

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

Award No. 26078

Docket No. 45831

04-1-02-1-U-2929

The First Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Locomotive Engineers  
(Union Pacific Railroad Company

**STATEMENT OF CLAIM:**

"Appealing the Upgrade Level 5 Discipline assessed to Engineer R. J. Chaput and request the removal of discipline assessed and pay for any and all time lost with all seniority, vacation and all other rights restored unimpaired. Action taken as a result of formal investigation held on August 14 and 15, 2001."

**FINDINGS:**

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On July 25, 2001, the Claimant, an employee with more than 26 years of service at the time of this dispute, was removed from service as a result of sexual harassment accusations made by a female driver who was an employee of a crew transportation service contracted by the Carrier to transport train and engine crew

members for the Carrier. On July 27, 2001, the Claimant was sent a formal Notice of Investigation charging him with a possible violation of Rule 1.6 (Conduct); Rule 1.9 (Respect of Railroad Property); Rule 1.6.2 (Notification of Felony Convictions); and Rule 1.12 (Weapons) as contained in the Carrier's General Code of Operating Rules (GCOR). The specific allegations read as follows:

"While employed as the Engineer for the Union Pacific Railroad, working on the LJM41 at Arden, Nevada, on July 22, 2001, at approximately midnight, it is alleged that you engaged in conduct unbecoming an employee when you made unwelcome sexual comments repeatedly and/or other verbal behavior of a sexual nature toward Ms. Kelly Yates, an employee of Retzenberger (transportation contractor provided by Union Pacific Railroad at Arden/Las Vegas, Nevada). In addition you allegedly admitted to Manager Frank Cisneros that you had a firearm on railroad property and that you were a convicted felon."

After two mutually agreed-upon postponements, the Investigation was conducted on August 14 and 15, 2001. By letter dated August 25, 2001, citing the Carrier's UPGRADE Discipline Policy, Superintendent Cameron A. Scott issued the Claimant a Level 5 "Notification of Permanent Dismissal," the first paragraph of which stated:

"Dear Mr. Chaput:

Reference Notice of Formal Investigation and Hearing sent you dated May 21, 2001, and subsequent Postponement Notice Sent you under day of July 27, 2001, and subsequent postponement notice. After carefully considering the evidence at the Hearing and Investigation held in Pocatello, Idaho, on June 11, 2001, I find that the following charges against you have been sustained."

The next paragraph was an exact re-statement of the charges, as set forth in the July 27, 2001 Investigation Notice. The balance of the letter specified the discipline of dismissal, requested that the Claimant return all Company property to the Carrier, and informed the Claimant that he should find attached a copy of the Investigation transcript, which was also sent to the Organization.

On August 27, 2001, the Claimant received the above dismissal notice. According to the record, the Claimant immediately contacted Superintendent Scott, via Scott's cellular telephone, and left a message informing him of what he perceived to be were several discrepancies in the first paragraph of the August 25, 2001 dismissal letter, as follows: (1) Claimant's notice of Investigation was dated July 27, 2001, not May 21, 2001; (2) Claimant's Investigation took place on August 14 and 15, 2001, not on June 11, 2001; and (3) the Investigation was held at Las Vegas, Nevada, not Pocatello, Idaho. The Claimant furthermore informed Scott that, based on these errors, he did not believe the Carrier had taken time to review the Investigation record before assessing the Level 5 dismissal. In a letter dated August 31, 2001 to the Organization, the Claimant memorialized the contents of the message he left on Scott's cellular telephone.

On August 27, 2001, the Claimant received a "Revised Notification of Permanent Dismissal," which was identical in all respects to the August 25, 2001 discipline notification, except for the following changes in the opening paragraph:

"Dear Mr. Chaput:

First paragraph should read: Reference Notice of Formal Investigation and Hearing sent you dated July 27, 2001, and subsequent postponement notice. After carefully considering the evidence at the Hearing and Investigation held in Las Vegas, Nevada, on August 14, 2001, and August 15, 2001, I find that the following charges against you have been sustained."

During its on-property handling of this dispute with the Carrier, the Organization raised various procedural issues and arguments concerning the merits of the case, which failed to result in the parties' resolution of the matter. Thus, on March 21, 2002, the Organization served a Notice of Intent to file an *ex parte* submission with this Board. The parties then had until June 6, 2002 to submit their respective *ex parte* submissions to the Board, we note.

The record confirms that, on June 6, 2002, subsequent to the Organization's date of filing, and after the parties had prepared their *ex parte* submissions, the Carrier, under the signature of Superintendent Cameron A. Scott, issued a letter to the Claimant reinstating him to service "with all seniority rights unimpaired, effective immediately." The letter conveyed the Carrier's position that, "Discipline

assessed under its UPGRADE Policy should be educational in nature and not punitive," and that given the facts and circumstances, the Carrier had deemed it appropriate to reduce the discipline from Level 5 to Level 3.

