

The purpose of this investigation is to develop the facts and place your responsibility, if any, in connection with a report received that you displayed conduct unbecoming a CSX employee when you allegedly made slanderous and false statements and used obscene language in the work place during a conversation with a Company Officer at approximately 11 hours on April 25, 2006 at the Barr Yard Administration Building, and all circumstances relating thereto.

On May 8, 2006, Carrier issued Claimant an amended notice indicating that the date of the incident at issue was April 24, 2006. The letter also indicated that, pursuant to Claimant's request, the investigation had been postponed until May 16, 2006. Following the investigation, Claimant was found guilty of violating Rule GR-2 of the Carrier's Operating Rules and dismissed from Carrier's service. Rule GR-2 provides, in relevant part:

All employees must behave in a civil and courteous manner when dealing with customers, fellow employees and the public. Employees must not:

1. Use boisterous, profane or vulgar language;
4. Be disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless, or incompetent . . .

R.T. Brock testified at the investigation that on April 24, 2006, he was employed by the Carrier as Road Foreman of Engines at its Chicago, Illinois facility; at the time of the investigation, he was employed as an engineer. He stated that at approximately 10:30 to 11:00 a.m., at the Barr Yard Administrative Building, he was in the Road Foreman's office making copies for Organization representatives for a hearing that morning. He stated that Claimant, who was also to attend the hearing, entered the office; no one else was present. He stated that the investigation was running late because they were waiting for the hearing officer.

During the hearing, then-RFE Brock read into the record a statement he had prepared summarizing the events of April 24, 2006. The statement recited that Claimant had entered the office and began to inquire about Trainmaster David Harris allegedly destroying Carrier property, using violence and threatening Organization-represented employees. RFE Brock's statement recited that he had replied that he had been on vacation and on a rest day and had not heard anything about Trainmaster Harris. The statement further recited that Claimant had asked whether the Carrier was going to fire Trainmaster Harris, as he had been removed from the property in a straightjacket. The statement recited that Claimant stated that the Carrier was using unqualified hearing officers, but the real problem was that Trainmaster "S," apparently the hearing officer in an investigation, was looking at his watch because a named female Carrier employee was in a hotel in Chicago and Trainmaster "S" was in a hurry to "f . . ." her before she was called for work. According to RFE Brock's written statement, Claimant then stated that

the joke was on Trainmaster "S" because the female employee was the first out and had already been called to work. The statement further recited that RFE Brock was in shock, as he had known both employees and their families for a long time. The statement further recited that RFE Brock was disappointed that Claimant would make such "slanderous" statements and that he would represent the Organization in such a manner.

RFE Brock testified that immediately following the conclusion of this conversation he contacted his supervisor, D. Beagle, and asked him how to proceed. He stated he was advised to write the statement and forward it to the appropriate individuals. He testified that he sent the statement to Trainmaster "S" and D. Beagle at 1:14 p.m. the following day, April 25, 2006.

At the investigation, RFE Brock acknowledged that he had been a Road Foreman of Engines, a Carrier officer, at the time of the incident but was no longer employed in that capacity. The Organization's representative attempted to question RFE Brock about why that was the case, but the Hearing Officer refused to allow that line of questioning. The Organization representative also attempted to question RFE Brock about comments he had allegedly made at a management meeting on April 26, 2006, as he believed that they demonstrated bias and animus towards Claimant and were therefore relevant to RFE Brock's credibility. However, the Hearing Officer ruled that the matter was not relevant to the charge and denied the Organization's request. The Organization also requested that the Carrier produce for the investigation 13 Carrier officers who had been present at that meeting, but that request was also denied. RFE Brock testified that he bore Claimant no animus, and that he had never made Claimant the butt of a racial slur or joke.

The Claimant testified at the investigation that on April 24, 2006, he was present in the Road Foreman's Office at Carrier's Barr Yard Administrative Building for an investigation that was set to begin at 9 a.m. He further testified that when he arrived, he found that no arrangements had been made to secure a hearing officer. He testified that he told RFE Brock that they had no hearing officer and that pending arrangements he would like to have locomotive download information that was relevant to the investigation. He stated that RFE Brock replied that he was not at liberty to provide the information in advance of the investigation, and that he had heard that Trainmaster "S" had expelled Claimant from an investigation. Claimant testified that he replied that the hearing officer had no right to do so and the matter would be rectified, as the member in that case had a contractual right to choose his representative.

Claimant further testified that he told RFE Brock that Hearing Officer "S" had appeared to be in a hurry because, as other hearing participants had also noticed, he kept looking at his watch. He stated that RFE Brock offered the opinion that the hearing officer was probably going to meet someone, that he was involved with a female employee. Claimant stated that he replied that RFE Brock had just made a serious judgment about another Carrier officer, and that it might affect Claimant because it could involve victimization of an employee. He testified that he told RFE Brock that he had an obligation to bring the situation to someone's attention, and that RFE Brock replied that it had been common knowledge for a while. Claimant specifically denied that he had

offered any information about an alleged affair. He also stated that prior to the events at issue he had not known the female employee. Claimant also denied stating that Hearing Officer "S" had been in a hurry because he wanted to "f . . ." another employee, and denied that the "f" word had been used at all during the conversation.

