

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 196, (Case No. 196)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

VS

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David R. Scoville, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing March 5, 2015, when Claimant, Stephen Cartrette (0155465) was disciplined, following investigation held in Saginaw, Texas, with a Level S 30-Day Record Suspension with a 3-year review period for his conduct and falsifying statements on March 5, 2015 as it related to his request for a promotion by email. The Carrier alleged violation of Maintenance of Way Operating Rule (MWOR) 1.6 Conduct and MWOR 1.13 Reporting and Complying with Instructions.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant’s record this discipline and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing March 5, 2015, continuing forward and/or otherwise made whole.”**
(Carrier File No. 14-15-0224) (Organization File No. 90-SF13C5-155)

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within all 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 have participated in accordance to the Agreement that established the Board.

The facts indicate that the Claimant held a Welder’s position on the headquarter truck out of Krum, Texas. It was alleged that on March 5, 2015, the Claimant misrepresented his qualifications for promotion to the position of Foreman and because of that allegation the

Claimant was directed to attend a formal Investigation on March 19, 2015, which was mutually postponed until March 24, 2015, concerning in pertinent part the following charge:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged conduct and falsifying statements on March 5, 2015 as it relates to your request for a promotion by email.

This investigation will determine possible violation of MWOR 1.6 Conduct and MWOR 1.13 Reporting and Complying with Instructions.”

On April 22, 2015, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30-Day Record Suspension with a Three Year Review Period.

It is the Organization’s position that the Claimant was denied a “fair and impartial” Investigation for various reasons that included the Hearing Officer improperly gathering evidence prior to the Investigation and entering that evidence into the record and acting as a witness, therefore, improperly holding multiple roles during the Hearing. It further suggested that Carrier Witness, C. D. Vega improperly controlled the Hearing and conduct of the Hearing Officer which was shown by his opening statement on page 6 of the transcript, his request for an immediate recess while testifying that was granted by the Hearing Officer despite the Hearing Officer’s earlier statement that “no recesses would be granted during testimony” followed by a closed door meeting with the Hearing Officer who was his subordinate. It asks that based upon those alleged procedural errors the discipline be removed without reviewing the merits.

Turning to the merits, the Organization argued the record shows that the Hearing Officer specifically asked the Claimant if he was being insubordinate by sending the subject email and requesting a promotion and the Claimant replied no, because he was never told that he could not request a promotion and he made his request in accordance with Rule 8(a) of the Agreement. It further argued the Claimant never stated that Roadmasters Vega and Knapp had promoted him, but only stated that both had verbally told him they were okay with him relieving the Foreman’s position. Additionally, it asserted that if Mr. Vega had not been willing for the Claimant to be promoted or was opposed to his promotion it would not make sense that Mr. Vega would send out an email to other Carrier Officers seeking their input about possible promotion of the Claimant. The Organization concluded that the Carrier had not met its burden of proof and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the Claimant was not denied a "fair and impartial" Investigation. It argued that contrary to the Organization's assertion there is nothing in the Agreement that prohibits a Hearing Officer from gathering relevant information and/or evidence prior to a formal Investigation in an effort to develop all of the facts and provide a "fair" Hearing, as was done in this instance. It further argued the record shows that there was nothing improper about the Hearing Officer having a conversation during the Hearing with a Carrier Witness behind closed doors because that conversation had nothing to do with the Investigation which was evident by the fact that all evidence was left in the Hearing Room and was not tampered with. Lastly, it argued that even if the Organization had any contractual support for its procedural arguments, which it did not, the Organization still failed to show that the alleged errors impaired or prejudiced the Organization in the presentation of its case. It requested that the case be resolved on its merits.

Turning to the record the Carrier argued the facts substantiate that the Claimant stated he received verbal approval for a promotion from Roadmasters Knapp and Vega both of whom denied giving such approval. It argued there is evidence via email and text message stating the promotion was not approved. It asserted that after receiving the aforementioned information, the Claimant then sent an email, which Mr. Vega and Mr. Knapp were not included on, stating approval was received. It suggested that the email sent by Claimant was a clear attempt to deceive and distort the truth in order to obtain a promotion that was not approved. Lastly, it asserted the record is clear that the Claimant was guilty as charged and the discipline was appropriate and it asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. The Carrier is correct that there is nothing in the Agreement that prohibits a Hearing Officer from doing pre-investigative work prior to a formal Investigation including gather relevant information and/or exhibits. There is no proof in this case that the Hearing Officer held multiple roles of Witness/Hearing Officer or that she actually crossed the line by testifying against the Claimant while conducting the Investigation. The Organization next argued that Carrier Witness Vega improperly exercised control over the Hearing Officer which was evident by his behavior during the Hearing and Vega's decision to call the Hearing Officer into a closed door meeting while the Investigation was in a recess.

