going home, knowing

[1] A further issue—whether Carrier's Hearing Officer had the right to base her determination of Claimant's guilt in part upon what she perceived as his argumentative behavior at the hearing—was raised in argument. While not

that Braden was scheduled to be on at 6:00 a.m. the following morning. Claimant was subsequently "shocked" when he received a notice of investigation concerning his actions without ever once having been approached by his supervisor for his version of events.

We turn first to the Organization's procedural objections. First, the Board rejects the Organization's argument that Carrier's failure to list McNair as a principal must be read as evidence of a wrongful prejudgment on its part. Carrier alone bears responsibility for making what it considers appropriate arrangements for conducting fair hearings and therefore must be accorded wide latitude in discharging its obligations. In our view that includes selection of whom it wishes to examine as primary subject of its inquiry. Here there is neither prejudice to Claimant nor illogic in naming McAlpine only, and not McNair, as principal. McNair was the complaining party--Claimant never made a formal complaint against McNair, although if his testimony at this hearing is credited, he had ample motive to do so. In sum, Claimant had a full and fair opportunity to cross-examine McNair and there is no basis in this record for concluding that failing to list her as a principal was error.

Nor do we find error in Carrier's using the same person who conducted the investigation to serve as witness against Claimant. Nothing in the rules has been pointed to that would prohibit such assignment of duties, nor has the Organization sponsored any compelling authority in opposition to the several prior awards Carrier cites for the proposition that such arrangements are common and not prejudicial.

The Organization's remaining procedural objections are more problematic. The Board has carefully reviewed this record and concludes that several aspects of the Carrier's case handling strongly connote an element of prejudgment on its part. While each, standing alone, appears less than overwhelming, we conclude that when taken in combination they deprived Claimant of impartial due process.

With respect to introducing Claimant's disciplinary history into the investigative record, Rule 22 § 4 (d) of the parties' Agreement states:

---

fully developed in this record the issue of the Hearing Officer taking cognizance of witness demeanor fits comfortably within the scope of her authority to make credibility determinations.

> "An employee's personal service record will not be introduced or referred to in the hearing or in the transcript of the proceeding of the hearing. Only evidence presented at the investigation and contained in the transcript will be used in determining guilt or innocence."

The record reveals that Hearing Officer Timberman, in asking Trainmaster Nies whether Claimant had received any prior training regarding his obligation to treat employees with respect, elicited a recitation of several previous incidents in which Claimant had been given coaching, counseling and in one instance discipline. Somewhat later in the proceedings, Timberman asked Nies why McAlpine had not been contacted prior to setting up the notice of investigation, and Nies replied with a generalized discussion of previous incidents in which Claimant had been "abusive, argumentative, and so forth" causing him to conclude he might become argumentative if asked in this instance for his version of events. We conclude that both references to Claimant's past history constituted technical violations of Rule 22 § 4 (d).

Standing alone, these references might easily be viewed as essentially constituting well-meaning background information for the hearing officer as much as any purposeful attempt to circumvent the rule. We fully credit Carrier when it says these disclosures did not serve as a basis for determining guilt, tempered by recognition that sophisticated parties do not usually cite the rapsheet in such circumstances when articulating findings. But more importantly, the disclosures do not stand alone.

It is undisputed that Carrier made no attempt to interview or take a written statement from Claimant prior to serving him with notice of investigation. Omitting discussion with the employee whose conduct is under the ball jar is obviously not fatal in all circumstances. It may be appropriate in a variety of contexts--for example where the subject has abandoned his job and is unavailable. But the only reason put forth here for not checking out McNair's story with Claimant before he was noticed for hearing was that he might get feisty if asked about the incident. To this Board, that seems a frail raft to cling to. As Justice Mitchell wrote a hundred years ago, he who has one man's story has no man's story. And not speaking with the employee under suspicion, while not ideal, also may be entirely benign when the totality of the remaining circumstances are blemish-free. That is not this case.

Accordingly, without respect to whether an interview or a written statement might have produced anything of substance to obviate a hearing and absent compelling circumstances, basic fairness demanded that he be contacted for his side of the story before being summoned before a Carrier official for examination and cross examination. If nothing else, a timely conference to obtain Claimant's side of the story would have enabled him to better focus on Carrier's concerns and assist with preparation of his responses at hearing. In our view, multiplying Carrier's prerogatives to include freedom from confrontation can mean a net subtraction from an employee's basic rights of self-defense.[2] Talking with everyone else and failing to even inquire of Claimant in this case raises pronounced suspicions that Carrier was strongly predisposed to find guilt.[3]

Our concerns gain vigor when we consider that Carrier not only did not interview Claimant, but it also did not summon the one and only witness to the crucial exchange, McNair's caller. Without input from the person who heard the argument between Claimant and McNair, it inevitably was left with a he-said, she-said kind of debate. Plainly, credibility determinations are within Carrier's province, and, as indicated, it must be afforded plenary discretion to conduct its investigation in its own manner, subject to minimal and extremely narrow limitations. Hence, it was clearly within its rights to not make McNair's caller available for the investigation. But it concerns the Board that a thoroughgoing fact finder would not want to hear from the only disinterested party to these events. The inexplicable selectivity of witnesses buttresses our finding that Claimant's rights were prejudged.

In summary, when Carrier foregoes a potentially critical witness; fails to consult the employee under suspicion before he receives notice; and discusses his personal service records at the hearing, our antennae are up and feeling about for a livelier understanding

---

[2] The Board does not intend to imply that Carrier was mistaken in its presurmise, which in fact turned out to be correct---when presented with notice of investigation, Claimant became angry and marked off sick for the day.

[3] Evidence of that mind-set can also be seen in the testimony of the Terminal Manager. The following colloquy between him and the Organization's representative concerned the question of why McNair's complaint was initially investigated and not Claimant's: "Q: I guess what I'm asking is, we had a situation here where two employees lodged a complaint about the other on the same evening, is that correct? A. That is correct...she did comply with the instructions, she did go get the crew. She just did not do it immediately as Mr. McAlpine

of fair play. We come away from our review of this record with the sense that Carrier prejudged the merits of the case in a way that denied Claimant a fair and impartial Investigation. These conclusions call for sustaining the claim.

In view of our findings, we do not reach the merits of the dispute. Accordingly, there should be no misunderstanding concerning the solely procedural basis for our conclusions. Claimant has in the past evidenced incivility to fellow workers, and, while triggered by his concern for Carrier's operational objectives, the same allegedly rough social behavior is at the heart of his troubles here. The notion conveyed by this record is that Claimant is clearly not someone you want to upset. He has slipped out of a tight spot in this instance, but if hard self-analysis does not follow, his problems will be before another Board in short order, perhaps with portentous ramifications for him.

AWARD

The Claim is sustained in accordance with the Findings.

James E. Conway
Chairman and Neutral Member

R. C. Arthur
Employee Member

Gene L. Shire
Company Member

---

demanded. Q. So, in other words you made a judgment as to the merits of both of these complaints, is that correct? A. That's correct."