On June 26, 2006, following an investigation, the Carrier found RFE Brock guilty of conducting unbecoming a Carrier employee when, on April 26, 2006, he "made disparaging remarks concerning BLET Local Chairman A. Vasquez" and dismissed him from Carrier's service. At the investigation into those charges, Carrier witnesses testified that during a management meeting on April 26, 2006, RFE Brock asked if they knew what had happened earlier that day, when the local Organization chairman (Claimant) had been escorted off the property. The Carrier witnesses testified that RFE Brock had stated that Claimant had been escorted off, perhaps by immigration authorities, because "he didn't have his green card." Brock testified at his investigation that he stated that Claimant had been escorted off the property, perhaps by the police or one of several federal agencies. He specifically denied stating anything regarding a green card, although he stated that he might have referenced immigration authorities because there had recently been several immigration raids in the area.

The Carrier first asserts that the Organization's procedural arguments lack merit. Notwithstanding the asserted vagueness of the investigation notice, the Carrier contends that Claimant obviously understood which conversation was at issue. Further, Carrier states, the typographical error in the date of the incident is immaterial and harmless, and was corrected by the amended notice, issued well in advance of the investigation. The Carrier points out that numerous awards support its position on this issue. The Carrier also asserts that there is no merit to the Organization's contention that the charge is untimely, as the initial notice was mailed only three days after the incident at issue.

The Carrier further contends that there is no merit to the Organization's claim that the lack of witnesses and documents prejudiced the investigation. The Carrier points out that it produced the witness with first-hand knowledge of the incident at issue, and the 13 supervisors whose presence the Organization requested had no direct knowledge of that incident and were, therefore, rightfully excluded from the investigation.

On the merits, the Carrier asserts that the charges against Claimant are supported by substantial evidence. The Carrier points out that it maintains rules to prevent the use of vulgar language, intimidation and violence in the workplace, and RFE Brock's statement clearly supports the conclusion that Claimant used vulgar and profane language, and made false and slanderous statements. The Carrier asserts that Claimant's self-serving version of the incident was properly rejected. The Carrier notes that its later dismissal of RFE Brock demonstrated that, following the incident involving Claimant, it questioned RFE Brock's conduct, but that does not call into question his integrity or veracity. The Carrier notes the well-established principle that where, as here, there are conflicting versions of events, the responsibility for resolving the credibility conflict lies with the investigating officer, and he properly did so in this case.

Finally, the Carrier contends that the discipline assessed against the Claimant was fully justified. Especially in view of the changing and diverse workplace, remarks such as those made by Claimant cannot be tolerated, Carrier asserts. Carrier concludes that Claimant was guilty of a major offense and properly dismissed.

The Organization raises numerous objections to Claimant's dismissal, both procedural and substantive. However, it asserts, the case boils down to a credibility dispute between two individuals, Claimant and then-RFE Brock, who, it states, demonstrated bigoted and small-minded motives for making the allegations against Claimant. The Organization stresses that the hearing officer refused to allow questioning of Brock concerning the management meeting where he allegedly made bigoted remarks against Claimant, and when and why he was relieved of his duties as a Carrier officer. Exploration of these areas, the Organization asserts, was critical to the full assessment of Brock's credibility, especially since after Claimant's investigation Brock was charged, and later dismissed by the Carrier, for making disparaging remarks concerning Claimant.

The Organization notes that it also requested the presence of the 13 Carrier officials who were present at the April 26 management meeting, who could have testified concerning Brock's allegedly derogatory comments, but that request was denied. The Organization argues that the allegations of racial bigotry, later determined well-founded by the Carrier, raise serious doubts as to the credibility of the only witness against Claimant, and the Organization had a right to explore those issues. Because the hearing officer did not allow exploration of these matters, the Organization concludes that his decision to credit RFE Brock over Claimant was not supported by substantial evidence.

Further, the Organization points out that it raised nine major procedural defects in the investigation. First, it states, the original charge notice was very vague, in that it did not specify the nature of the statements alleged, to whom they were allegedly made, or did it specify any particular rules violations. Second, the Organization contends, the charge did not comport with the 10-day time limit for issuance. The original charge, it notes, stated that the incident occurred on April 25; it was not until May 12, some 17 days later, that the Carrier issued an amended letter indicating that the incident occurred on April 24. During that time, the Organization asserts, Claimant was attempting to prepare a defense to an occurrence of which he had no knowledge, on April 25.

