

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 109
)
) Award No. 104
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: June 4, 2007

STATEMENT OF CLAIM:

1. The discipline (withheld from service by letter dated July 7, 2005 and subsequent dismissal by letter dated August 12, 2005) imposed upon Mr. L. Sanchez on charges of alleged violation of General Code of Operating Rules 1.9 - Respect of Railroad Property and 1.6(5)(7) - Conduct and Company Policy Regarding Equal Opportunity/Affirmative Action, effective December 5, 2000 and revised May 1, 2005, in connection with alleged discourteous and offensive behavior to a Motel owner on June 20, 2005 at or near Tabernash, Colorado, was unwarranted, on the basis of unproven charges and in violation of the Agreement (System File D-05-15D/1437302).
2. As a consequence of the violation referred to in Part (1) above, Mr. L. Sanchez shall now have the aforesaid discipline cleared from his record and he shall be reinstated to service on his former position and compensated for all wage loss beginning July 7, 2005 and continuing.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

By letter dated July 7, 2005, Carrier notified Claimant to appear for an investigation on July 27, 2005. The notice alleged that Claimant was discourteous and may have demonstrated offensive behavior of a sexual nature to a motel owner on June 20, 2005. The hearing was held

as scheduled. On August 12, 2005, Claimant was notified that he had been found guilty of the charges and dismissed from service.

The Organization contends that Carrier violated Rule 48(a) because it failed to accord Claimant a fair and impartial hearing. In particular, the Organization observes that the Notice of Discipline was issued on August 12, 2005, but the transcript of the investigation was not prepared until August 15, 2005. Consequently, in the Organization's view, the finding of guilt could not have been based on the record developed because the deciding officer did not have the record. The Organization cites a number of awards involving operating crafts in support of its position.

Initially, we note that the deciding officer who issued the Notice of Discipline was also the hearing officer in the investigation. Thus, the issue raised by the Organization is whether Carrier denies an employee the due process required for a fair hearing where the hearing officer does not wait for the transcript of the hearing before making his findings and imposing discipline.

Two of the Awards cited by the Organization are not on point at all. In NRAB First Division Award No. 26078, the Notice of Discipline referenced a different Notice of Investigation than the one served on the claimant and a different hearing than the one accorded the claimant. Additionally, although the discipline notice was issued under the superintendent's name, it was signed for the superintendent and mailed by an employee of the transcription service that transcribed the tape of the hearing. There is no indication in the Award as to whether the discipline notice was sent before the transcript was prepared. What was crucial was the evidence that the decision to discipline was not based on the record developed at the claimant's investigation. In First Division Award No. 24935, due to a malfunction of the tape recorder, a substantial portion of the investigation was not recorded, resulting in a significantly incomplete transcript. Nevertheless, the hearing officer found the claimant guilty and imposed discipline. Thereafter, the hearing officer purported to reconvene the hearing and recalled the claimant and another witness whose testimony had not been recorded due to the malfunction. The Board held that Carrier violated the claimant's due process rights. The Board rejected Carrier's argument that the hearing officer could act with an incomplete transcript because he had been present for all witness testimony, reasoning, "If true, there would be no reason to reconvene the hearing. Rather, the Carrier disingenuously completed the Hearing transcript in an attempt to validate the discipline it had already imposed."

In NRAB First Division Award No. 25987, the Board held that Carrier violated the claimant's due process rights when it refused to show the date that the transcript was prepared. The Board reasoned that by withholding the date the transcript was prepared, Carrier was withholding evidence crucial to determining whether the decision was based on the evidence developed at the investigation, The Board explained:

[T]here are numerous on-property Awards which have held that the Carrier has an Agreement obligation to assess discipline based on the evidence contained within the

record. The rendering of a decision without the advantage of the transcript constitutes prejudgment and failure to provide a fair and impartial investigation.

That principle is particularly applicable when the Hearing Officer does not render the decision. Where, as in this case, the discipline was assessed by the Superintendent, the transcript of the Investigation obviously becomes critical in determining whether discipline was warranted. The Superintendent did not hear and observe the witnesses as they testified, and thus a proper decision would have to be predicated on review of the Hearing transcript.

We agree with First Division Award No. 25987. Where a Carrier officer other than the hearing officer assesses discipline and does so before the transcript is completed, it is impossible for the decision to have been based on the evidence developed in the investigation. The conclusion that the decision to impose discipline was not based on the evidence developed at the hearing does not automatically follow where the hearing officer is the Carrier official who assesses discipline even though he does so before the transcript is prepared.

