

AWARD NO. 326
Case No. 326

File No. McGhee-DS-09-19-INV/MW-PITT-19-62-SG-723 SOU

SPECIAL BOARD OF ADJUSTMENT NO. 1049

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) DIVISION – IBT RAIL CONFERENCE
TO)
)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY
) (FORMER SOUTHERN RAILWAY COMPANY)

STATEMENT OF CLAIM:

Claim on behalf of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. D. McGhee, issued by letter dated November 1, 2019, in connection with his alleged (1) conduct unbecoming an employe in that during a verbal exchange with a Carrier supervisor, he purposely threw a cup of coffee at the supervisor, striking him in his lower back; and (2) conduct unbecoming an employe in connection with the above charge, when he struck a drink the Carrier supervisor was holding, purposely knocking it out of his hand, was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (System File McGhee-DS-09-19-INV/MW-PITT-19-62-SG-723 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant D McGhee shall now have his dismissal set aside with all notations thereof removed from all Carrier records and he shall also be restored all seniority and all financial and benefit losses, such as vacation and health insurance benefits occasioned as a result of the violation, including: (1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of suspension from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully suspended); (2) any general lump-sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; (3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was suspended from service, or on overtime paid to any junior employee for work Claimant could have bid on and performed had Claimant not been suspended from service; and (4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement, that this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

On September 18, 2019, Claimant D. S. McGhee was employed as a machine operator on gang T&S 20. Prior to the start of work that morning, Claimant and a supervisor were involved in a discussion about overtime pay for the day before, which escalated to the point where Claimant threw a cup of coffee at the supervisor, striking the supervisor in the back. Claimant then knocked a drink from the supervisor's hand.

By notice dated September 30, 2019, Claimant was directed to attend a formal investigation to determine his responsibility, if any, in connection with conduct unbecoming an employee in that, during an exchange with a Carrier Supervisor, he purposely threw a cup of coffee at him, striking him in the lower back, and conduct unbecoming an employee in connection with the above charge when he struck a drink the Carrier Supervisor was holding, purposely knocking it out of his hand. The hearing was held October 17, 2019, after which Claimant was found to be guilty as charged, and by notice dated November 1, 2019, he was dismissed from service.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first contends that Claimant was denied his right to a fair and impartial hearing when the Carrier failed to issue precise charges, stating that the notice of investigation did not reference the specific rule Claimant was alleged to have violated. The Organization asserts that the lack of a rule citation is a violation of the applicable agreement, and it argues that the discipline should be overturned on that basis alone.

With respect to the conduct of the hearing itself, the Organization objects to the Carrier's failure to make all relevant witnesses available to testify. It notes that there was at least one other witness to the incident who did not appear at the hearing, even though his written statement was entered,

and it asserts that the Carrier cherry picked which evidence to use against Claimant. The Organization states that it was improper to enter the hearsay statements of witnesses who were not subject to cross-examination, citing prior awards.

Third, the Organization argues that the hearing officer denied Claimant a fair and impartial hearing, as the record demonstrates that he was prejudiced against Claimant. It cites the hearing officer's allowance of the written statement referenced above as evidence of the hearing officer's bias, and it states that he only developed facts which supported the Carrier's position, rather than all of the facts. The Organization avers that the Board should overturn the discipline assessment on those grounds, without reaching the merits.

The Organization also submits that the Carrier failed to meet its burden of proof in connection with all of the charges. It contends that the Carrier did not establish that Claimant was substantially at fault for the incident in question. The Organization notes that there is no dispute that an altercation between Claimant and his supervisor occurred, but it submits that it was the supervisor who initiated the altercation. It points to Claimant's testimony that the supervisor intentionally bumped against Claimant, even though there was plenty of room to pass, spilling hot coffee on Claimant. The Organization cites Claimant's testimony that he was calm up until the point that hot coffee was spilled on him due to the supervisor's actions. It avers that when the mitigating factors are considered, the Carrier failed to meet its burden of proof that Claimant was guilty of the charges.

The Organization further maintains that the discipline assessed is arbitrary and unwarranted. It states that prior awards have recognized that rehabilitation is appropriate if an employee's career can be salvaged, and that the goal of discipline should be corrective rather than punitive. The Organization reiterates that Claimant's actions were due to provocation from the supervisor, and it cites prior awards which have considered such factors in finding discipline assessments to be excessive. It also contends that the Carrier has not treated Claimant even handedly, as evidenced by the supervisor not being subject to discipline, and it cites additional awards which have frowned upon assessment of disparate discipline. The Organization concludes that dismissal was not

warranted, and that Claimant should be returned to service.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessed. It argues that there is no agreement requirement to cite a specific rule in a notice of investigation. The Carrier states that the purpose of a notice of investigation is to make the employee aware of the matter to be investigated so that a defense may be prepared, and it avers that the notice of investigation in this case did just that. It avers that, unless Claimant had engaged in some other conflict for which he was removed from service, Claimant should have had no doubt about what incident was under investigation.