The Organization also notes that it objected to the on-property behavior of Carrier manager Dave Knuckles who, prior to the hearing, conducted job briefings where he discussed the instant case with crews, portraying Claimant as guilty. The Organization points out that it attempted to secure the presence of this witness at the hearing, but Carrier denied the request. The Organization also notes that the Carrier failed to produce its policies concerning discrimination and racial harassment, and denied the request that it produce a CSX Human Resources Department official qualified to testify concerning Carrier's policies.

The Organization contends that the Carrier further demonstrated its prejudice by immediately removing Claimant from the seniority roster and denying his computer

access, contrary to its usual practice. In addition, the Organization points out, the Carrier assigned police to watch Claimant when he was on Carrier property in his role as an Organization representative.

The Board has carefully reviewed the record in its entirety, and concludes that it lacks substantial evidence to support the Carrier's determination that discipline should be imposed. Claimant, an employee with 28 years' seniority with the Carrier, was dismissed based upon the testimony of one individual that Claimant had made vulgar remarks that two other Carrier employees were engaged in an affair. As Claimant denied making the remarks, credibility was not only at issue, it was the sole and determinative issue going to the merits of this case. Thus, it was incumbent upon the Hearing Officer to make a full and complete record of all matters relevant to the credibility of these two individuals. In this Board's view, he failed to do so and denied Claimant his right to a full and fair investigation.

By limiting testimony to the specific conversation that resulted in the charge, the Hearing Officer precluded the Organization from fully exploring matters directly impacting RFE Brock's credibility, including whether he harbored bias or racial animosity against Claimant and whether he would be truthful with respect to what transpired at the management meeting on April 26, where his own conduct was at issue. Indeed, the Carrier later determined, notwithstanding RFE Brock's denial, that he had in fact made disparaging remarks, including an ethnic slur, against Claimant at that meeting, thus casting serious doubt upon RFE Brock's credibility. By failing to allow evidence concerning these matters at Claimant's investigation, the Hearing Officer viewed the events of April 24 in isolation and denied himself the opportunity to consider crucial factors relevant to assessing RFE Brock's veracity. Thus, the decision to credit RFE Brock's version of events was not supported by substantial evidence.

In reaching this conclusion, we do not disturb the well-established principle that credibility determinations are the province of the hearing officer, nor do we make any findings as to which version of the events at issue was more credible. We simply find that because the hearing officer foreclosed consideration of matters directly bearing on the credibility of the only witness against Claimant, the Hearing Officer was not in possession of all of the information necessary to assess RFE Brock's credibility. Thus, the Carrier has failed to meet its burden of proof.


Moreover, our determination herein should not suggest that we condone conduct such as that alleged against Claimant, nor do we indicate what discipline, if any, would have been appropriate had the charges been proven. However, they were not.

In light of the foregoing, we need not address the remaining issues raised by the Organization. The claim will be sustained.

AWARD

Claim sustained. The Carrier is directed to comply with this Award within 45 days.


JACALYN J. ZIMMERMAN
Neutral Member


ROY E. MEADOWS
Carrier Member
Written dissent attached


RICHARD K. RADEK
Organization Member

Dated this *29th* day of *August*, 2007.

Carrier's Dissent to
Public Law Board No. 6936
Award No. 28
Referee Jacalyn J. Zimmerman

The Majority's logic and decision in favor of the Petitioner in this case failed to recognize well-established principles in this industry relating to fact-finding during an investigation, credibility determination, and the limit of the Board's jurisdiction.

The incident under review in this case occurred on April 24, 2006, for which Claimant was charged on April 27, 2006. The Majority erroneously relied upon, in its findings, the June 26, 2006 results of an investigation of an April 26, 2006 incident involving the Road Foreman of Engines (RFE). What was developed 41 days after the close of the Claimant's May 16, 2006 investigation in the case at bar definitely was irrelevant to the April 27, 2006 charge, was inadmissible in this record, and should have been of no interest to the Majority.

Additionally, the Hearing Officer rightfully credited the RFE's rendition over that of the Claimant concerning the April 24, 2006 incident. The RFE had just returned from vacation and, while not apprised of the content of the Claimant's harangue, he rightfully took exception to its insulting delivery. The Majority, however, went outside the scope of review of the incident, as demonstrated above, to not only reject the RFE's account, but endorse the Claimant's version for no conscionable reason.

The Hearing Officer also correctly limited development of the facts to what occurred on April 24, 2006. The Board mistakenly drew a negative inference by the Hearing Officer's adept handling and, in doing so, blazes a new frontier by subscribing to include in investigative record unlimited and unbridled interrogation of unrelated, undetermined, subsequent matters.

The Majority's findings and decision in this case are erroneous and the Carrier Member dissents.

August 29, 2007
Date

Roy E. Meadows
Roy E. Meadows, Carrier Member