

BEFORE PUBLIC LAW BOARD NO. 7566

CASE NO. 199

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2019-00046

Claimant: J. Smith

STATEMENT OF CLAIM

“Claim of the System Committee of the Brotherhood that:

1. The discipline [forty-five (45) day actual suspension from service] imposed upon Mr. J. Smith for alleged violation of company rules, regulations and/or policies between May 1 and 2, 2019, at or near South Ackerville, the Waukesha section house and or/the Duplainville siding was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2019-00046 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Smith's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement. Additionally, the Claimant shall have his seniority restored, his accredited months of service and all benefits that were not received during his time out of service.”

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

Claimant received a Carrier letter dated May 21, 2019, to appear for an investigation to determine whether he:

[V]iolated any CN rules, regulations and/or policies between May 1st and May 2nd, 2019 at or near South Ackerville, the Waukesha section house and/or the Duplainville siding when you were allegedly observed:

- Failing to properly back-up in accordance with CN's back-up policy, and/or
- Failing to use proper 3-point contact while exiting your vehicle, and/or
- Fouling the track without proper authority, and/or
- Failing to wear proper personal protective equipment, and/or
- Failing to do a proper roll-by inspection, and/or
- If you used a personal cell phone while on-duty

The hearing involved Claimant and his co-worker Mr. Johnson. Following the hearing, the Carrier issued the following letter dated July 15, 2019:

I have reviewed the transcript of the formal investigation, which was held on June 25, 2019, to develop the facts and to determine your responsibility, if any, and whether or not you violated any CN rules, regulations and/or policies between May 1st and May 2nd, 2019 at or near South Ackerville, the Waukesha section house and/or the Duplainville siding when you were allegedly observed:

- Failing to properly back-up in accordance with CN's back-up policy, and/or
- Failing to use proper 3-point contact while exiting your vehicle, and/or
- Fouling the track without proper authority, and/or
- Failing to wear proper personal protective equipment, and/or
- Failing to do a proper roll-by inspection, and/or
- If you used a personal cell phone while on-duty

The record contains credible testimony and substantial evidence proving that you violated: Violation Type: Level 3 System Vehicle Back Up Policy

Engineering LIFE Rule E-22 - PPE

OTS Rule 100 - Fouling the Track

USOR 523 - Inspecting Passing Trains

OTS Rule 600 - Train Approach Warning

OTS Rule 300 - Job Briefings

OTS Rule 905 - Safety Precautions for Working On or Around Roadway Machines Engineering

LIFE Rule E-21 - On-Track Work Equipment (Hi-Rail) & Rail Cars

In consideration of the incident, the proven rule violations, and your past discipline record, you are hereby assessed the following discipline(s):

60 Days Actual Suspension From Service (July 16, 2019 through September 13, 2019)

The Carrier maintains substantial evidence of the infractions exists in the record. There is nothing in the record that warrants overturning the findings. The Carrier continues that the discipline is commensurate to the violations. The evidence shows clear and significant violation of track protection policies. These Level 3 violations warrant significant discipline, and the Carrier did not abuse its discretion by issuing the suspension.

The Organization contends the Carrier agents' actions violated the Claimant's right to a fair and impartial investigation, failed to meet its burden of proof and that it also issued arbitrary, excessive and unwarranted suspension. The Organization raises procedural and substantive issues. The procedural regarding a missing witness is found at submission page 5:

Carrier supervisor Mr. F. Hoppe played multiple roles in the series of events that led to this investigation. It is undisputed that Mr. Hoppe is the Claimant's and his co-worker Mr. Smith's direct supervisor, as well as the charging officer (despite not appearing at the investigation) on the Claimant's notice of investigation (Transcript Exhibit 1), the disciplining officer on the Carrier's July 15, 2019 notice of discipline (Employees' Exhibit "A-1") and he was intimately involved in preparing the Claimant's statements surrounding the events that led to the Carrier's imposed discipline. We submit that Mr. Hoppe's various roles in the preparation of the investigation and the assessment of discipline denied the Claimant his right to a fair and impartial hearing. Notwithstanding, the Carrier should have arranged for Mr. Hoppe to attend the investigation and testify to the facts he gathered surrounding the questions (presented as statements) that he gathered from the Claimant and Mr. Smith. In this regard, we point out numerous decisions have held that in discipline cases it is the Carrier's responsibility to present all witnesses with pertinent information and to develop all facts relevant to the incident(s) under investigation. Of the numerous awards in support of our position in this regard are National Railroad Adjustment Board (NRAB) First Division Award 19910, Second Division Award 2923, Third Division Awards 20014, 23097, 31547, 33609, 33628, 41785, Award 40 of PLB No. 4081, Award 23 of PLB No. 5606, Award 2 of PLB No. 5681 and Award 43 of PLB No. 5942 (Employees' Exhibit "D"). We would remind this Board that in discipline cases, the Organization does not have the responsibility to request, demand or provide witnesses for the investigation. In this case, Mr. Hoppe's name is referenced approximately twenty-five (25) times throughout the investigation. It is

clear that Mr. Hoppe had relevant information to the facts of this dispute and the Carrier failed to provide him as a witness.