The Carrier also states that Claimant received a fair and impartial hearing, and it points to award authority which has upheld the introduction of written statements in a railroad disciplinary hearing. It denies that the hearing officer was biased or that he had prejudged Claimant's guilt. The Carrier further argues that Claimant's admission to most of the relevant facts, including throwing the coffee on his supervisor and slapping the drink from the supervisor's hand, obviates any procedural challenges.

The Carrier also asserts that the evidence adduced at the hearing fulfilled its burden of producing substantial evidence to establish Claimant's guilt. It states that the testimony and statements presented during the hearing conclusively proved that Claimant was guilty of the purposeful and intentional aggressive actions toward his supervisor as described above. The Carrier notes that the testimony of the charging officer was corroborated by testimony of not only the supervisor, but by two other employees who witnessed the events. It maintains that such evidence, including Claimant's own written statement and testimony, leave no doubt that Claimant was guilty of conduct unbecoming an employee, and that there are no mitigating circumstances.

With respect to the level of discipline imposed, the Carrier states that Claimant's physical attack on another employee cannot be tolerated in the workplace, and it points to prior awards which have upheld dismissal for similar conduct. It states that it is well within its rights to treat the violation as it did, and that it has no obligation to retain in its employ an individual who commits such

misconduct. The Carrier states that there are no mitigating circumstances which warrant modification of the discipline, and it asserts that dismissal is appropriate in light of the seriousness of the offense.

We have carefully reviewed the record in this case and the parties' arguments, and we find no procedural barrier to our consideration of the merits. We find that the notice of investigation adequately apprised Claimant and his representative of the matter to be investigated. We also find no indication that Claimant was prejudiced by the proceedings, or that the hearing officer was biased against Claimant. While there is no absolute bar to the entry of written statements in a disciplinary hearing, in this case we do not find that the hearing officer's allowance of one written statement deprived Claimant of a fair and impartial hearing, as that statement indicated the author did not observe the specific acts in question. The employees who apparently did see the interaction, on the other hand, were present to testify and they were subject to cross examination, and it appears to us that the facts in question were fully developed.

Turning to the merits, we find that the Carrier has provided sufficient evidence to establish that Claimant was guilty of conduct unbecoming an employee. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline assessment, which has been defined in prior awards as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.


Here, we believe that the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that Claimant engaged in conduct unbecoming an employee when he threw his cup of coffee on the supervisor's back, and again when he slapped the drink from the supervisor's hand. Claimant admitted to having committed those actions, and in our view, it should be obvious that such conduct has no place in the work setting.

It appears that the only real issue is whether Claimant was somehow justified in throwing a cup of coffee on his supervisor and knocking the drink from the supervisor's hand. Our review of the record reveals no such justification. There is some dispute about whether the supervisor bumped

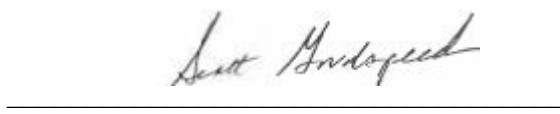
Claimant as he walked away, causing some coffee to spill on Claimant first. The supervisor denied making contact with Claimant, an eyewitness said that it appeared that the supervisor accidentally brushed against Claimant and that a few drops of coffee came out, and Claimant testified that the supervisor bumped against him intentionally and with sufficient force to cause his cup to break and coffee to spill on his shirt and pants. On this point, we do not think that the Carrier was obligated to believe Claimant's testimony or to find it credible. We believe the conflicting testimony presented a credibility issue which the Carrier was not obligated to resolve in Claimant's favor, and which we are not in position as an appellate body to second guess. Moreover, even assuming that the supervisor bumped against Claimant and caused some coffee to come from Claimant's cup, we do not believe Claimant's much more significant actions can be justified.

The next question before us concerns the level of discipline assessed. There is no doubt that there is no place in the workplace for the conduct that Claimant demonstrated, and the Carrier is indeed well within its rights to assess discipline against employees who engage in such behavior. The record does not demonstrate to us that the two employees were similarly situated, so we do not believe that Claimant has been subject to disparate treatment, but rather we find that he has been disciplined for his own improper conduct. To overturn the Carrier's assessment would require the Board to find that the Carrier acted arbitrarily or capriciously so as to constitute an abuse of discretion. On this record, we cannot find that the Carrier's actions were an abuse of discretion, so we will not substitute our judgment for the Carrier's now.

AWARD: Claim denied.


Michael D. Phillips
Chairman and Neutral Member


Adam Gilmour
Employee Member


Scott Goodspeed
Carrier Member

Dated: November 13, 2023