CARRIER FILE NO. 1025502
ORGANIZATION FILE NO. 96050

PUBLIC LAW BOARD NO. 5719

PARTIES TO DISPUTE:

UNION PACIFIC RAILROAD COMPANY)
(WESTERN REGION))
) NMB CASE NO. 40
VS) AWARD NO. 40
)
BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

STATEMENT OF CLAIM:

Request reinstatement of Seattle Student Engineer V. J. Christianson with expungement of Level 5 Discipline assessed by letter of October 2, 1996, and for pay for any and all time lost with all seniority and vacation rights unimpaired following investigation and hearing held in Seattle, Washington on September 19 and 20, 1996.

FINDINGS AND OPINION

The Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. This Board has jurisdiction of the dispute here involved.

The parties to this dispute were given due notice of hearing thereon.

Claimant in this case was a Student Engineer undergoing training at Salt Lake City, Utah, when he was notified to report for formal investigation on a charge that:

> "**** on or about August 13, 1996, while employed as Student Engineer, you allegedly acted inappropriately towards Danielle Gonder, an employee of the Reston Hotel located in Salt Lake City, Utah ***."

The Organization has raised a serious procedural question in its presentation of the dispute to this Board, and that issue is that the Organization believes claimant was denied the right to a fair and impartial hearing as guaranteed by Article 38 of the governing agreement. Article 38 reads in part as follows:

> "Sec. 2 Discharge, Hearing and Decision:
> A fireman or hostler will not be discharged without a thorough investigation and a fair and impartial hearing.

"Sec. 5 Representation at Hearing: The fireman or hostler accused may have a representative of his choice present at a hearing to assist him in presenting his case. The accused and his representative may remain throughout the entire hearing, hear the testimony of all witnesses and interrogate them, if desired. In case of conflicting testimony, witnesses giving same will be brought together."

It is the position of the Organization that Section 5, when there is a conflict in testimony, means that the witnesses will be brought together face-to-face. In this particular case the accusing witness, Ms. Gonder, was not present at the investigation but was questioned over the telephone. The Organization contends that since Ms. Gonder was not present, i.e., not "brought together" with claimant at the investigation, claimant was therefore denied the fair and impartial hearing provided for in Article 38.

It is Carrier's position that Article 38, Section 5, merely provides that the witnesses will be brought together and that the rule is silent with respect to the manner in which they are to be brought together. Carrier argues that in this particular instance the witnesses were brought together by virtue of the use of a telephone. It points to the fact that the complaining witness was not an employee of the railroad and there was no way the railroad could subpoena her and force her to attend the investigation.

The Board must note here that despite the language contained in Section 5 of Article 38, and the fact there was conflict in the testimony of the complaining witness and claimant, the record before us fails to reveal that Carrier made any effort to contact Ms. Gonder in order to have her physically present at the investigation, electing instead to ignore the language in Section 5 by solely relying on the telephone presentation. In matters of this nature, which Carrier considered serious enough to warrant dismissal from service, it is the opinion of this Board that Carrier was required to make every effort to comply with the literal language of the rule which provides that where there is conflicting testimony "witnesses giving same will be brought together." Rather than merely rely on telephone testimony, such as here involved, the rule at a minimum required Carrier to make a serious effort to have the accusing party available at the investigation. If such effort failed to produce the witness, then resort to telephone testimony could be considered as an alternative.

The question before this Board is whether or not Carrier's failure to produce Ms. Gonder at the investigation can be considered sufficient to rule that claimant was denied his right to a fair and impartial hearing.

It is the opinion of this Board that in phrasing the language of Article 38, Section 5, the parties certainly intended that there be a confrontation between witnesses giving conflicting testimony, and, in the case of witnesses under Carrier's control, the rule must be read in such fashion to provide face-to-face confrontation. In those instances, such as here involved, where a witness is not under Carrier's control and Carrier lacks the wherewithal to force such witness to attend, then an alternate confrontation, such as via telephone testimony, appears to be a logical solution if justice is to be served.

In view of the circumstances in this particular case the Board will rule that the telephone confrontation between claimant and Hotel employee Danielle Gonder was within the parameters of the language of Section 5 of Article 38 and we will deny the Organization's procedural argument that Carrier's failure to physically produce Ms. Gonder at the investigation denied claimant his right to a fair and impartial hearing.

The record is clear that in her telephone testimony Ms. Gonder clearly set forth her complaint about what occurred in the hotel lobby on the date in question. Ms. Gonder was thoroughly cross-examined by claimant's representatives. The record is also clear that even though he had the opportunity to do so, claimant at no time sought to inform Ms. Gonder that her accusation was totally false or that the incident as she reported it did not actually occur. In fact, the record is clear (Tr. Page 125) that when claimant was asked if he had any questions for Ms. Gonder he shook his head in the negative. This Board is then left to wonder why claimant made no effort to defend himself against the accusation made by Ms. Gonder. We have here a situation where claimant, through his Organization, is contending he was denied the right to a face-to-face encounter with his accuser yet he declined his right to question her when given the opportunity.

Based on a close review of the complete record before us, it is the conclusion of this Board that there was an incident which occurred in the lobby of the Reston Hotel and there is a strong inference that claimant was involved. Claimant's failure to react to Ms. Gonder's testimony, when given the opportunity to do so, does not reflect in his favor. The Board, however, does not believe the decision to dismiss claimant from service was warranted. Dismissal from service, the ultimate penalty, should only be imposed upon presentation of clear, concise and substantial evidence. All that we really have before us is a complaint by Ms. Gonder that the incident occurred and a denial from claimant that his actions that evening were inappropriate.