The Organization raises substantive arguments asserting that the Carrier failed to establish the violations in pages 6 and 7 of the submission:

[T]he Claimant and his co-worker were targeted for the purpose of being disciplined. By letter dated August 8, 2019 (Employees' Exhibit "A-2"), the Organization contended that Carrier witnesses Bennet and Anderson set out on May 1, 2019 from Green Bay, Wisconsin, driving across their assigned territory and bypassing the employees they supervise in their own zone, with the end goal of observing the Claimant and Mr. Smith until a violation of the thousands of Carrier rules was found. This is not a case where a supervisor happened to witness a rule violation and then held an investigation into the matter. This was a targeted attack on the Claimant and his co-worker. As noted in the record, Carrier witness Mr. Anderson readily admits that he was instructed by Mr. Bennett to go directly to the Claimant and Mr. Smith with the sole purpose of finding a rule violation. The record is clear that the Carrier in this instance, instructed its own supervisors to go to extreme lengths and ignore their own employees and responsibilities for the purpose of disciplining the Claimant and his co-worker (Tr.PP.62&63).

Notwithstanding, in this case the Carrier failed to meet its burden of proof that the Claimant is at fault for violating the charged rules because the record shows that the rules are not actually enforced amongst all employees of the Carrier. For instance, Mr. Anderson openly admitted that both he and Mr. Bennett violated the system vehicle backup policy, which is the very same thing the Carrier held the investigation into the Claimant and his co-worker's behavior (Tr.P.67).

Nevertheless, the most important matter for this Board to consider is that the Carrier failed to support its findings of guilt with any credible evidence. There is not one (1) picture or video of the Claimant and his co-worker violating the rules. The Carrier's case relies solely on the testimony of two (2) supervisors who were instructed to follow the Claimant and his co-worker to find rule violations. The testimony presented in this record does not rise to the level of substantial evidence that the Claimant is guilty of a rule violation.

The Organization's correspondence of August 8, 2019 raises many issues both with the investigation and the proof:

This investigation was the result of a well thought out, targeted, biased, multiple day stakeout with one intention and one intention only. The intention was clearly to spy on the Claimant and Mr. Smith, for whatever amount of time required, in order to catch any moment when a violation

may occur. The Carrier has literally thousands of rules that have been written, for their employees to follow. It is quite impossible by any standard to memorize this amount of information. If an employee is watched for long enough, and the intention of the person spying is to find a violation at whatever cost, that person will inevitably find a violation.

Carrier witnesses Bennett and Anderson set out on May 1, 2019 from Green Bay, WI with one motive. They were planning to drive across most of their territory, thereby bypassing the majority of the employees on their zone, with the end goal of finding and spying on the Claimant and Mr. Smith until a violation was found.

Carrier witness Mr. Anderson clearly admits that Mr. Bennett told him that his goal was to go directly to the Claimant and Mr. Smith. Again, bypassing the majority of their employees on their journey.

When asked what the purpose of the two-day observation mission was, Mr. Anderson responded, "To try and find unsafe behaviors and correct them."

The testimony on page 62 outlines not only the length that Mr. Anderson and Mr. Bennett were willing to go to in order to find violations, but also the disturbing fact that they were willing to allow time and time again, their own employees to allegedly violate rules that were serious in nature.

MR. LETIZIA: And were any of those violations of a serious nature, or were they all just kind of not a big deal?

MR. ANDERSON: They were serious to me.

MR. LETIZIA: And was there a reason that you didn't go address those issues immediately?

MR. ANDERSON: I'd have to defer to Rob Bennett for that, to answer that question. MR. LETIZIA: On why you didn't? You can't—

MR. ANDERSON: I didn't, because my senior manager told us—told me we weren't going to. We were going to continue to observe.

It is abundantly clear through the aforementioned testimony that the only objective was to find and log as many violations as possible in order to continue to build a discipline history on the Claimant and Mr. Johnson.

Furthermore, Mr. Anderson openly admits that both he and Mr. Bennett violated the System Vehicle Backup Policy the very same thing that they are alleging the Claimant and Mr. Johnson violated.

MR. LETIZIA: Did you pull out forward or reverse?

MR. ANDERSON: I believe we backed out.

MR. LETIZIA: And which one of you got out to back up the car in that instance?

MR. ANDERSON: Neither.

MR. LETIZIA: Is that in compliance with the backup policy?

MR. ANDERSON: No.

Oddly, all of the alleged violations are missing one thing. Proof. The Carrier during the investigation failed to provide a single picture that shows that the Claimant and/or Mr. Johnson violated any rules. All of the allegations rely solely on the tag team word of both Mr. Anderson and his boss, Mr. Bennett.

