

PUBLIC LAW BOARD NO. 7599

AWARD NO. 8

CASE NO. 8

PARTIES TO

THE DISPUTE: Brotherhood of Maintenance of Way Employees Division
IBT Rail Conference

vs.

Grand Trunk Western Railroad Company

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline [disqualified from all positions that could require him to be an 'Employee in Charge' for one (1) year and fifteen (15) working days' actual suspension and fifteen (15) days' deferred suspension] of Mr. C. Wabindato issued by letter dated April 22, 2013 in connection with his alleged failure to provide adequate track protection and proper job briefings when working with the RFD (rail flaw detector) portable rail tester crew was on the basis of unproven charges, excessive, harsh and unwarranted and in violation of the Agreement (Carrier's File GTW-BMWED-2013-00002 GTW).
2. As a consequence of the violation referred to in Part 1 above, Claimant C. Wabindato shall have his record expunged with any and all discipline and references to this matter removed and with all rights and benefits restored, shall be reinstated to his former position, reimbursed any and all lost wages (current and future), with the Carrier reviewing their Roadway Worker Protection rules, ensuring that they are compliant with Federal Regulations and retraining all employees to make certain a clear, comprehensive and consistent understanding of the regulations are in place throughout the workforce."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was disciplined for two forms of misconduct: First, failing to provide adequate track protection for a two-person Rail Flaw Detector (RFD) crew working in Battle Creek Yard on February 21, 2013 and, second, by failing to provide proper job briefings in connection with

the job. At the time of the alleged incident, claimant had over nine years of service with the Carrier. His work record, according to the records received during the investigation, was clear of discipline for the four years prior to the incident in question.

The Organization raised procedural objections to the hearing officer allowing rules to be discussed that were not cited in the notice and for allowing evidence about claimant's prior discipline record. By not citing specific rules in the notice, the Organization contended the Carrier had failed to provide proper notice of the precise charges as required by Agreement Rule 25(d). Under the circumstances, neither of the objections have merit. By its terms, Rule 25 does not require specific rules to be cited in the notice. Such a rule requires only that sufficient information about the incident, like time, date, place, and circumstances be provided to allow the claimant and the Organization to know what the subject of the investigation will be. The notice in question did provide sufficient information.

It is well settled that an employee's prior discipline history normally should be taken into account when assessing new discipline. By receiving it during the investigation, the claimant and the Organization have the opportunity to challenge the accuracy and relevance of the history. The Carrier could have left it out of the investigation and taken it into consideration later. But receiving the evidence as it did during the investigation did not constitute procedural error.

This record also contains an anomaly that is rarely seen in discipline disputes. Claimant was determined to have failed to provide adequate track protection for the RFD crew in violation of On-Track Safety Rule 500. However, the transcript makes it crystal clear that claimant did not violate the rule. His method of providing protection is specifically described and permitted by the rule. Moreover, his method of providing protection was specifically corroborated by Rule 520.

According to the investigation transcript, immediately after the alleged incident, claimant met with his supervisor to explain his method of providing protection. The supervisor agreed that claimant had complied with the applicable rules. In a three-way discussion between claimant, his supervisor, and the supervisor's supervisor, it was decided there would be no formal discipline assessed against claimant. Instead, because there was a dispute (one person's word against that of another) over the content of the job briefing that claimant did provide to the RFD crew, it was decided in the three-way discussion that claimant would be assessed with an efficiency test failure; there would not be any formal discipline that would exceed what would be essentially a verbal warning and "... that was the end of it." The supervisor so testified at the investigation. Accordingly, this Board wonders why the investigation was held at all. The record does not provide the answer, so we proceed to deal with the Organization's other procedural objections.

Per Rule 25, Section 3(a), an appeal from discipline by the Organization automatically places a stay on the implementation of the discipline until after the on-property handling of the case is completed with a properly issued denial of the claim and appeal. Rule 24 requires the

parties to engage in a grievance appeal meeting before a final denial may be issued. The rule, however, does not specify how or in what manner the meeting must be conducted.

