SPECIAL BOARD OF ADJUSTMENT NO. 1127

AWARD No. 5
CASE No. 5

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Union Pacific Railroad Company
(Former Southern Pacific Transportation Company-Western Lines)

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained.

DATE: January 14, 2002

DESCRIPTION OF CLAIM:

On July 10, 2000 a drawing was found in a meeting room at the Carrier's Yuma, Arizona facilities. The drawing depicted a white man holding a man's severed head. The severed head had glasses and was thought to resemble a black employee who had begun a racial discrimination lawsuit against the Carrier and one of its supervisors, a Mr. Jerry Smith. The drawing also had three cartoon-like bubbles containing comments attributable to the white man holding the severed head. They read as follows:

> Hey Jerry I killed that nigger for you.
>
> All mighty white man wins again.
>
> Let that be a lesson for all niggers on the Yuma Dist.

On September 11, 2000, Carrier officials received the opinion of a forensic documents examiner that Claimant, also a black man, was the author of the comments. The opinion was based on an examination of the handwritten comments.

After an investigation was held on September 27, 2000, Claimant was assessed a Level 5 Upgrade disciplinary penalty for writing the comments on the back of a graph that contained safety statistics. The paper was believed to be Carrier property. The drawing was viewed as violating the Carrier's Equal Employment Opportunity Policy. The discipline equated to a dismissal from all service.

At the time of his dismissal, Claimant had more than 19 years of service that were essentially free of related discipline.

The Claim in this dispute seeks to overturn the discipline and make Claimant whole for all losses.

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.

The Organization advanced several procedural objections that must be addressed as threshold matters before reaching the merits.

Rule 45 of the parties' Agreement reads, in pertinent part, as follows:

> Notice. - (a) Employes in the service sixty (60) calendar days or more shall not be disciplined nor dismissed without first being given a fair and impartial hearing before an officer of the Company * * *
>
> * * *
>
> Where circumstances indicate an employe should not be permitted to continue in service, he may be suspended pending an investigation.
>
> * * *

The Organization's first procedural challenge objected to the fact that Claimant was withheld from service prior to the investigation hearing. Given the potentially inflammatory nature of the drawing and the text of the parties' Agreement on this point, the Board does not find the Carrier's action to have been improper.

The Organization also objected to the hearing officer's exclusion of the payment contract between the Carrier and the document examiner as well as the transcript of Claimant's deposition in the lawsuit involving Smith and the black co-worker. The Board's review of the transcript concerning these points reveals no improper conduct by the hearing officer. Given the attendant circumstances, his evidentiary rulings are not found to have been unreasonable.

Finally, the Organization challenged the fairness and impartiality of the hearing. In this regard, the Organization contended that Claimant's guilt was pre-determined by the hearing officer. It cited a question propounded by the hearing officer to Claimant beginning on page 201, line 26 in support of its challenge. The question was only the second question put to Claimant. It was as follows:

> Okay. And Mr. Clark, based on the information and the testimony given by the forensics expert, Mr. Michael Bertocchi, can you explain *why you created such a document?* (Italics supplied)

The foregoing question was not merely a slip of the tongue by the hearing officer. The objections by the Organization and the ensuing discussion that followed (through page 202, line 10) show that the hearing officer did, indeed, believe Claimant had created the drawing and wanted to know why he did so.

The transcript provides several other corroborating instances to demonstrate the hearing officer's pre-determination of Claimant's guilt. Five additional examples serve to illustrate this fact.

The first example noted took place early in the hearing before the testimony of the document examiner. The comments of the hearing officer, beginning on page 56 at line 6, reflect that he considered the document examiner to be "... our ..." witness and that his testimony "... is the key in this." This strongly suggests the hearing officer had already taken sides with the Carrier and had embraced the anticipated testimony of the document examiner.

Second, beginning on page 61, line 18, the hearing officer similarly revealed his expectation that the document examiner would have a persuasive explanation of the method he used in arriving at his opinion.