The Carrier entered in statements for both the Claimant and Mr. Smith that were written by Fred Hoppe, who plays multiple roles in this investigation. Mr. Hoppe is the Supervisor of both the Claimant and Mr. Smith as well as the Charging Officer and Disciplining Officer and a final role as preparer of the accused employees' statements. This is a great deal of hats for one person to wear. In fact, it is difficult if not impossible to have a fair and impartial hearing if the charging officer is preparing statements on behalf of those he has charged, who just so happen to be employees that report directly to him. For this reason alone, it is the position of the Organization that this discipline should not be allowed to stand.

Mr. Bennett clearly provides proof through his testimony that he and Mr. Anderson were targeting the Claimant and Mr. Anderson and only them.

MR. LETIZIA: And what was the—Did you have a job briefing at that point, what the plan was for the day? Mr. Bennett: Yeah, we talked about going south on the south end of the Waukesha sub and observing what we observed.

MR. LETIZIA: Okay. Were you traveling specifically to go see this crew?

MR. BENNETT: No. We were traveling down the sound end. There was three or four crews down there; a grapple truck, and I think he had two welders down there. So we were just—we were just bopping down. We have a Sentinel GPS tracking, and we were trying to—we were trying to find a truck. And then during all that time, we visually could see their truck, too. Wasn't sure who they were for sure, but when they got off, we could see that truck. And then we looked in the Sentinel and we knew it was that section, so we knew it was our section, and so that time we started following them.

Mr. Bennett throughout the investigation states that he was not targeting the Claimant and Mr. Smith, but his testimony above proves otherwise. Mr. Bennett clearly had a mission to find violations even if it involves not being honest, violating multiple rules and ignoring alleged serious violations that could have resulted in the Claimant and Mr. Smith being injured or killed. Clearly Mr. Bennett is being dishonest as to what actually occurred in regard

to the alleged violations by the Claimant and Mr. Smith. No manager would allow violation after violation to continue in front of them for two days, and say nothing thereby risking the lives of the employees that he claims to be saving the lives of.

Carrier witness Jones testified that the Claimant and Mr. Smith had more feet of sight distance than he recorded. This is important as the Carrier has added this to the laundry list of alleged violations.

MR. LETIZIA: Okay. So—but, I mean, is it safe to say that if—whoever was watching in this case would've had more feet than you recorded actually riding the rail if they're stepped back from the track, in this particular instance?

MR. JONES: If—yes, they could have. Yes.

Clearly the Carrier has not proven in any way that the Claimant and Mr. Smith are in violation of OTS Rule 100 or OTS Rule 600. The Claimant and Mr. Smith were followed for two days by a Senior Manager and a Track Supervisor. The two spying officials targeted them from the get go when they left Green Bay on May 1st. They rented an unmarked car drove well over one hundred miles, admittedly broke multiple rules including the System Vehicle Backup Policy and OTS Rule 300-Job Briefings, as well as put themselves and allegedly the Claimant and Mr. Smith at risk by doing absolutely nothing to correct the alleged ongoing violations. The reason that both Mr. Anderson and Bennett were able to overlook these serious infractions in good conscience, was because they did not happen. The Carrier has failed to prove the alleged rule violations in this investigation.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence de novo. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

This Board has addressed similar issues involving introduction of statements but no context in the evidence for those statement. (See, e.g. PLB 7566 Award 55, PLB 7566 Award 198). Here, Mr. Hoppe played an important role in obtaining comprehensive statements that were entered at the hearing. Mr. Hoppe is Claimant's and Mr. Johnson's direct supervisor, the charging officer and later served as the disciplining officer. He was

significantly involved in the matter that involved two days of Carrier officials monitoring Claimant and Mr. Johnson.

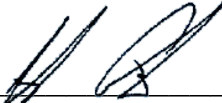
The Carrier and the Organization had legitimate interests in the context for the statements that were introduced. The Carrier in establishing the context for the statements and the Organization in cross-examining Mr. Hoppe about his role in this matter and the circumstances surrounding the statements he obtained. The responsibility to produce the appropriate witnesses is the Carrier's and not the Organization's duty. Here, Mr. Hoppe was significantly involved in the investigation but not produced. His testimony was important to the determination of culpability and his absence harmed the Claimant by not offering context for the statements that were introduced. Mr. Hoppe was more than a mere notetaker and was involved in the investigation of alleged misconduct. It was error for Mr. Hoppe not to be produced.

The Organization raised serious allegations of misconduct by Carrier officers in targeting Claimant and Mr. Johnson, ignoring safety rules, and lying by Mr. Bennett. Those defenses could have been developed had Mr. Hoppe been present and called as a witness. That failure to produce him as a witness harmed Claimant because there was no context for the detailed statements entered into evidence and the Organization defenses alleging targeting and unfair treatment of the employees could not be fully developed.

Claim sustained. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.



Patrick Crain
Carrier Member



Adam Gilmour
Organization Member



Brian Clauss
Neutral Member

Dated: December 20, 2023