Turning to the record the transcript reveals that on page 3 the Hearing Officer explained the operational Rules of the Investigation in pertinent part as follows:

"...Reasonable recesses will be granted upon request except during testimony...."
(Underlining Board's emphasis)

Beginning on page 6 of the transcript Witness Vega after giving his job resume immediately stated the following:

"...Um, today, I will be acting as a, a witness. Um, and I guess we can get started with the, with a statement. Can I see the copy of the original notification please? And then a co- also, if I may see a copy of the text message, uh, log."

The statement above reflects a witness that appears to be directing the Hearing Officer as to the presentation of the case against the Claimant. On page 14 of the transcript while there was a discussion between the Hearing Officer and the Organization Representative over the introduction of evidence Witness Vega interrupted the proceeding and requested a recess on the basis he needed to use the restroom. That request was honored and shortly, thereafter, the Hearing Officer entered Witness Vega's office for a closed door meeting. When the Hearing Officer reopened the Investigation she was challenged by the Organization as to what transpired during that meeting wherein the Hearing Officer on pages 15 and 16 of the transcript stated that she and Mr. Vega had discussed her future relief job assignments and nothing pertaining to the Claimant's Hearing.

On pages 16 and 17 of the transcript the Hearing Officer acknowledged that Tiffaney L. Johnson from the Texas Division Administration Office had forwarded her emails from Roadmasters Vega and Knapp dated March 5, 2015, regarding the Claimant's alleged behavior. In the 3:32 p.m. email of that same date Roadmaster Vega determined that the Claimant had lied and he wrote the following:

"...We need to put him up for Investigation for conduct due to his lying."

At 3:42 p.m., March 5th Mr. Vega sent instructions to Ms. T. L. Johnson wherein he stated:

"Please set up and investigation on Mr. Cartrette for conduct and lying. I'll be a witness."

The emails from the aforementioned Carrier Officers added some light for the Hearing Officer about the Claimant's alleged behavior and it also gave her some insight as to the opinion of her Superiors' feelings over that alleged behavior.

On page 17 of the transcript while questioning Mr. Vega the Hearing Officer again accepted a request from Mr. Vega for a recess so that Mr. Vega could make copies of the March 5, 2015, original emails and comments by Mr. Knapp and Mr. Vega regarding the Claimant. The Organization again objected to the recess on the basis that the Hearing Officer had said there would be no recesses during the testimony of witnesses. The Organization inferred that perhaps

during the closed door meeting between the Hearing Officer and Mr. Vega that it may have been suggested to the Hearing Officer that she ask for additional evidence because then Mr. Vega could offer the original emails that did not include the Hearing Officer's name (See page 18 of the transcript).

The Board has no way of knowing what was said behind closed doors. The discussion held behind closed doors while the Investigation, was in recess, between active participants of that Hearing was ill-advised and leaves the question of fairness open to debate and taints the proceedings. There is no proof that anything improper was said between the Hearing Officer and Roadmaster Vega during their closed door meeting, however, the request for additional evidence shortly after the Hearing was re-opened and the allowance for another request for recess to make copies of the emails without the Hearing Officer's name on them suggests that the Organization's argument is not without some merit. It is clear that when the March 5, 2015, emails were originally sent the Hearing Officer was not copied and it is equally clear that on the following day she was provided the same emails that included her Superiors' opinions about the Claimant's actions.

The Carrier has a responsibility to provide employees scheduled for a formal Investigation to a "fair and impartial" Hearing wherein the Hearing Officer is an unbiased "trier of facts". The Board is not convinced in this instance that the Claimant was provided a "fair and impartial" Hearing and on that basis the discipline is subject to being set aside.

Additionally, the Board has further determined that the Organization made a strong argument in behalf of the Claimant, that being that it is difficult to believe that Roadmaster Vega would have sent out an email to his fellow Roadmasters requesting their opinions about the Claimant's ability to be a Foreman if he did not believe that the Claimant had potential for the position especially since he and Roadmaster Knapp never stated that the Claimant was not qualified for the position. Instead Knapp testified on page 22 of the transcript that the Claimant was not ready for the position (based upon the comments of other Roadmasters) because of his alleged frequent failures to report for work. (The Board notes there is nothing on the Claimant's disciplinary record that indicates he had any trouble reporting for work in accordance with his responsibilities). The record also reveals that the Claimant's original request for a promotion was not a formal request in accordance with the Agreement nor was the denial of that request a formal answer. The Claimant was not satisfied with that response and then chose to make a formal request in accordance with Rule 8(a). The Claimant is not without some fault as he should have been more explicit in his formal request for promotion as to exactly what his Superiors had informally advised him, but we are not persuaded that he intentionally attempted to misrepresent his abilities or that either of the two aforementioned Roadmasters ever personally

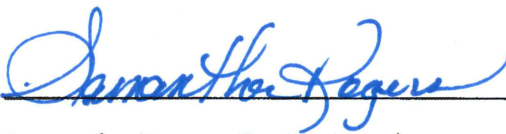
told the Claimant that they did not approve of his potential promotion. It is determined that the Carrier did not meet its burden of proof, therefore, the Board finds and holds that the discipline is set aside and the Claimant's disciplinary record is cleared of the allegation and the Claim is sustained in accordance with Part 2 of the Claim.

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 7/21/17