

SPECIAL BOARD OF ADJUSTMENT NO. 1112
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Vs.
BURLINGTON NORTHERN &
SANTE FE RAILWAY CO.

CASE # 80 – AWARD #81 – Larry E. Johnson

[Termination – Unauthorized use of Company Vehicle, AWOL, Sexual Harassment]

Dennis J. Campagna, Esq., Referee

William A. Osborn, Carrier Member

Roy C. Robinson, Organization Member

BACKGROUND

A. Special Board of Adjustment #1112

This Special Board of Adjustment was created pursuant to the provisions outlined in a Memorandum of Agreement (“MOA”) between the Carrier and the Organization dated September 1, 1982. Appeals reviewed under this MOA are expedited, and the Award resulting from any appeal, bearing only the Referee’s signature, is considered “final and binding” subject to the provisions of the Railway Labor Act.

B. The Appellant

Larry E. Johnson, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on July 12, 1976. At all relevant times, the Appellant was employed as a Foreman on the second shift gang at Galesburg, Illinois. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about October 12, 2004, following an Investigation conducted on September 18th, 2004, recessed, reconvened and concluded on September 20, 2004 by Michael F. Heille, ADMP and Conducting Officer, the Appellant was dismissed from employment effective September 10, 2004, having been charged with a violation of the Maintenance of Way Operating Rules 1.6, Conduct, 1.9, Respect of Railroad Company 1.15, Duty-Reporting or Absence and Maintenance of Way Safety Rule S-26.4, and Sexual Harassment as a result of the alleged incidents described below. The Appellant currently seeks, by way of this process, a reversal of the Carrier's decision to terminate his employment, reinstatement, and a make-whole remedy, consistent with Rule 40.

D. Facts Gathered from the September 18th & 20th Investigation

On September 18, 2004, a formal investigation was convened by Mr. Michael Heille, ADMP, who served as the conducting officer. During the investigation, the Appellant was represented by John Oeth III, Local Chariman, BMW, Lodge 798, Galesburg, Illinois. Mr. Oeth objected to the continuation of the hearing due to the fact that he had received, approximately 10 minutes prior to the start of the hearing, information he had earlier requested, information Mr. Oeth maintained was crucial to the Appellant's defense. Following the questioning of Jerry Dale, Special Agent for the BNSF Resource Team by Mr. Heille, the hearing was recessed until September 20, 2004 in order to give Mr. Oeth an opportunity to review the information he received, and to prepare his case. The Hearing was reconvened on September 20, 2004. The Carrier's case, as reflected in the record created at this formal investigation, established that:

- On August 25, 2004¹ Jerry Dale, Senior Special Agent for the BNSF Resource Protection Team, was contacted by Rick D. Pecs, Police Chief, Knoxville, IL Police Department. Chief Pecs maintained that the Appellant "[w]as harassing

¹ All dates noted herein occurred in calendar year 2004 unless otherwise noted.

his fiancée, Lisa Johnson". While Chief Pecsí indicated that he did not wish to pursue a formal complaint against the Appellant at that time, he requested that Mr. Dale speak with the Appellant "[a]nd get him to stop." (TR 9)²

- On September 1st, Mr. Dale was contacted by Chief Pecsí for a second time, maintaining that the Appellant continued to harass his fiancée and he wanted to do something about it. Accordingly, Mr. Dale gave the Chief a "hotline number", and suggested to him that he file a formal complaint. (Id.) On that same date, Chief Pecsí filed a formal complaint in which he alleged as follows:

1. "Pecsí reported sexual harassment and theft of time involving [the Appellant]", (TR 10)
2. That these allegations had been "ongoing for weeks, dates not recalled and 8/31/2004." (Id.)
3. "How: Pecsí stated Larry Johnson has been showing up at Lesa Johnson's job, a convenience store named Casey's in Knoxville, Illinois. Larry Johnson works for BNSF and has been driving a Company vehicle to Casey's. This has been going on for several weeks, dates not recalled. Pecsí believes Larry Johnson is doing this on Company time as he is driving the company's vehicle, description unknown."

