

PUBLIC LAW BOARD NO. 7988

**CASE NO. 2
AWARD NO. 2**

**Brotherhood of Maintenance of Way Employees
Division - IBT Rail Conference**

and

Soo Line Railroad Company

**Claimant: S. Whedon
System File No. D-15-20-445-08
Carrier File No. 2020-00017838**

BACKGROUND:

On March 4, 2020 the Carrier issued to Claimant S. Whedon a notice of formal investigation and hearing which stated, in part, as follows:

The purpose of this investigation/hearing is to determine the facts and circumstances and to place your responsibility, if any, in connection with your alleged Rules Violation on February 14, 2020. This indicates a possible violation of, but not limited to, the following rules:

➤ **GCOR 1.6 Conduct**

On the agreed-upon date July 28, 2020 the investigation/hearing convened. Claimant, with representation assistance, presented testimony and two (2) exhibits and examined the Carrier's witness and ten (10) exhibits.

On August 12, 2020 the Assistant Chief Engineer - Chicago notified Claimant of the following:

The Notice of Formal Investigation was in connection with leaving work and not informing your manager on February 14, 2020.

Upon a review of the transcript of the investigation it has been determined that the hearing record contains substantial evidence and proof that you violated the following rules:

➤ **GCOR 1.6 Conduct**

Based on the facts and evidence in the hearing record, the severity of the incident, and your past discipline history, you are hereby issued discipline of fifteen (15) demerits.

On October 7, 2020 the Organization filed an appeal; the Carrier denied the appeal on December 1, 2020. The dispute remains following conference on September 1, 2021. In accordance with the Agreement dated December 16, 2021 this dispute is before the Board for review and decision.

FINDINGS:

Public Law Board No. 7988, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

As stipulated in Paragraph (H) of the Agreement, the record in this proceeding "will be limited to the notice of investigation, transcript of investigation, letter assessing discipline, and correspondence exchanged on-property, as applicable." Additionally "[t]he Neutral Member shall have the authority to require the production of such additional evidence, either oral or written, as he or she may desire from the parties." The Neutral Member did not require additional oral or written evidence.

In this appellate forum the Board's role and function is to review the record. The scope of that review is set forth in Third Division Award No. 21299 as reported by the Carrier in its response to the appeal:

Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is substantial evidence to sustain a finding of guilty. If that question is decided in the affirmative, the penalty imposed for the violation is a matter which rests in the sound

discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that Carrier's action with respect thereto was discriminatory, unjust, unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.

This dispute is a discipline case. The Carrier's responsibility is to present substantial evidence that establishes facts supporting the charged rule violation and show that the assessed discipline is appropriate under the circumstances. As stated in Second Division Award No. 7492 substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Substantial evidence resides at the base of the evidence pyramid, an unexceptional level or threshold compared to preponderance of the evidence, clear and convincing evidence or beyond a reasonable doubt.

As a preliminary matter the Organization states the Carrier violated Rule 18 - Discipline and Grievances, Paragraph (a), in the collective bargaining agreement. The relevant provision in Paragraph (a) follows:

- (a) An employee who has been in the service of the Soo Line for sixty (60) days or more, and whose application has been approved *will not be disciplined or dismissed without a fair and impartial hearing and shall be advised in writing of the specific charges[.]*

[Emphasis added.]

The Carrier disagrees; it maintains that the notice of formal investigation and hearing "advised [Claimant] in writing of the specific charges." The notice states:

The purpose of this investigation/hearing is to determine the facts and circumstances and to place your responsibility, if any, in connection with your alleged Rules Violation on February 14, 2020. This indicates a possible violation of, but not limited to, the following rules:

➤ **GCOR 1.6 Conduct**

The Carrier is responsible for the notice. As written it states that "your alleged Rules Violations on February 14, 2020 . . . indicate a possible violation of, but not limited to, the following rules: GCOR 1.6 Conduct." In other words, without specifying or at least generalizing to any incident or situation - - on-duty, off-duty, on property, off property, statements, conduct, actions - - the Carrier alleges Claimant may have violated GCOR 1.6. A potential rule violation without any incident or situation linked to it is non-sensical. The Carrier presents the Board with an

unidentified, unknown incident as a foundation for Claimant acting in some manner or stating something, somewhere that may constitute a major rule violation which could lead to Claimant's dismissal. The notice has the aura of a "fishing expedition" with the potency to deliver a punitive measure by prejudging culpability. The other interpretation or explanation for the notice is that the Carrier is withholding the particulars of the incident. Both of these situations - - did not know but prejudged, did know but did not disclose - - are incompatible with Rule 18(a) and Claimant's contractual right to due process and fair and impartial hearing. The Board finds that the notice does not satisfy Rule 18(a) and, thus, the Carrier violated it thereby denying Claimant due process and a fair and impartial hearing prior to assessing discipline.

Given the finding that the Carrier violated Rule 18(a), the Board will sustain the appeal and requested remedy:

As a remedy, the discipline assessed shall be set aside, and all notations of this fifteen (15) demerits be expunged from all Carrier records, including Claimant's personal record, and Claimant shall be made whole for any loss he may experience as a result of this assessment of discipline.

AWARD:

Appeal sustained.

The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.



Patrick Halter
Neutral Referee

Dated: 8/11/2022



Erica Barnard
Carrier Member

Dated: August 11, 2022



John Schlismann
Employee Member

Dated: August 11, 2022