The remaining examples came after the hearing officer also heard testimony to the effect that the separate investigation into the authorship of the drawing by the Yuma Police Department was inconclusive. Nonetheless, while questioning Claimant on page 210, line 33, the hearing officer said, in regard to the document examiner's opinion, that "... the evidence produced is pretty conclusive ... that you are the author of the document."

Fourth, again while questioning Claimant, from page 227, line 5 through page 229, line 13, the hearing officer reflected the role of a prosecutor conducting cross-examination. Such an approach is inconsistent with the requirements of fairness and impartiality.

Finally, beginning on page 288, line 4, the hearing officer used leading and suggestive questions in an attempt to reconcile a 5-day discrepancy between the testimony of two witnesses concerning the chain of possession of the drawing. Indeed, the hearing officer actually told the witness what kind of an answer he "... was looking for..."

The question cited by the Organization, when taken together with the several corroborating examples discussed, compels the Board to conclude that Claimant was denied a proper hearing. Indeed, the transcript shows the hearing officer had detailed advance knowledge of the Carrier's evidence, had already taken sides with the Carrier's position at the outset of the investigation, and had pre-determined Claimant's guilt. Such an approach is entirely inconsistent with the requirement to provide Claimant with a fair and impartial hearing. The Board, therefore, has no other available recourse but to overturn the discipline and sustain the Claim.

The Board's overall finding herein is limited to the pre-determination of guilt issue. Accordingly, nothing herein should be taken as a finding that the Carrier's action constituted racial discrimination against Claimant or any other employee. As the dispute was presented to the Board, it did not ask the Board to resolve any issues of racial discrimination and the Board has not done so.

AWARD:

The Claim is sustained. Carrier is directed to comply with this award on or before February 15, 2002.

Gerald E. Wallin, Chairman
and Neutral Member

CARRIER'S DISSENT TO AWARD NO. 5 SBA 1127

The transcript does not support the Board's finding the Hearing Officer pre-judged the case. Carrier believes the following quote should be kept in mind, rendered by David Lefkow on this property in Award No. 27 of PLB 5125:

> "The investigation was not a model of industrial justice but it did not so offend traditional railroad industry guidelines to warrant overturning the results of the disciplinary process." (Emphasis added)

The instant award begins with a quote of a question to the Claimant (Mr. Clark) from the Hearing Officer. As quoted, it appears to be an "are you still beating your wife" type of question. However, when viewed in the light of the 200 pages of testimony which preceded the question, during which a handwriting expert testified in response to direct and rigorous cross-examination that it was relatively easy to determine Mr. Clark was the author of the writing on the drawing, the Hearing Officer's question is certainly understandable. Still, it is worth pointing out that the Hearing Officer did not simply ask "why did you create such a document", but instead prefaced his question with, *"...based on the information and the testimony given by the forensics expert, ..., can you explain why you created such a document?"* He could have asked, "Did you create the document?" and if trained in a courtroom he probably (though not necessarily) would have. However, this was a railroad hearing being handled by a line officer. It is asking too much to expect courtroom niceties in this circumstance.

As for the so-called corroborating instances of prejudgment found in the hearing, the following is offered in rebuttal:

The award argues the statement by the Hearing Officer beginning on Line 18 of Page 56 *"suggests the Hearing Officer had already taken sides with the Carrier and had embraced the anticipated testimony of the document examiner."* Again, the statement has been taken out of context.

In the pages prior to the Hearing Officer's statement, the Representative had alleged Claimant was being retaliated against and brought in unrelated facts concerning another employee. The Hearing Officer attempted to limit the extraneous statements in order to keep the investigation focused. He reminded the Representative that what they were dealing with was, "... *the charges against Mr. Clark, as Mr. Clark being the creator and the author of this document. That's what we're here to investigate today. Not anything as far as any law suits, any other charges whatsoever."*

The above shows the Hearing Officer was attempting to point out that all he had in front of him was a charge that Mr. Clark was the creator of the document and the purpose of the hearing was to determine if the charge was credible. Nevertheless, the Representative would not leave the subject of retaliation and continued to try to bring in facts related to a discrimination suit brought by a friend of Mr. Clark. It was only then that the Hearing Officer made the statement the award criticizes:

> *Okay, I understand. And once we're through with our, the witness, the forensic document examiner, he is the key in this. Mr. Hyatt is bringing charges against Mr. Clark, based on the evidence that has been produced by the forensics document examiner. Now, so if- if- and he, if in true he can proof it at this hearing that Mr. Clark is the creator of this document, retaliation would not be against Mr. Clark, it would be whatever comes out of it for creating this document, which is totally unacceptable on Union Pacific property. Now that's not retaliation if you correct a wrong that's been done and you find the person that created the wrong. That's not retaliation.*

When fairly viewed in context, the underlined language shows the Hearing Officer was maintaining his neutrality and open to determining whether or not there was proof Mr. Clark authored the document.

Turning to the second example the award offers to show the Hearing Officer *"revealed his expectation that the document examiner would have a persuasive explanation of the method he used in arriving at his opinion."* This is clearly a skewed interpretation of the Hearing Officer's motivation. The interpretation is not supported by the context of the statement.

Prior to the language cited, Mr. Clark asked several questions, of the charging officer (Mr. Hyatt) and before the questioning of the document examiner, as to why there was emphasis on his handwriting and why his writing example was original and other peoples' were copies. Mr. Hyatt answered, *"I didn't request any- any of those records. Now, that was done by, I guess whoever's working with the forensic expert. But I didn't have anything to do with the personal records."* This clearly showed Mr. Hyatt was the wrong person to ask for this information. Nevertheless, Mr. Clark would not give up on his questioning, over several pages of transcript, finally asking, *"Why wasn't it okay to have machine copies of* [my writing]*?"* The Hearing Officer in attempting to keep the hearing going, responded:

> *Okay, now also what we need to do, and I want a copy of that to enter as an Exhibit, but what we'll do is- is Mr. Hyatt stated he was not involved in issuing what documents went out.*

When we get Mr. Bertocchi in here, he- he will probably have a good hand on- or I mean he should- he should be able to testify as to what documents he had and what he looked at and be able to show you, so.

The question you have there as far as the machine generated, I don't believe Mr. Hyatt can answer that question."

Clearly this was nothing more than the Hearing Officer trying to explain to the agitated Mr. Clark that since Mr. Hyatt had no answer to his questions, it would be more appropriate to wait and ask Mr. Bertocchi, who apparently was the active party in the procedures used. There is no foundation for the Board to characterize this as indicating bias toward the Carrier by the Hearing Officer.

Thirdly, the award indicates the majority felt the Hearing Officer ignored "*testimony to the effect that the separate investigation into the authorship of the drawing by the Yuma Police Department was inconclusive.*" The award mentions this as though to indicate the Hearing Officer was thereby ignoring a significant doubt being raised concerning the authorship of the document.

In fact, as the Carrier Special Agent Nelson testified at Page 195, the Yuma Police did not even have the case. There was never a separate Yuma Police Department investigation. They were only assisting Special Agent Nelson in his investigation. It is true Mr. Nelson said on Page 188 that the results of the help he received from the Yuma detective were "inconclusive". However, he was simply repeating what the detective had told him. His testimony continued at Page 194 that the Yuma police department individual he was working with told him that to get the handwriting analyzed, they would send it to the state crime lab and the delay would be significant, as opposed to taking the writing to a private firm. He stated the detective said: "*...would be- would take up to anywhere from three to six months. And I thought using, since they* [the Carrier Law Department] *did have an expert who has been known to use the techniques and can do it, that would expedite and we could find out who did it sooner.*" In fact, Mr. Nelson testified at Page 196/Line 12 that he had informed the Yuma police detective about the private forensic expert, and the detective said "*that was good.*", indicating he agreed with the Carrier's action of attempting to expedite the matter. Finally, at Page 299/Line 6, Mr. Nelson reported upon his update from the detective (at the request of the Organization). The detective told him he had not done anything with the investigation after Mr. Nelson had informed him the private expert had been retained. Therefore, the above shows there was no parallel investigation by the Yuma police to cast any doubt on the findings of the Carrier's expert witness. In this light, the Hearing Officer's statement at Page 210/Lines 32 - 35, which was not objected to by the Representative, cannot be considered prejudgment. He simply stated:

> *Mr. Clark, straight up forward, there's- there's been some- the evidence produced is pretty conclusive based upon the examiners evidence that you are the author of the document. But you again state you have- you did not create it.*

The award, in citing only the underlined portion of the above quote, disregarded context to support its improper finding of prejudgment.

Fourthly, the award states *"the Hearing Officer reflected the role of a prosecutor conducting cross-examination. Such an approach is inconsistent with the requirements of fairness and impartiality."* First, it is noted the Claimant's representative did not object to the questioning.[1] Second, the Carrier must ask, who else is going to ask these questions if not the Hearing Officer? This was a serious charge involving the Carrier/Public policy against discrimination. Such serious charges require direct and straightforward questions in order to develop the facts. The Carrier is at a loss to know how else the Hearing Officer could act in this situation to develop these facts. The Hearing Officer made a statement to the Representative as to his view of his responsibilities in the investigation:

> *I'm conducting the investigation as fair and impartial as all possible, to get all the information out. But again, the- the- just throwing out allegations against somebody that you cannot back up and/or support without documentation...*
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> *We need to get with the Notice of Investigation, the document at hand. And for your part, to bring any evidence that you might have, documents and/or witnesses to support Mr. Clark in his statement that he did not create the document. That's what we're here for. We need to get away from, you know, your thoughts and allegations against somebody else in this investigation.*

Finally, the Award states the Hearing Officer used *"leading and suggestive questions"*, even to the extent of telling the witness *"what kind of answer he '...was looking for...'"*. Again, it is pointed out, the Representative did not object to the questions asked by the Hearing Officer, nor was this (or the other examples brought up by the Board) included in the Organization's submission.

In this instance the Hearing Officer was trying to clarify a discrepancy in dates which had been the subject of many questions concerning when a witness, Mr. Chapman, had delivered the cartoon to Special Agent Nelson. Mr. Chapman

[1] As stated by David H. Brown in Award 3 of PLB 3282 on this property, "We think that if [the hearing] officer is to be held accountable as a jurist, then the advocate for a party to the investigation should be charged with the responsibility of a lawyer to protect the record."

had written in his planner that he gave the cartoon to Mr. Nelson August 12, whereas Mr. Nelson's notes indicated he had received it August 17. Both individuals maintained their records were accurate. In an effort to clarify or resolve this conflict, the Hearing Officer asked Mr. Nelson to review his notes to determine if there could have been an error which would explain the discrepancy. There was no winking or nudging going on and there was no objection to the question from the Representative at the hearing. This was simply a question to Mr. Nelson to again review his notes for a possible explanation. Mr. Nelson did review his notes and did not change his testimony. That being the case, the hearing continued. Clearly, what the Hearing Officer "was looking for" was just an explanation to a discrepancy in two witnesses' testimonies, not a particular answer as the award implies.

There is more than substantial evidence Mr. Clark was the author of the written statements on the cartoon. For this, he was properly dismissed for violating both Carrier and Public Policy. The Organization did not present any evidence to overcome this finding even though they were given full opportunity to do so in the hearing. This dissent also shows the Organization's procedural argument had no basis. In fact, except for the Hearing Officer's question at Page 201, the Organization did not even cite any of the so-called "corroborating" examples the award presents.

In addition to the foregoing, the Carrier has an observation concerning the Neutral. This Neutral has shown by this award a disturbing tendency to become an advocate for the Claimant. He made his decision upon arguments that were not raised on the property by the parties. If the Neutral is going to be an advocate, perhaps he should hold himself out as such.

For all of the above reasons, Carrier dissents.