Under the circumstances it is our decision that the action to dismiss claimant from service cannot be upheld. At the same time there is evidence that an incident did occur and that claimant was somehow involved; therefore, we do not believe claimant should be rewarded for such involvement.

It is therefore the decision of this Board that claimant be returned to active service with all rights unimpaired but without pay for time lost.

AWARD

Claim disposed of as set forth in the above opinion. Carrier is instructed to comply with this award within 30 days of the date hereof.

F. T. Lynch, Neutral Chairman

D. J. Gonzales, Carrier Member

J. L. McCoy, Organization Member

Award date 4-29-97

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PUBLIC LAW BOARD NO. 5719

INTERPRETATION OF AWARD NO. 40

Award No. 40 of PLB No. 5719 was signed by the Board on April 29, 1997. Under date of June 3, 1997, the Organization petitioned the Board for an Interpretation as follows:

> "Reference Award No. 40 of Public Law Board 5719 wherein you reinstated Engineer V. J. Christianson without back pay.
>
> "It has come to this Organization's attention the Carrier is reinstating Student Engineer V. J. Christianson back to service with a Level 4 of the UPGRADE Discipline Policy. It is the position of this Organization, after reviewing your award that Student Engineer Christianson should be returned to service at the level he was at previous to this incident.
>
> "In talking with Mr. Gonzales this date, he stated that since Award No. 40 reinstated Engineer Christianson without back pay, it was the Carrier's policy that they would be returned to service at a Level 4. The Organization strongly disagrees with this position and therefore, it is our request that you give a formal interpretation of your award as to whether or not, Engineer V. J. Christianson should be returned to service at the level he previously was before the incident in question that was handled by Case No. 40 of Public Law Board 5719. Please advise."

This request for an interpretation was made in accordance with the provisions of Section 7 of the agreement establishing this Public Law Board, such section reading in part:

> "In case a dispute arises involving an intepretation of an award while the Board is in existence or upon recall within sixty (60) days thereafter, the Board, upon request of either party, shall interpret the award in light of the dispute."

Carrier was offered the opportunity to reply to the Organization's request and it was subsequently agreed the matter would be discussed in an Executive Session of the Board. For various reasons the Board did not meet in Executive Session until December 18, 1997, at which time, having been unable to resolve the dispute, Carrier was granted the opportunity to submit a written reply which was received on February 20, 1998. The Organization replied thereto under date of March 6, 1998.

It is the position of the Organization that when claimant was restored to service by virtue of Award No. 40, his discipline record should have returned to the level in effect prior to the incident involved; that is, Level 0.

Carrier has argued that prior to a 1998 modification of the UPGRADE Discipline Policy it had been the practice to view a commutation from dismissal to time served as reducing the employee's Level 5 discipline status to a Level 4. The 1998 modification of the UPGRADE Discipline Policy now provides that such a Level 5 will be reduced to Level 3, unless the employee's prior status was at Level 4.

We will note for the record that the practice to which Carrier alludes was not reduced to writing and was not made a part of the UPGRADE Discipline Policy distributed to the employees prior to the 1998 modification; i.e., while it may have been a practice, it was a practice known only to Carrier--it was not a practice of which the employees or their representatives were aware.

In its written reply to the Organization's request for an Interpretation of Award No. 40 Carrier has taken the position that it "correctly reduced the Level 5 to a Level 4 consistent with its application of the UPGRADE Discipline Policy as it existed at that time. Therefore, the claimant's Level 4 status is not a matter that falls within the Board's jurisdiction in Executive Session."

The Board does not agree with this Carrier assessment in that the dispute concerning claimant was submitted to the Board by agreement between the Carrier and the Organization; therefore, when the adopted award did not address the question of Level of discipline, the Organization was certainly within its rights to seek an interpretation. The question concerning which Level of discipline would remain on claimant's record was neither discussed nor referred to when the dispute was originally presented.

When the decision was made to return claimant to active service without pay for time lost, the Organization believed his discipline Level would revert to that in effect prior to the incident. Carrier instead applied the alleged practice and reduced claimant's discipline from Level 5 to Level 4.

It is the ruling of this Board that the issue of a proper discipline record for this claimant, following his restoration to active service is an issue that is properly before the Board and is an issue which must be resolved.

Claimant Christianson was dismissed from service by letter dated October 2, 1996, and he was restored to service following adoption of Award No. 40 on April 29, 1997, therefore, he was out

of service for an appreciable amount of time as a result of the incident for which he was charged. Inasmuch as this Board believed claimant was somehow involved in the incident, it was the decision to not grant him any pay for time lost. That being the case, we cannot agree with the Organization's position that his discipline level should have reverted to Level 0. His discipline record must reflect a proper level if claimant is to be afforded the opportunity to learn from his mistake and guard against future detrimental actions.

At the same time the Board does not agree that Carrier acted properly in merely reducing the Level 5 to a Level 4 based on an alleged practice which had not been made known or available to the employees.

A proper disposition of this issue would be to return claimant to service at Discipline Level 3 without prejudice to the UPGRADE Discipline Policy as it existed prior to the 1998 modifications, and it is so ordered. Carrier will make the necessary correction in claimant's discipline record.

F. T. Lynch

F. T. Lynch, Chairman and Neutral Member

Date of Interpretation April 9, 1998