

PUBLIC LAW BOARD NO. 7163

AWARD NO. 76

CASE NO. 76

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes
Division - IBT Rail Conference

vs.

CSX Transportation, Inc.

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained.

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed upon Mr. J. Jones by letter dated April 30, 2009 for alleged violation of CSX Operating Rules, General Regulations 2, 3, and 3A; and the CSX Code of Ethics in connection with allegations of failure to follow instructions, insubordination, quarrelsome behavior and improper use of a cellular phone on March 16, 2008 was arbitrary, capricious and on the basis of unproven charges (Carrier's File 2009-043537)
2. As a consequence of the violation referenced in Part 1 above, Claimant J. Jones shall '... be compensated for all earning opportunities and other benefits deprived him, and that he be immediately returned to the active service of CSX Transportation with all rights and benefits reinstated. ***' (Employees' Exhibit "A-3") as a result of this unjust discipline."

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.

As the Statement of Claim describes, claimant was dismissed for four different kinds of misconduct, all of which allegedly occurred on March 16, 2008. At the time of the incidents on March 16, 2008, claimant had somewhat less than 12 years of service. Although his work record at the time contained recent disciplinary entries for 15 and 30-day suspensions, those suspensions were entirely struck down by this same Public Law Board for the due process reasons explained in our Awards 74 and 75. Thus, for the purpose of our analysis of the instant record, claimant must be viewed as an employee who had a completely clear work record for the duration of his service with the Carrier.

Our review of the record shows that virtually every aspect of each of the charges involves sharply conflicting evidence and testimony. To properly appreciate the setting in which the alleged misconduct occurred, some background information is necessary. All of this background stems from references to it in the instant transcript of investigation. Claimant had just completed serving the 30-day suspension on March 8, 2009. Thus, he had been back to work for less than ten days on the day in question. The 15-day suspension was served in early January. The record also references the fact that the same assistant roadmaster that sparked the instant charges was also involved in an earlier insubordination charge against claimant in the recent time frame. According to the record, that charge was sufficiently lacking in merit that the Carrier declined to invoke the investigation procedures of the Agreement and did not pursue it at all. As a result, the basis for "bad blood" between claimant and the assistant roadmaster existed when the events of March 16th began. It is clear that claimant had a high level of distrust of the assistant roadmaster as well as other Carrier officials.

During the early morning of March 16th, claimant and several other employees were sitting around a table in the crew room at the start of their work day listening to the weekly safety conference call. The assistant roadmaster, JDH, was also in the room and had just finished updating a binder containing bulletins. He walked over to the table area for the purpose of having the binder returned to its position on the wall behind the table. According to his testimony, JDH claims he specifically addressed claimant with his first name and asked him to replace the binder. He further testified that claimant replied with words to the effect that the task "... was not my job ..." and that there was no reason JDH could not do it himself. At that point, JDH turned to another employee and asked that employee to replace the binder. That employee said "Okay" but just set the binder on the table. JDH left the crew room without seeing the second employee replace the binder. None of the employees who were present provide any corroboration for JDH's testimony on the point of specifically addressing claimant by his first name and whether claimant said the task "... was not my job ..."

According to claimant's testimony, JDH never addressed him by name. Instead, JDH merely approached the table and generally asked the group to replace the binder. Claimant also denied that he ever said the task "... was not my job ...". Claimant's testimony on these two points is corroborated by one of the other employees who were present. That employee provided a statement to that effect right after the incident and he also testified accordingly at the investigation.

The foregoing description of the conflicting testimony is just the tip of the iceberg. Thereafter, JDH went to the office of the roadmaster and reported his version of the exchange. What follows hereafter is intended to be a deliberately concise summary of the ensuing events. The transcript of the investigation exceeded 100 pages of single-spaced text. Brevity is necessary to describe the many facets of the dispute.

Shortly after JDH reported the crew room matter to the roadmaster, claimant was called into the office to discuss the matter. This set up a situation where the ensuing conversation would pit claimant against the word of the two managers. Claimant felt he was in a hostile environment. He produced a recording device and announced that he wanted to record the encounter so he would have the equivalent of a witness to his version of the discussion. JDH refused permission to be recorded. Claimant then said he wanted to call an Organization representative and left the office to do so. Neither JDH nor the roadmaster did or said anything to prevent claimant from trying to contact a representative. Nonetheless, claimant was eventually charged with violating cell phone usage rules because he attempted to make contact while on duty.