Charles Wise
Director-Discipline
Labor Relations
Union Pacific Railroad

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AWARD:

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In this instance the Hearing Officer was trying to clarify a discrepancy in dates which had been the subject of many questions concerning when a witness, Mr. Chapman, had delivered the cartoon to Special Agent Nelson. Mr. Chapman

[1] As stated by David H. Brown in Award 3 of PLB 3282 on this property, "We think that if [the hearing] officer is to be held accountable as a jurist, then the advocate for a party to the investigation should be charged with the responsibility of a lawyer to protect the record."

had written in his planner that he gave the cartoon to Mr. Nelson August 12, whereas Mr. Nelson's notes indicated he had received it August 17. Both individuals maintained their records were accurate. In an effort to clarify or resolve this conflict, the Hearing Officer asked Mr. Nelson to review his notes to determine if there could have been an error which would explain the discrepancy. There was no winking or nudging going on and there was no objection to the question from the Representative at the hearing. This was simply a question to Mr. Nelson to again review his notes for a possible explanation. Mr. Nelson did review his notes and did not change his testimony. That being the case, the hearing continued. Clearly, what the Hearing Officer "was looking for" was just an explanation to a discrepancy in two witnesses' testimonies, not a particular answer as the award implies.

There is more than substantial evidence Mr. Clark was the author of the written statements on the cartoon. For this, he was properly dismissed for violating both Carrier and Public Policy. The Organization did not present any evidence to overcome this finding even though they were given full opportunity to do so in the hearing. This dissent also shows the Organization's procedural argument had no basis. In fact, except for the Hearing Officer's question at Page 201, the Organization did not even cite any of the so-called "corroborating" examples the award presents.

In addition to the foregoing, the Carrier has an observation concerning the Neutral. This Neutral has shown by this award a disturbing tendency to become an advocate for the Claimant. He made his decision upon arguments that were not raised on the property by the parties. If the Neutral is going to be an advocate, perhaps he should hold himself out as such.

For all of the above reasons, Carrier dissents.

Charles Wise
Director-Discipline
Labor Relations
Union Pacific Railroad

ORGANIZATION MEMBER'S RESPONSE
TO
CARRIER MEMBER'S DISSENT
TO
AWARD NO. 5, SBA 1127

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, anyone who was the least bit familiar with the arbitration process associated with this case, would have to agree this Carrier dissent could be categorized as "EXHIBIT A" as evidence in support of such a theory. Every issue raised by the Carrier Member in the Carrier's dissent was thoroughly discussed and rejected by the Board before the decision was issued January 14, 2002.

The Carrier Member suggests we should find the Hearing Officer's initial pertinent question to the Claimant, i.e., "Why did you create such a document?", ***"understandable"*** since there was 200 pages of testimony that purportedly determined Mr. Clark was the author of the writing on the drawing. Further, we should excuse the Hearing Officer who was untrained in a courtroom for not, instead, asking the question differently, in a manner such as, *"Did you create the document?"*

First, this Board should **NEVER** find it *"understandable"* for a Hearing Officer to conclude that a charged employee is guilty of an offense without hearing his/her available testimony. There is absolutely no justification for any thoughts to the contrary.

Secondly, regarding the abilities of the Hearing Officer in investigations of this nature, it should be remembered the Carrier Member pointed out to the other Board Members that Hearing Officer Thurman was one of the Carrier's better and more experienced individuals it had to take care of these responsibilities. Hence, the Carrier Member's attempt at this point to suggest something completely opposite, i.e., that the Hearing Officer was possibly less than qualified to conduct this investigation, is not only disturbing to this Board Member, it also seems the Carrier has changed its mind and now recognizes it failed to provide a Hearing Officer who would conduct the investigation in a fair and impartial manner. Not surprisingly, this is exactly what the Organization protested and the majority of the Board Members found to be the case.

As the Organization stated in its submission and during oral presentations, at no time should the Hearing Officer convey an adversarial role toward the employee charged or find an individual guilty before all the testimony, including that of the employee charged, is given and analyzed. By Hearing Officer Thurman's initial question to the employee charged, there is no doubt that he failed to conduct himself in such a manner, i.e., he failed to conduct the hearing in a fair and impartial manner as he obviously had pre-determined the Claimant's guilt.