According to the record, there was a telephone call from the Carrier's Highest Designated Officer ("HDO") to the Assistant General Chairman ("AGC") on June 17, 2013. This occurred within the sixty day time limit for conducting the meeting per Rule 24. This case was discussed. The AGC contends the discussion did not satisfy the meeting requirement. The HDO maintains it did. Given the state of the record and the lack of specific requirements for the meeting in Rule 24, we conclude a meeting was conducted. As a result, this procedural objection of the Organization also lacks merit and must be rejected as a basis for determining the outcome of this dispute. Thus, we turn to consideration of the dispute on its merits.

According to the record, claimant was the Employee in Charge ("EIC") of the rail flaw detection activity in Battle Creek Yard on February 21, 2013. A job briefing was conducted by claimant before the RFD crew set about its work. After somewhat more than one hour, a light engine that had been in the rip track area of the yard needed to move around the outer limit of the protected work area to exit the yard to the east. In addition to having applied other protective measures, claimant positioned himself at Switch No. 4 and was in radio control of the engine crew as well as in contact with the yard tower during the entire engine movement. As the light engine moved over the switch that claimant was controlling, the RFD crew became concerned the engine might be able to back up into the track where they were working so they removed their detector from the track and moved off to the side. They were concerned that proper protection had not been provided as they understood the rules so they reported the incident and a preliminary investigation ensued.

As previously noted, the record completely exonerates claimant for the means by which he provided on-track protection for the RFD crew. He did not fail to provide the requisite on-track protection. Therefore, this basis for the Carrier's discipline must be reversed.

The remaining basis for the discipline deals with the content of claimant's job briefing he gave to the RFD crew before they began their work. According to claimant's testimony, he did mention that a light engine would be passing around the work area in 45 minutes to one hour. One of the RFD crew members testified at the investigation and denied that such information was provided in the briefing. There is a reference in the transcript attributed to the other crew member that the other crew member recalled that something was said about the engine movement. However, the hearing officer decided to close the investigation without recessing to obtain the testimony of the other RFD crew member. As a result, the transcript leaves the issue as one person's word against another. The evidentiary record provides two plausible yet contradictory accounts of the job briefing.

In disputes of this nature, it is well settled that the hearing officer who conducted the investigation is empowered to assess credibility. This follows from the fact that the hearing officer is present at the investigation to see and hear the various witnesses and gauge their

demeanor. As a result, past arbitration awards have developed a so-called "deferral doctrine" that stands for the proposition that arbitration boards reviewing discipline cases will defer to the credibility assessment made by the hearing officer to resolve evidentiary conflicts. That said, however, it is axiomatic that arbitration boards cannot defer to the hearing officer's assessment if the applicable record does not show what it was or how it was derived.

Where, as here, an evidentiary record has sharply competing but plausible versions, it is incumbent upon the hearing officer to provide a sufficiently detailed and persuasive explanation of the rationale for any credibility assessment that favors one account over the other. Such a rational explanation is necessary to prevent the assessment from being entirely discounted on the basis of evident partiality.

The foregoing said, not only is the instant record entirely devoid of a rational explanation by the hearing officer, the record is also missing a credibility assessment by him. The Carrier official who assessed discipline cannot supply the missing assessment because he was not present at the investigation and, therefore, is not entitled to invoke the deferral doctrine. Thus, we find ourselves confronted with two plausible positions with no proper means of reconciling them. The positions are essentially equal but opposed and offsetting. In arbitration, the failure to provide a proper reconciliation of an evidentiary tie or draw must be resolved against the party with the burden of proof. On this record, it is the Carrier that shouldered the burden of proof to establish a proper basis for its discipline of claimant. Therefore, for the reasons discussed, we are compelled to find that the Carrier has not satisfied its burden of proof to establish claimant's alleged culpability for failing to provide a proper job briefing.

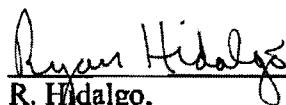
Given the foregoing discussion, we find the Carrier's disciplinary decision is not supported by substantial evidence in the record. As a result, the claim must be sustained.

AWARD:

The Claim is sustained.

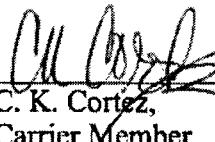


Gerald E. Wallin, Chairman
and Neutral Member



R. Hidalgo,
Organization Member

Date: 11/4/2014



C. K. Cortez,
Carrier Member