Two of the awards cited by the Organization do sustain claims because discipline was imposed before the transcript was prepared, even though the hearing officer was the Carrier official who assessed discipline. First Division Award No. 25043 and PLB 6040, Award No. 13. PLB 6040 expressly rejected Carriers argument "that it was appropriate or fair for the Hearing Officer to determine culpability and assess discipline in reliance on his personal notes and recollections of the investigation rather than the official certified transcript of the proceedings."

We do not find First Division Award No. 25043 or PLB 6040 Award No. 13 controlling in the instant case. The discipline imposed in the instant case resulted from allegations that Claimant had sexually assaulted the co-owner of the motel where he was staying while on Carrier business. The motel co-owner testified that she had a brief conversation with Claimant concerning earlier problems with water pressure and cable television and proceeded to the laundry room. According to the co-owner, Claimant followed her to the laundry room speaking to her and when she turned around he was right in front of her, he grabbed her breast and pinched it. Claimant, on the other hand testified to having a brief conversation with the co-owner but denied following her to the laundry room and denied any physical contact with the co-owner. There were no other witnesses to the incident.

Claimant's culpability thus turned entirely on whether his testimony or that of the co-owner was considered to be more credible. This was not a case where differences in credibility might be resolved based on differences in perception, recall, or other honest mistakes. One of the two witnesses had to be fabricating his or her testimony. Countless awards have recognized that credibility assessment in such circumstances is superior when based on observation of the witnesses rather than a cold transcript. Consequently, Boards that act in an appellate capacity routinely defer to credibility determinations made on the property. Similarly, in cases where culpability turns on witness credibility, Boards have held that Carrier denies the employee a fair investigation where the assessment of culpability is made by someone other than the hearing

officer. Because the hearing officer's observation of the witnesses is crucial to a fair determination of credibility and because the assessment of Claimant's culpability turned entirely on witness credibility, we cannot say that in the instant case, the hearing officer's assessment of discipline without benefit of the cold transcript demonstrated prejudgment or otherwise deprived Claimant of a fair investigation.

The Organization argues that Carrier violated the Agreement because it did not provide a copy of the transcript until a month after discipline was imposed. Rule 48(e) requires that a decision be rendered within twenty days following the conclusion of the hearing. There is no dispute that Carrier complied with Rule 48(e). Rule 48(f) provides, "A copy of the transcript of the hearing will be promptly furnished the employee charged, his representative(s) and the General Chairman." The Organization argues that waiting until a month after discipline is imposed in not promptly furnishing the transcript. In on-property Third Division Award No. 29584, the Board reasoned that the purpose of Rule 48(f) is to enable the Organization to decide whether to appeal the discipline and to prepare the appeal if it decides to take action. The Board held that Carrier violated Rule 48(f) when it delayed furnishing the transcript until after the time limits for filing an appeal had expired. However, because Carrier offered the Organization additional time for filing the appeal, the Board held that the violation did not prejudice the claimant's rights and did not provide a basis for upsetting the discipline. In the instant case, Carrier furnished the transcript while there was considerable time remaining for filing an appeal and there is no showing by the Organization that Claimant's right to file an appeal was in any way prejudiced by the delay. Accordingly, Rule 48(f) provides no basis for overturning the discipline in the case before us.

As discussed above, proof of the charges turned entirely on the relative credibility of Claimant and the motel co-owner. The hearing officer credited the co-owner and we defer to that determination. We add our own observations that the co-owner's testimony was corroborated by her reporting the incident to her husband, the other co-owner, immediately after it happened and their calling the police immediately thereafter. Furthermore, there was no evidence of any motive to fabricate on the part of the co-owner or of any other reason to believe that the co-owner was lying or honestly mistaken about the incident. We conclude that Carrier proved the charges by substantial evidence.

We recognize that Claimant 24 years of service and an excellent work record. However, sexual assault is far too serious an offense to warrant a second chance even by one with such lengthy and exemplary service. Given the gravity of the offense, we cannot say that dismissal was arbitrary, capricious or excessive.

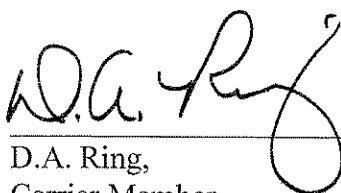
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AWARD

Claim denied.

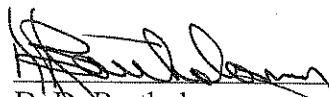


Martin H. Malin, Chairman



D.A. Ring,
Carrier Member

Aug 20, 2007



D. D. Bartholomay,
Employee Member 8-20-07

Dated at Chicago, Illinois, July 26, 2007