

PUBLIC LAW BOARD NO. 6283

Case No. 1 Award No. 1

PARTIES TO DISPUTE

American Train Dispatchers Department
International Brotherhood of
Locomotive Engineers
and
Norfolk Southern Railway Company

STATEMENT OF CLAIM:

Claim on behalf of Piedmont Division Train Dispatcher C. H. Howard, requesting reinstatement and pay for time lost following his dismissal for conduct unbecoming an employee in connection with his unauthorized entry into a secured area in the Chief Dispatcher's Office, and the subsequent theft of Company-owned materials on the evenings of March 3, 4 and 7, 1999.

FINDINGS: An investigative hearing was held on April 16, 1999 to determine the Claimant's responsibility in connection with the charge that he entered a secured area of the Chief Dispatcher's office, Greenville, SC, on the evenings of March 3, 4 and 7, 1999, without having obtained proper authority to do so, and that he allegedly stole Company owned materials while there. The Claimant was subsequently found guilty of the charge and he was dismissed from the service on April 20, 1999. After unsuccessful efforts on the property to settle the matter, it was advanced to this Board for resolution.

The Carrier, in arriving at its findings of guilt to the charge, relied upon a videotape, set up because of prior thefts, taken by a surveillance camera that had been placed in the Chief Dispatcher's office. The Carrier submits that the videotape showed the Claimant in the Dispatcher's office and it contends that it showed him removing the Carrier's property. The Carrier points out that initially the Claimant denied that he had entered the secured areas. After he became aware of the videotape, the Claimant presented varying statements concerning his whereabouts on March 3, 4 and 7. Moreover, the Carrier points out that, after the videotape was shown at the hearing, the

Claimant again had varying accounts of his activities on the three (3) nights. Thus, the Carrier concluded that his explanations were inconsistent and lacked total credibility. Accordingly, given the proven offense, which is a very serious one, his dismissal from the service was not unduly harsh.

The Organization, for its part, contends that the proceedings were not conducted in a fair and impartial manner. In this respect, it notes that the Assistant Division Engineer, Brig A. Burgess ("Burgess") assessed the discipline on April 20, 1999. However, the transcript of the hearing was not available until April 28, 1999. Simply stated, the Organization maintains that determining guilt to a charge without a review of the hearing transcript "clearly demonstrates prejudgment of the Claimant by the Carrier" and, therefore, the claim should be sustained on that basis.

The Organization also asserts that the Carrier improperly included the Claimant's prior discipline record when it disciplined the Claimant. This issue arose because the Carrier, in Burgess' initial decision letter of April 20, 1999, made no mention that the Claimant's prior discipline record had been considered in arriving at the quantum of discipline. The Organization also asserts that Superintendent John L. Wagner ("Wagner") did not raise that issue when he denied the Organization's appeal. The issue was presented for the first time after the Organization advanced its appeal. The Carrier in its June 22, 1999 response to the appeal stated in part:

"The evidence adduced at the hearing fully substantiated his culpability in this matter; and the serious nature of the offenses, in conjunction with his prior disciplinary record, warrants Claimant's permanent dismissal."

In sum, with respect to this question, the Organization contends that the Carrier improperly reached a determination on the extent to which the Claimant should be disciplined.

The Board will not address the merits of this claim because we find that it must be sustained on due process grounds. We so hold mainly for the following reasons.

With respect to the issue of discipline being assessed prior to the review of the transcript, the Carrier maintains that the discipline letter of April 20, 1999 was written by Burgess, who also served as the hearing officer at the investigation. Therefore, he heard all of the testimony firsthand and had all the facts necessary to make a decision. In his role, he obviously heard and observed all of the witnesses as they testified and could determine their credibility prior to reading the transcript. Additionally, the Carrier has argued the Organization failed to show how a different decision would have been reached by Burgess if he had read the transcript before rendering his decision.

The Carrier's arguments rest on a premise that the Hearing Officer had a clear retentive memory and was able to remember what was relevant and what was not.

Certainly, the Board by its decision here, does not rule out the possibility that in some situations, when the Hearing Officer and the Deciding Official are one and the same, that a proper decision could be rendered before review of the hearing transcript. When this issue arises, each case must be decided on the merits of the record before the adjudicating body. Indeed, this Board is aware that there have been Awards in this industry where arbitrators have affirmed this practice. We also note that the three cited precedent cases before this Board have upheld, as we will here, the idea that the hearing transcript serves a vital role.

There are a number of reasons why parties require a stenographic record of arbitration hearings. The most obvious reason is that it provides a complete and accurate record. It frees the Hearing Officer the inconvenience and distraction related to note taking, and improves the Officer's ability to fully observe witnesses and other participants in the hearing. Of course, it provides the only factual source for reviewing the entire record before making a decision.

The Carrier, when it denied the Organization's contention with respect to Burgess' failure to read the transcript before he rendered his decision attempted to shift the burden to the Organization, stating

in part that "...you failed to state how a reading of the transcript would have allowed Assistant Superintendent Burgess to render a decision different from that outlined in his letter of April 20, 1999..."

The disciplinary proceeding is under the control and direction of the Carrier. The language of the Parties' Agreement, indeed a basic tenet of the management process, is the principle that the Carrier will deal with its employees in an impartial fashion in accordance with the commonly accepted standards of fairness. Here, the Organization challenges the Carrier on fairness grounds and when this occurs, the Carrier cannot shift its burden to the Organization. Indeed, the Burgess' decision letter of April 20th made no mention to what evidence he considered vital in his determination. The Board recognizes that he is not required to specifically state what elements he considered. However, it is unreasonable to ask the Organization to speculate on what factors Burgess considered when he arrived at his decision.

The case at hand resulted in a hearing transcript of ninety-two (92) pages. A number of complex substantive issues were raised during the hearing, some of which were crucial in reaching a final determination about the Claimant's guilt.

While this Board does not in any sense demean Burgess' ability to remember the testimony, given the nature of this case, it is highly unlikely that Burgess' memory was so good that he could weigh all the relevant testimony, facts and exhibits in the manner contemplated by the notion of a fair and impartial process. See, among others: First Division Awards No. 25043, Referee Dennis; No. 24874, Referee Wesman; No. 24935, Referee LaRocco and PLB No. 6040, Award No. 13, Referee Eischen. These Awards affirm our position on the key procedural issue in this case.

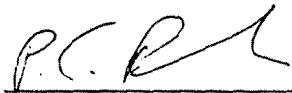
In summary, while we have fully considered the arguments presented in the Carrier's submission as well as its strong advocacy before this Board, given the nature of this case and the issues presented, a review of the complete record was required. The hearing transcript is crucial to this review to establish a conclusion that there was substantial evidence to support the discipline assessed.

In conclusion, the Deciding Official erred because he rendered a decision before he had the written record of the investigation before him. His actions deprived the Claimant of due process.

With respect to the remedy, the Claimant has been granted a disability annuity by the Railroad Retirement Board, effective March 8, 1999. Accordingly, the question of reinstatement and back pay are moot. However, the Board directs that whatever records there may be with respect to this case be purged from the Carrier's (and the Organization's) archives.

AWARD

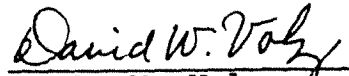
As specified in the Findings.



P. G. Piserchia
Carrier Member



Eckehard Muessig
Neutral Member



D. M. Volz
Organization Member

Dated: 2-21-2000