"Lesá Johnson does not welcome the visits from Larry Johnson, but can not stop him from shopping there. (He) He tries to speak to Lesá Johnson on a personal level and has asked on 08/31/2004 if he could visit her at her apartment on 08/31/2004. He informed Lesá Johnson that he had "a lot of idle time" at work on 08/31/2004 and would be able to stop by. She did not want him to go to her house and informed him of this."

"He somehow discovered where Lesá Johnson lives and showed up, uninvited, date not recalled. She asked him what he wanted and he kept saying, " I found you, I found you!"

"Pecsí stated Lesá Johnson is very uncomfortable with the attention she has received from Larry Johnson. (She would like this attention) She would like this attention to stop and for him to leave her alone. How long has this been occurring and how often in the past? Ongoing for weeks. How do you know about this? Caller heard about the incident from another' person."

² References to the Official Transcript of this Investigation noted as "TR" followed by the appropriate transcript page number.

"Have you reported this issue to anyone in management? Yes. Name:
Jerry Dale"

"Title, work area, or responsibility: Unknown When reported: 09/01/2004
Action taken: Pecsí was referred to the hotline.

"Interview notes: None.
Call back arrangements: NCB
Supplemental: What Division did this occur within? Unknown What
Department did this incident occur in? Operations If other please specify:
Unknown

Conditions: The information contained in this report was provided by a
third party.

Source: The Network, Inc. does not verify the accuracy of the correctness
of the information contained in this report."

(Exhibit 3)

- Chief Pecsí supplied Mr. Dale with a prepared, type-written statement, on official Knoxville Police Department Stationary on September 10th. The statement reiterated much of the same information Chief Pecsí supplied in his formal "hotline" complaint, consisting of his (Pecsí's) statement of what Lesa Johnson, his fiancée, allegedly told him. (Exhibit 4, TR 15-16) Mr. Dale counted four occurrences whereby the Appellant allegedly spoke to Ms. Johnson. (TR 17)
- On September 10th, Mr. Dale interviewed the Appellant, who supplied Mr. Dale with the following "Statement": "I have spoke to the woman twice. In general, went by her house, spoke to her thru the door, she had to go because of business. Never gone back since." (Exhibit 5) While Mr. Dale did not offer the Appellant the opportunity to have a Union Representative present at the time of his interview, not being aware he had any right to such. (TR 36) It was also established that the Appellant never requested Union representation. (TR 34, 36) Mr. Dale described his interview with the Appellant as congenial and pleasant. (TR 35)

- Mr. Dale concluded his investigation on September 10th, at which time he “verbally” notified the Division Engineer, who took the Appellant out of service that same date. (See TR 39)
- Mr. Dale testified that neither Chief Pecsí nor Ms. Johnson would give testimony in this matter. Chief Pecsí’s refusal was allegedly due to the fact that “[h]e’d been receiving calls from Mr. Johnson’s wife, and had, Mr. Johnson’s wife had already called people in the community where he lives about this incident. And he felt like that, he didn’t want to pursue it any further with, and testify”. (TR 17-18) Mr. Dale, who received his information from Chief Pecsí, and not Ms. Johnson, indicated according to Chief Pecsí, Ms. Johnson would not testify because “[o]f fear of Mr. Johnson, or the retribution from Mr. Johnson.” (TR 20, 32) [See also testimony of Roadmaster John Bainter, who served as the Appellant’s immediate supervisor. TR 40-41, Exhibit 7] On September 14th, Mr. Bainter reported that neither would testify because “[C]hief Pecsí informs me that neither the victim or himself would not appear because Mr. Johnson’s wife was now calling his cell phone and harassing he and the victim, as well as friends of his.” (TR 46, Exhibit 7) In this later regard, Mr. Bainter testified that the Appellant’s wife did call him following the Appellant’s removal from service on September 10th, and in “[a] real short conversation”, inquired as to the reason(s) underlying the Carrier’s decision. (TR 54)
- Mr. Dale indicated that he was unaware as to the reason why Police Chief Pecsí could not have handled the alleged harassment of his fiancée himself without the Carrier’s intervention. (TR 27) Moreover, Mr. Dale noted that the Appellant had, at no time, been civilly or criminally charged with harassment or stalking. (TR 61)
- During his testimony, Mr. Dale could not recount the number of occasions he spoke with Chief Pecsí since he did not keep a logbook. (TR 31)
- In addressing the statement drafted by Chief Pecsí, Mr. Dale noted that he could neither assert its truth or untruth, but noted that it could very well have represented a statement by “[a] disgruntle fiancée, or boyfriend.” (TR 32)