As for the Carrier Member's reference to other corroborating instances of the Hearing Officer being unfair and biased cited by the Neutral, contrary to his suggestion otherwise, it is believed the one overly revealing question alone, i.e., without the other corroborating instances, served to illustrate the Hearing Officer's pre-determination of guilt, which clearly established a basis for the ultimate conclusion that the Claimant was denied a fair and impartial hearing. The other instances cited served only to make the **certainty** of this appropriate and inescapable conclusion, **more certain**. As such, the Carrier Member's attempts to put a spin on the self-evident corroborating examples as being *something less than corroborating* is a useless exercise of no value whatsoever. Again, these regurgitated arguments were considered by the Board and appropriately rejected by the majority prior to rendering the decision in this case.

Without waiving the forgoing and for illustrative purposes, let us look at one of the corroborating examples, the first one, the Carrier Member attempts to discredit. In this case the Neutral Member indicated, "*The comments of the hearing officer, beginning on page 56 at line 6, reflect that he considered the document examiner to be "...our..." witness and that his testimony "...is the key in this..."* which "*...suggests the Hearing Officer had already taken sides with the Carrier and had embraced the anticipated testimony of the document examiner.*" In this example, the Carrier Member attempts to have us believe that the Hearing Officer's statement was made to only address the employee representative's allegation that the Carrier was retaliating against the Claimant in connection with a purported unrelated matter. Regardless of what the Hearing Officer may have been addressing, it does not change the fact that he referred to the forensic document examiner as "***our***" witness. Did the Claimant bring the forensic document examiner to the hearing as his witness? No. It is, therefore, clear that the Claimant was not on the side that the Hearing Officer referred to as "*our*" side. Did the Carrier arrange for the forensic examiner to be present at the investigation in support of the charging officer's allegations? Yes. How does one know this? Please see the testimony of the Hearing Officer that the Carrier Member has outlined in his dissent, which states, "*Mr. Hyatt is bringing the charges against Mr. Clark, based on the evidence that has been produced by the forensics document examiner.*" Hence, it is clear the Hearing Officer was on the side of the Carrier and the Charging Officer as evidenced by his reference to the forensic document examiner as being "***our***" witness. Again, regardless of what he was addressing, it is clear the Hearing Officer had taken sides which he was forbidden to do.

As for the Hearing Officer's comment that the forensic document examiner was "*the key in this*," based on the Carrier Member's contention that the Hearing officer was addressing a retaliation issue, we are expected to believe that the forensic document examiner was "*the key in*" establishing if retaliation was occurring or not. This, however, would be in direct conflict with the Hearing Officer's next statement that he was there in connection with the charges brought against the Claimant by Mr. Hyatt.

Obviously, this is a clear illustration of how the Carrier Member's attempt to put a different spin on what the Hearing Officer's statements meant, makes no sense whatsoever and each must be categorized as sophistry.

Finally, this Board Member has one last comment that deals with the Carrier Member's observation provided at the end of his dissent concerning the Neutral of this Board. While we are all veterans of these arbitration processes, it seems indecorous to me that any Board member would attempt to bully a Board Neutral with the hope of gaining more favorable decisions in the future. Integrity is not is to be feared or suppressed. Instead it is something that should be embraced. This is especially true for the members of this tribunal as we should be concerned with doing *what is right* in each and every case we review, and not be concerned with merely keeping score of wins and losses.

To reiterate, before it issued its decision, this Board discussed and rejected each of the extemely strained arguments raised by the Carrier Member in the dissent as they were completely devoid of merit and logic. This Board Member is confident that those who may read the dissent in the future will, once they are familiar with the case, recognize the sophistry of the Carrier's arguments and appropriately reject them as well.

Respectfully submitted,

R. B. Wehrli
Employee Member SBA 1127

April 19, 2002