Claimant was unable to contact his General Chairman. While he was outside of the office, another Carrier official happened to drive onto the scene. Claimant was again called into the office to discuss the matter. Claimant was again by himself while at least two Carrier officials were present. Eventually, the Division Engineer participated in the discussions via speakerphone. Claimant did begin recording the conversations at some point. For this he was charged with insubordination. Claimant was also charged with being quarrelsome as a result of being loud and interrupting the Carrier officials consistently by talking over them. Claimant's testimony disputed the contentions that he behaved in that manner. However, the hearing officer who conducted the investigation did not see to it that the recording was admitted in evidence as part of the record. Accordingly, there is no ostensibly objective and disinterested account of the conversations for this Board to review.

Moreover, the Carrier official who made the disciplinary decision also did not have the evidence available to him. That official was not present at the investigation. According to the record, that official made his decision simply by reading the transcript or by having someone else read it for him and write the decision letter for his signature. The record does not contain any cogent credibility assessment of the evidentiary conflicts by the hearing officer. Indeed, the record does not contain any kind of a credibility assessment whatsoever. In this kind of a dispute, that is a significant problem. We will come back to this shortcoming later.

Why the Carrier officials refused to have an objective recording of the discussions is, frankly, somewhat baffling to this Board. It likely would have shed considerable light on the question of whose account of the discussions was more accurate. Given the setting in which the refusal occurred, it is clear that the Carrier officials were effectively in control of whether such a recording would have been available to us. The process of evidentiary analysis permits the drawing of an adverse inference in such circumstances. In general, when one party to a disputed event is in control of material evidence concerning the dispute and prevents it from becoming part of an evidentiary record, the finder of fact is entitled to draw the inference that the evidence would not have supported the party's position and would, instead, support the account made by the adverse party, in this case, that would be the claimant.

The record also suggests that claimant had standing permission to contact an Organization

representative whenever he felt he was being harassed or threatened with circumstances that might subject him to discipline.

Given the foregoing discussion, it is clear that the instant dispute involves significant and material conflicts flowing from the competing testimony of the claimant and the Carrier witnesses. Although the evidence conflicts, either account could be the more truthful. In other words, both accounts are plausible. And, as we noted previously, the Carrier official who made the disciplinary decision was not present at the investigation and, as a result, was not in a proper position to assess credibility.

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." The doctrine 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 accounts, the validity of which depends on the reconciliation of such conflicts, it is incumbent upon the hearing officer to provide a sufficiently detailed and persuasive explanation of the rationale for any credibility assessment that chooses one account over the other. Such a rational explanation is necessary to prevent the assessment from being entirely discounted by us on the basis of evident partiality because of the practical reality that the hearing officer is a Carrier official whose livelihood and career depends upon continued employment with the Carrier on favorable terms.

The foregoing said, not only is the instant record entirely devoid of a rational explanation by the hearing officer, the record is also lacking any credibility assessment by that official. Thus, we find ourselves confronted with two plausible accounts 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 which shouldered the burden of proof to establish a proper basis for its discipline of claimant. On the record before us, for the reasons we have noted, we are compelled to find that the Carrier has not satisfied its burden of proof to justify any discipline whatsoever.

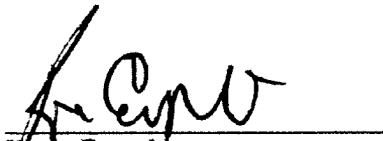
Accordingly, the Carrier is directed to offer claimant reinstatement to his previous employment status with seniority and the other attributes of that status unimpaired subject only to the Carrier's usual administrative return-to-service requirements. The Carrier is further directed to fully compensate claimant for any lost pay and economic benefits associated with the time he has been out of service. Finally, all references to the instant dismissal must be expunged from his work

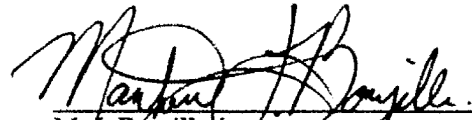
records.

AWARD:

The Claim is sustained. The Carrier is directed to comply with this Award within thirty days of the date shown below.


Gerald E. Wallin, Esq., Chairman


Kevin Evanski,
Organization Member


M. J. Borzille,
Carrier Member

Date: 11/18/2010