

PUBLIC LAW BOARD NO. 5564

Case No. /Award No. 120
Carrier File No.: 8-2021-20
Organization File No.: DM-2132-METRA-103
Claimant: M. Haynes

NORTHEAST ILLINOIS REGIONAL)
COMMUTER RAILROAD CORPORATION)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION - IBT)
RAIL CONFERENCE)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier’s discipline [time served suspension from June 4 through June 30, 2021 with a thirty-six (36) month review period] of Mr. M. Haynes, by letter dated July 1, 2021, for alleged violation of Employee Conduct Rule ‘N’ Item D ‘Dishonest’ was arbitrary, unwarranted, without the Carrier having met its burden of proof and in violation of the Agreement (System File DM-2132-Metra-103/8-2021-20 NRC).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant M. Haynes shall now have all charges dropped, be made whole for all wage loss and be provided all protections and remedies provided for under the Agreement.”**

FACTS:

Manager of Medical Services N. Lang reported that she called employee J. Gardner on Friday May 28, 2021, to ask him questions regarding his recent Covid-19 diagnosis. Gardner had been diagnosed and hospitalized the day before. According to Lang, Gardner told her he had a call from Claimant Haynes. Before answering

Claimant's call, Gardner allegedly told Lang that Claimant had requested Gardner to identify him as close contact, so that Claimant could receive a paid, excused absence for quarantine. Lang also reported that Gardner said he did not consider Claimant Haynes to have been a close contact.

Claimant was subsequently charged with dishonesty. The Organization contested the charge, leading to the instant proceeding. It alleges there was a denial of due process and cites the following provisions of the parties' Agreement:

RULE 32. HEARINGS - DISCIPLINE AND UNJUST TREATMENT.

(a) An employee who has been in the service sixty (60) calendar days or more will not be disciplined or dismissed without a proper hearing as provided for in paragraph (d), below, unless such employee shall waive formal hearing and accept discipline in writing (sample waiver form on the next page) witnessed by his representative. Suspension from service pending charges and hearing is permissible in major offenses.

(b) Whenever charges are preferred against an employee, they will be filed in writing within ten (10) days from the date the Carrier has knowledge of the alleged offense, with copy to the General Chairman. Such notice shall specify the specific charges against the employee.

* * *

(d) An employee against whom charges are preferred, or who may consider himself unjustly treated, shall be granted a fair and impartial hearing by a designated official of the Carrier which shall take place within ten (10) days after notice is served, either under paragraph (b) or paragraph (c), above. A charged employee shall be given reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented by the duly-accredited representatives of the employees. All witnesses except the one testifying will be excluded from the hearing both before and after testifying. Only evidence and statements bearing directly upon the specific charges against the employee which have been subject to cross examination will be used in assessing discipline against the employee. A decision in writing will be rendered within twenty (20) days from the close of the hearing. A copy of the transcript of evidence taken at the hearing, and a copy of the decision, will be furnished (sic) the employee affected and his duly-accredited representative.

(e) If the decision rendered is in favor of the employee, his record shall be cleared of the charge, and if suspended or dismissed, he will be

reinstated to his former position with seniority unimpaired and shall be compensated in the amount he would have earned had he continued in the service, less the amount earned in other employment. (f) If the decision is not satisfactory, the employee shall have the right of appeal in the usual manner up to and including the highest official designated by the Carrier to whom appeals may be made as provided in Rule 33. If the charge against the employee is sustained and he is dismissed and later reinstated, the manner of his exercising his seniority will be subject to agreement between the General Chairman and the Carrier.

CARRIER POSITION:

The Carrier disputes any denial of due process during the Investigation, and points out that the Hearing Officer was simply doing a ministerial task in admitting evidence.

In its view, there is no question that Gardner communicated that he had some sort of interaction with Claimant on May 27 and May 28. Yet, Claimant has denied any exchange with Gardner. Claimant's statements cannot be reconciled with Gardner's, placing the issue of credibility into question. As the Carrier sees it, Lang has no motive to be dishonest, while Claimant does. Insofar as this case revolves around a credibility decision, the Carrier argues the Board must defer to the Hearing Officer's determination of what testimony to believe.

ORGANIZATION POSITION:

The Organization asserts that the official assessing discipline and the investigating officer were one in the same: Senior Director, Engineering L. Powell. In this regard, it is important to emphasize that Manager Lang e-mailed Mr. Powell on May 29, 2021 providing details concerning Claimant's alleged dishonest act of claiming to be a close contact of Gardner. Nevertheless, rather than the Carrier provide a charging officer at the Claimant's Investigation, it allowed Hearing Officer Sorenson to hold multiple roles during Claimant's hearing: he entered exhibits and progressed the charge against Claimant. He had *ex parte* communication with witnesses and despite mandatory sequestration of witnesses, had Lang's statement read into the record over the Organization's objections. The Carrier's merging of prosecutorial and judgmental roles deprived Claimant of fair and impartial hearing and violated the Agreement.

In the Organization's assessment, there is no evidence that Claimant contacted or spoke with Gardner on May 28, 2021 prior to Gardner speaking with Lang.

Claimant directly asserted that he never had a conversation with Gardner for the purpose of identifying him as a close contact, and Gardner directly asserts that he never had a conversation with the Claimant on May 28, 2021 regarding close COVID-19 contact. The only conversation between Claimant and Gardner regarding COVID-19 was of a joking nature originating from a sneeze on May 27, 2021.

Gardner directly testified that Lang's statements regarding his alleged presumptions were inaccurate and false. Lang did not speak with Claimant and there is no evidence Claimant ever told the Carrier that he was a close contact of Gardner.

The Carrier's entire case is based on what Gardner allegedly said to Lang regarding a phone conversation he was going to, but had not yet had with Claimant on May 28, 2021. Significantly, both Gardner and Claimant unequivocally deny Lang's account of events. Further, in the Organization's assessment, Hearing Officer Sorenson made no credibility determination regarding conflicting testimony.

DECISION:

We find impropriety in Sorensen's request for Gardner to read Lang's memo into the record prior to testifying. Rule 32 specifically provides: "All witnesses except the one testifying will be excluded from the hearing both before and after testifying." This language is mandatory. Though Hearing Officer Sorenson complied with the physical aspect of keeping witnesses apart, he openly defied the mandate that witnesses be excluded unless testifying. Reading Lang's statement into the record ignored this requirement and violated the Rule 32(d) intent that witnesses not be exposed to the statements of other witnesses. Equally concerning was the Hearing Officer's communication with witnesses for the Investigation. The appearance of impropriety in conferring with witnesses is such that a fair and impartial hearing is rendered impossible.

AWARD:

The claim is sustained in full. The Carrier shall immediately remove the discipline from Claimant's record, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident.

ORDER:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

July 13, 2023



Patricia T. Bittel, Neutral Member



John Schlismann, Employee Member



I Dissent

Sylwia Dutka, Carrier Member