

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7357
AWARD NO 1, (Case No. 1)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

vs

**CP RAIL SYSTEM/DELAWARE AND HUDSON
RAILWAY COMPANY, INC.**

**William R. Miller, Chairman & Neutral Member
Timothy W. Kreke, Employee Member
Anthony Stillittano, Carrier Member**

Hearing Date: March 26, 2010

STATEMENT OF CLAIM:

- "1. The discipline (removed and withheld from service, assessment of forty (40) Demerits and subsequent dismissal on June 17, 2008 imposed upon Mr. D. Griffin for alleged violation of GCOR Rule 1.1.1 (Safest Course) and GCOR Rule 1.6 (Conduct) during his shift on May 15, 2008 on DHRail 1 in the vicinity of Cooperstown Junction, New York was arbitrary, capricious on the basis of unproven charges and in violation of the Agreement (Carrier's File 8-00613).
2. As a consequence of the violation referred to in Part 1 above, the aforesaid discipline shall now be removed from Mr. D. Griffin's record and he shall be reinstated immediately with all wage lost since his removal from service on May 16, 2008 until such reinstatement."

FINDINGS:

Public Law Board No. 7357, 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 dispute were given due notice of the hearing thereon and did participate therein.

On May 19, 2008, the Carrier notified Claimant to appear for a formal Investigation on May 27, 2008, concerning in pertinent part the following charge:

"...The purpose of this investigation will be to determine your responsibility, if any, for your alleged violation of GCOR Rule 1.1.1 (Safest Course) Eff. April 3, 2005, and alleged violation of GCOR Rule 1.6 (Conduct). For your actions during an incident where you allegedly threw a track spike at your Foreman (Mr. F. Konosky) during your shift on May 15, 2008 on DHRAIL 1, in the vicinity of Cooperstown Junction, NY...."

The subject Rules in dispute are as follows:

"SAFETY RULES

GCOR 1.1 Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

1.1.1 Maintaining a Safe Course

In case of doubt or uncertainty, take the safe course

GCOR Rule 1.6

Employees must not be:

- 1. Careless of safety of themselves or others.**
- 2. Negligent.**
- 3. Insubordinate.**
- 4. Dishonest**
- 5. Immoral.**
- 6. Quarrelsome.**
- or**
- 7. Discourteous.**

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated."

On June 17, 2008, Claimant was notified that he had been found guilty as charged and the Carrier imposed 40 Demerits which resulted in his dismissal, due to the accumulation of over 60 demerits.

It is the position of the Organization that several procedural errors occurred in the handling of the case which denied the Claimant his fundamental right to a fair and impartial Investigation and "due process". It argued that the Hearing Officer was consulted immediately after the alleged incident and made the determination to withhold the Claimant from service, thus, according to it the Hearing Officer prejudged the Claimant and could not hold a fair and impartial Hearing. Additionally, it argued that it was improper that the Hearing Officer did not render the decision and lastly it contended the Carrier erred in allowing the individual who preferred the charges to issue the discipline. It contended that arbitral precedent supports its position to such an extent that the Board need not even address the merits of the case and should sustain it on the basis of the alleged aforementioned procedural violations.

On the merits it argued the Carrier did not meet its burden of proof. It contended that the sole evidence presented by the Carrier in support of its decision to discipline the Claimant is based upon the testimony of Trackman Harrington which was totally opposite to that of the Claimant. It further argued that only those two witnesses had direct knowledge of the incident. The witness testified that the Claimant threw a spike at the Foreman which the Claimant denied. According to Organization it is a well established arbitral principle that an employee cannot be found guilty on the testimony of a sole witness. It concluded by requesting that the discipline be set aside and the claim sustained as presented.

It is the Carrier's position that the evidence indicates that Claimant was afforded all the contractual rights to which he was entitled. It argued that Claimant was properly notified of the charges, he attended the Hearing, was properly represented and his defense was not hindered, therefore, it reasoned that the Claimant was afforded a fair and impartial Investigation.

It further argued that the facts reveal that on May 15, 2008, the Claimant was working as Trackman with Trackman Harrington unloading tie plates. According to it, at approximately 12:30 a.m., Trackman Harrington who operated a plate machine witnessed the Claimant, who was standing in front of him, throw a track spike "over hand" in the direction of Track Foreman F. Konosky just missing his head. It further argued that the record substantiates that the Claimant was guilty as charged and there was nothing shown to mitigate his behavior and modify the discipline. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and will next address the Organization's procedural arguments. The issue of Hearing Officer's improperly holding multiple roles in the formal Investigation process has been the subject of countless Awards and authority can be found on both sides of a variety of issues raised in the instant case.

In the case at hand the Organization has argued with arbitral support that the Hearing Officer should have rendered the decision because he was in the best position to make credibility decisions and judge the demeanor of witnesses, therefore, when an Officer who was not present

at the Hearing issued the decision the Claimant was denied "due process". That argument is not without merit, however, Organization's have successfully made the counter argument that has sometimes resulted in rulings that have determined that the Hearing Officer should not render the decision because his neutrality is questionable as he also prosecuted the Carrier's case. (See Third Division Awards 13443, 13978, 14496, 19062, 19914, 20471, 28908 and Second Division Award 4536 to name just a few) Additionally, we have Awards wherein the same argument made by the Organization in this instance has been rejected such as Third Division Award No. 17532 which stated the following:

"...It is not fatal to the legality of the investigation to have someone who was not the Hearing Officer render the discipline decision...."

In Third Division Award No. 17965 it was stated in pertinent part the following:

"...There is nothing in the Agreement which provides that the official signing the discipline form must be present at the investigation...."