- John Bainter, Roadmaster and the Appellant's immediate supervisor, testified that the Appellant has permissive use of a Company vehicle to perform official tasks. In addition, Mr. Bainter noted that the Appellant would also be permitted to have continued use of the Company vehicle while he was on break, for purposes such as getting food or cigarettes. (TR 45) Mr. Bainter further testified that his knowledge of the Appellant's presence at either Casey's convenience store, or the Mobil station where Ms. Johnson worked was obtained as a result of his reading of Chief Pecsí's statements. (TR 57)
- Neither Ms. Johnson nor Chief Pecsí gave testimony in the official Investigation conducted by the Carrier. Moreover, it was also established that during the process of his official investigation, Mr. Dale never spoke with Ms. Johnson. (TR 60)

The Organization's case, consisting primarily of the Appellant's testimony, established that:

- While the Appellant admitted that he had visited Ms. Johnson's house on one occasion, he noted that when he did so, Ms. Johnson answered her door with only a blanket, and no clothes on. (TR 50) The Appellant testified that Ms. Johnson laughed as she excused herself, and that the Appellant never returned to her residence. (Id.) In addition, the Appellant testified that he did not use a Company vehicle for said visit which took approximately 2 minutes, (TR 48, 49, 53), that he did not conduct said visit on Company time, (Id.), that Ms. Johnson had given the Appellant her address and invited him to "[s]top by any time." (TR 63-65)
- In addressing the specific allegations made by Chief Pecsí, the Appellant: never harassed Ms. Johnson, (TR 53, 65), went to her house by invitation from her (TR 64), and never acted rude or obscene to Ms. Johnson, (TR 65). The Appellant testified that he had informed Ms. Johnson that he was married, and that she had asked about his wife "several times." (Id.)

- With respect to the Appellant's encounters with Ms. Johnson, the Appellant testified as follows: He admitted seeing Ms. Johnson at Casey's, a convenience store located in Knoxville, Illinois when he stopped on two occasions for food and/or cigarettes. (TR 48-49) The Appellant testified that their conversations included discussions about Ms. Johnson's son, and various problems her son had with his vehicle. (TR 50) The Appellant also testified that he was aware that Ms. Johnson had previously worked at a Mobil Gas located in Galesburg, Illinois where he had occasion to fuel his Company truck, (TR 49), and that he also fueled up at the Sitco Station just outside of Knoxville, IL. (Id.)³ The Appellant testified that during one of their conversations, he asked Ms. Johnson "[w]ho [she] was dating these days", to which she informed the Appellant that she was "[d]ating a police officer." (TR 50) The Appellant denied that he ever told Ms. Johnson "{ found you. I found out where you live. I found you." (Id.)
- The Appellant testified that to his knowledge, his wife never called Chief Pecsí or Division Engineer Roskilly. (TR 51) He also maintained that to the best of his knowledge, his wife never called Mr. Bainter, although, as noted above, Mr. Bainter testified to the contrary. (TR 51, 54) There was no testimony from either Chief Pecsí or Mr. Roskilly in this regard.