As a result of the Carrier's reduction of the discipline, the Claimant was reinstated "with time withheld from service to be regarded as a period of actual suspension." The Claimant was directed to contact the Senior Manager of Train Operations no later than June 17, 2002 in order to arrange his return to service, which in fact, was timely accomplished, the record demonstrates. The last sentence of the Carrier's reinstatement letter to the Claimant stated, "Upon completing the above, you will be free to mark up for service. You will also retain your right to progress your claim for compensation for lost time to a Public Law Board." Therefore, the question before us is whether the Claimant is entitled to back pay from the date he was withheld from service, July 25, 2001 to his reinstatement date of approximately June 17, 2002.

The principal procedural argument raised by the Organization, as initially asserted by the Claimant in the form of his cellular telephone message to Superintendent Scott, stresses the Organization, centered on the August 25, 2001 discipline Notice. According to the Organization, the Notice itself is persuasive evidence that the Carrier prejudged the Claimant by determining his guilt without the Superintendent having reviewed the transcript. Specifically, in its September 21, 2001 letter of appeal to the Manager of Labor Relations, the Organization stated the following:

"Organization notes that according to letterhead on Superintendent Scott's August 25, 2001, letter, the Utah Service Unit office is located in Salt Lake City, Utah. The foregoing items are evidence that superintendent did not review the case as claimed in the letter. We also note that the signature affixed to the Notice of Discipline letter dated is initialed by an "MRC". Organization observes that on page 2 of the transcript supplied to us in this case (hearing held in Las Vegas at the Hampton Inn on August 14 and 15, 2001) is a statement that it was transcribed by a Marcia R. Cain. According to the statement Ms. Cain is not an employee of Union Pacific Railroad Company, but works for "CAS Associates, Inc". Apparently, Notice of Discipline letter was signed by Ms. Cain on behalf of Superintendent Scott and mailed by her to Claimant. Foregoing is

evidence that Claimant was not given a 'fair and impartial' hearing as required by the System Discipline Rule. It is [a] fundamental right of an accused person to have his case reviewed by designated Carrier officer or responsible Carrier employee prior to discipline being assessed. By not reviewing case Carrier proves that it was acting on a predetermination of guilt by Claimant. According to Notice of Discipline Claimant's work location is Arden, Nevada within the jurisdiction of the Utah Service Unit - Superintendent C. A. Scott."

The Organization further emphasized in subsequent on-property correspondence sent to the Carrier that Glenwood, Iowa, the location of CAS Associates, Inc., as indicated on the cover page of the Investigation transcript, is some 1,000 miles away from the Carrier's Utah Service Unit in Salt Lake City, encompassing Claimant's Arden, Nevada, work location.

With respect to the Organization's above procedural objection, the Carrier's position was that the Notice "contained an error," and subsequently was corrected and re-issued. According to the Carrier, Superintendent Scott did conduct a "thorough review" of the transcript before making his decision. Once his decision was made, he dictated the contents of the disciplinary Notice to Marsha R. Cain, an employee at CAS Associates, Inc., who prepared the August 25, 2001 letter to the Claimant (and again, who transcribed the hearing tape recordings). According to the Carrier, at the time of this dispute it had been the Carrier's practice to contract out certain of its correspondence preparation work with outside firms, including CAS Associates, Inc.

The Board has carefully considered the parties' positions in light of the factual record before us, as well as the body of arbitral precedent cited by the Organization in support of its key procedural issue. As a result, the majority finds that the discipline notice issued on August 25, 2001 did not comport with the parties' due process standard, for the exact reasons as expressed by the Organization, as quoted above.

As the Organization convincingly has pointed out, the unrefuted fact that both the Investigation transcript and the "Notification of Permanent Dismissal" were actually sent from the geographic location (Glenwood, Iowa) of CAS Associates Inc., and the appearance on the August 25, 2001 Notice of the initials

"MRC" under Superintendent Scott's "signature," is substantial evidence that the Carrier's transcript review process lacked integrity, and that its determination as to guilt was carried out before the Investigation record was read by any Carrier official. As previous Boards have held, the Claimant's due process right to have his Investigation record reviewed before any determination of guilt is made, is absolute, and the Carrier indeed possessed the burden of proving that it complied with that due process requirement.

Thus, the Board is not convinced that the errors in the Notice were "merely typographical." Furthermore, the sending of a second, "corrected" Notice two days later did not cure the defect, because nothing could change the glaring perception, which, again, the Carrier did not clarify from an evidentiary standpoint, that Superintendent Scott did not afford the record any review before arranging for the preparation of his correspondence setting forth the Level 5 discipline. The majority further concludes that such a critical procedural error precludes the Board from considering the claim on its merits. See First Division Awards 25043, 24935, and 24874; and (on-property) Public Law Board No. 5912, Award Nos. 23, 25, 26, 32 and 131.

Therefore, inasmuch as the Claimant has been reinstated through the unilateral action of the Carrier, the only issue left for the Board to determine is that of the compensation claim reserved to it via the Carrier's June 6, 2002 letter of reinstatement. The Board holds that under the circumstances here, and based on the foregoing, the Claimant is entitled to the back pay, time lost, and other benefits claimed, as specified in its Statement of Claim as set forth in its Submission before the Board.

#### AWARD

Claim sustained.

#### ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of First Division**

**Dated at Chicago, Illinois, this 13th day of December 2004.**