To further complicate the issue of whether it was improper for a Carrier Officer who was not present at the Hearing to render the disciplinary decision rather than the Hearing Officer, that argument was not raised on the property during the handling of the claim. The Carrier argued that the Organization's argument is "de novo" inadmissible and its belated defense cannot be accepted under the Board's Rules of Procedure and provisions of the Railway Labor Act, and again that argument has strong arbitral support. (See as example Third Division Awards 10577, 10639, 13892, 14994, 22054 and 25575) The Organization counters that argument with its lead Award, Third Division Award No. 14031 that had a similar fact situation wherein the person who decided the case did not hold the Hearing and the argument was not set forth on the property, but, nonetheless, the Board asserted authority on the basis: **"...If the Organization successfully proves to this Board that due process has been violated, then we will hold that such violation is fundamental, and can be raised at any stage of the proceedings...."** Attached to that decision was a strong Dissent which argued that the Award was a faulty anomaly lacking precedential value. Award No. 14031 is not without value, but it is not within the norm of arbitral reasoning and will not be used in the resolution of this case. Third Division Award No. 31774 which dealt with a similar and/or like case is more directly on point as it stated in pertinent part the following:

"...The hearing officer was not the person who issued the discipline and there is no indication that the hearing officer made any finding of fact or was otherwise involved in the decision to dismiss Claimant Pool. In evaluating whether this procedure is fatal to the discipline imposed, we must first look to the language of the Agreement. We find no language requiring that the hearing officer issue the discipline.

Nevertheless, the Agreement guarantees the employee a right to due process and a fair and impartial investigation. The question posed is whether having someone other than the hearing officer make the decision to dismiss Claimant Pool deprived him of due process. Such action does not amount to a due process violation per se. (Underlining Board's emphasis)

Examination of the facts in this case reveal that there is nothing in the language of Rule 25 Investigations and Discipline which requires that the Hearing Officer must issue the discipline. Additionally, there is nothing in that language which prohibits the charging officer from rendering the discipline.

Even though the Board finds no violation in the instant case of the aforementioned procedural arguments it would recommend that the Carrier give serious consideration in the future to having its Hearing Officers render disciplinary decisions or at the very least show proof of their input in the disciplinary decision as it could lessen the chance of potential violations of "due process".

Last, but not least the Board finds that there is no convincing evidence that the Claimant was pre-judged and denied a fair and impartial Investigation.

The Board having determined that the Claimant was not denied "due process" will resolve the case on its merits. Testimony of Trackman Harrington is explicit. On page 13 of the Transcript he was questioned as to what he allegedly saw the Claimant do and he stated as follows:

"Q Okay, You said you - - you stated that you saw him throw a spike. Now did he just pick up a spike off the ground and just underhand it or could you please explain that to me?

A He had a spike in his hands cause that's what he used. That's what they were using to pick up the plates - -

Q Right.

A - - or the spike. I know it was overhand.

Q Okay, Anything else?

A (shakes head)

Q So you're sure he threw the spike overhand at Mr. Konoski, or Foreman Konoski?

A Yes."

Trackman Harrington reaffirmed that testimony on page 15 of the Transcript.

On pages 16 and 18 the Claimant told a different story. On page 18 he testified as follows:

"Q Okay. Did you throw a spike at Frank Konoski?

A No, I did not.

Q Could you explain why you wouldn't do - - why you would not throw a spike at Mr. Konoski or anyone else that you work with?

A Simple fact, cause I need my job, and after what my circumstances are coming back this year, and I would never intentionally ever, ever harm anybody out there."

The only other witness who testified was Track Supervisor Vanderpool who was the Supervisor that Trackman Harrington reported the alleged incident to. When Mr. Vanderpool was questioned as to whether he saw the alleged incident he testified as follows:

"Q I did not witness him throwing the spike. No, I did not."

In its Submission to the Board the Carrier reasoned that Trackman Harrington had no reason to fabricate this incident and because of that there was no doubt, that the Claimant had thrown a track spike at Mr. Konosky which was confirmed by Harrington's testimony referenced above. The Organization was equally adamant that the testimony of the Claimant was not shaken or rebutted that he did not throw a spike in the direction of Foreman Konosky. It is also clear that Konoski had no knowledge of whether or not a spike was thrown at him and it is equally clear that Track Supervisor Vanderpool had no first-hand knowledge of what transpired. The Board has no reason to believe that Harrington fabricated his testimony, but on the other hand we have been given no reason to disbelieve the Claimant. Third Division Award No. 32890 is directly on point wherein the Board stated the following:

"The Board has thoroughly reviewed the record in this case. In sum the Board finds that the Carrier has not carried its burden of persuasion, which is a particularly heavy one in the case of dismissal. The record contains a direct

conflict of testimony between the Claimant and Carrier's primary witness against him, with no supporting testimony for either's position. In such situation, where the contradictory evidence can truly be said to result in a "net wash," the party with the burden of persuasion - this case the Carrier - must lose. Accordingly, the instant claim is sustained."

The aforementioned logic and reasoning applies in the instant case as well, therefore, the Claimant's termination is set aside because the Carrier did not meet its burden of proof. The Board finds and holds that the Claimant is to be reinstated to service with seniority rights intact, benefits unimpaired and full back pay making him whole (in accordance with Rule 25.9 of the Agreement) for all compensation lost from May 16, 2008, until restored to service.

AWARD

Claim sustained 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



Anthony Stillitano, Carrier Member



Timothy W. Kreke, Employee Member

Award Date: July 14, 2010