DISCUSSION

A. The Role of the Referee in the Instant Matter

Pursuant to the Memorandum of Agreement between the parties dated September 1, 1982, the role of the Referee in this matter is three-fold:

1. To determine whether there was compliance with the applicable provisions of Schedule Rule 40;

³ The record shows that the Appellant stopped at "Academy Mobil", located in Galesburg, IL on August 25th to fuel his vehicle. The record also shows that three other employees also stopped there for fuel. (See Exhibit 8)

2. To determine whether *substantial evidence* was adduced at the investigation to prove the charge at issue, and
3. To determine whether the discipline was excessive.

B. Compliance With Rule 40

At the outset of the investigation on September 18th, Mr. Oeth objected to the continuation of the investigation on the basis that he had just received crucial materials he had earlier requested, and had not had an opportunity to review said materials. Following the direct examination of Mr. Dale, Mr. Heille, who acted as the Conducting Officer, granted Mr. Oeth an adjournment until September 20th. On September 20th, Mr. Dale conducted his cross-examination of Mr. Dale, and raised no further complaints about his inability to prepare his case. Beyond his objection on September 18th, the Organization did not lodge any further claims regarding a Rule 40 violation. While the Organization did make numerous objections, said objections, raised over the introduction of various exhibits, together with the Carrier's reliance on hearsay evidence, went to the substance of the Carrier's case, and not to alleged violations of Rule 40. Accordingly, I find compliance with Rule 40 in this matter.

C. The Just Cause Requirement of Rule 40

Rule 40 represents the results of the mutual understandings between the Carrier and the Organization relative to Investigations and Appeals, and by its very terms, encompasses a just cause requirement surrounded by strict time limits. While there are literally thousands of case decisions applying a just cause principle, the more appropriate application is one that combines established elements of "due process" with the preponderance of the evidence standard. Accordingly, in the instant matter, just cause will be found to exist where it has been established that:

- The due process standards incorporated in Rule 40 have been followed, and

- Where, given the facts, circumstances and evidence in this matter, “substantial evidence” supports the Carrier’s conclusion that the Appellant did as he was charged.

Both elements must be present in order for the Carrier to succeed in its case.

While this procedure is appellant in nature, the Referee none-the-less serves as a check against mistaken decisions and provides a determination of whether reasonable grounds exist to believe that the charges made against this Appellant are true and support the proposed action, here, termination. This is the essence of just cause – that the Carrier, in carrying out its right to discipline employees, must do so in a manner that is not unreasonable, arbitrary, capricious or discriminatory.

D. Substantial Evidence Does Not Exist to Support the Instant Charge

In the instant matter, the Carrier seeks the Appellant’s termination from employment. It is well accepted that termination, often referred to as “industrial capital punishment”, is the most extreme penalty since the employee’s job, seniority and other contractual rights and benefits are at stake. This is particularly so in the instant matter where the Appellant has been employed by the Carrier since 1976. In order to safeguard the Appellant’s rights, the Carrier and the Organization have agreed that the Carrier’s determination following an investigation that comports with Rule 40 will not be disturbed where it can be demonstrated that the Carrier’s determination is supported by “*substantial evidence*.” It should be noted that while the burden imposed by substantial evidence is not as onerous as the burden imposed by “beyond a reasonable doubt”, such burden is far greater than that imposed by a “preponderance of the evidence” standard.

While the Organization has raised numerous procedural objections, the mainstay objection by the Organization had to do with the extraordinary use of hearsay evidence, upon which the Carrier relied in making its ultimate determination that the Appellant did as charged.

In the instant matter, it is apparent that the Carrier made its credibility determination against the Appellant, and did so based upon a case grounded *solely* on evidence of a hearsay nature. Accordingly, the Carrier determined that the Appellant engaged in the serious acts for which he was charged, namely his "unauthorized use of a company vehicle", for "leaving work without authorization while under pay", and for using "[t]he Carrier Truck to go to a private home that [he] was not invited to at approximately 6:15 p.m. on August 31, 2004."

Hearsay is generically defined as "a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted." (See Fed. Rules of Evidence, Rule 801). This definition includes assertions made outside of the hearing offered to prove the truth of the assertions, precisely as what has occurred in the instant matter. In non judicial proceedings, such as the one before us, there is a more flexible position on the admissibility of hearsay testimony as compared to a more formal court proceeding. However, the evidentiary value of a hearsay statement depends on the credibility of the declarant, who is, however, not subject to cross-examination, and whose perception, memory and truthfulness cannot be tested. Accordingly, the testimonial trustworthiness of the hearsay in question must be determined in the first instance, and whether, in the absence of the ability to cross-examine the declarant, the Appellant had a fair opportunity and means to counter the testimony in an appropriate fashion. Where the reliability of the evidence is particularly questionable, arbitrators will exclude it. In the instant matter, it is apparent that the Carrier chose to give the relevant evidence against the Appellant, totally hearsay in nature, great weight in reaching its determination that he did as he was charged. It must now be determined whether or not substantial evidence exists in the record to support the Carrier's determination.

The Carrier's case rests upon the testimony of Special Agent Jerry Dale, whose investigation involved a review of an *unsworn* complaint by Chief of Police Rick Pecs, and a written statement by Chief Pecs on official Knoxville Police Department

Stationary.⁴ Notably missing was a statement by Ms. Johnson, the alleged victim in this case. Also missing was any "live" testimony from Chief Pecsí. The lack of testimony from either of these individuals was based on a claim that both were concerned about potential reprisal activities and harassment by the Appellant. Respectfully, there is not one scintilla of evidence in the record to support this claim. In this regard, while Mr. Bainter testified that the Appellant's wife did in fact call him, he described their conversation as brief, and noted that the purpose of her call was simply to question the reason behind the Carrier's decision to remove her husband from service. Notably missing from Mr. Bainter's testimony was any evidence that the Appellant's wife was abusive in any way. Given these undeniable facts, the Appellant's livelihood lies in the hands of Chief Pecsí, an absent witness, who did not personally observe any of the alleged encounters the Appellant had with Ms. Johnson. Clearly, therefore, there is a substantive gap in the facts surrounding the Appellant's removal, to the extent that without more, Chief Pecsí's statement could be nothing more than an empty claim made by a disgruntle fiancée or boyfriend, a position even Mr. Dale was willing to agree with.

Given the foregoing, it is clear that the Appellant was deprived of a fair opportunity and means to counter the damaging allegations made by Chief Pecsí and Ms. Johnson in an appropriate fashion, thereby depriving him of his due process rights under the just cause principle set forth in Rule 40. Accordingly, it cannot be said that the Carrier's determination was supported by substantial evidence in the instant matter.

⁴ Given the "official" nature of Chief Pecsí's statement, it is curious at best as to why the Chief and/or his staff could not have handled what amounted to allegations of harassment and/or stalking by the Appellant as an official police issue, but rather chose the "Wizard of Oz" approach in his decision to file his complaint with the Carrier.

CONCLUSION AND AWARD

Given the foregoing discussion and analysis, it is the determination of this Referee that:

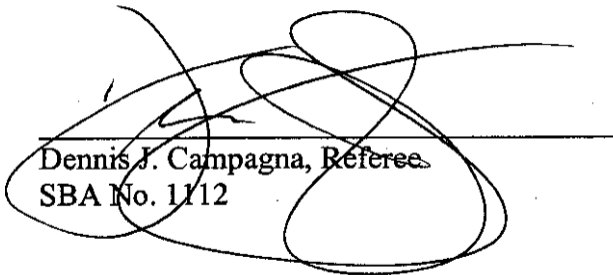
1. The Carrier has complied with Rule 40, and
2. Substantial evidence *does not* exist to support the charges at issue.

Accordingly, the Carrier lacked just cause to support the Appellant's removal from service.

Having found that the Appellant was unjustly disciplined and/or dismissed, such discipline giving rise to the Appellant's removal from service shall be set aside and removed from his record. Consistent with this determination, the Appellant shall be reinstated with his seniority rights unimpaired, and shall be compensated for wages lost, if any, suffered by him as a result of his unwarranted removal from service. (Rule 40(G)).

1-25-05

Dated


Dennis J. Campagna, Referee
SBA No. 1112