

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40443
Docket No. SG-39414
10-3-NRAB-00003-060064
(06-3-64)

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Northeast Illinois Regional Commuter Railroad
(Corporation (Metra)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Northeast Illinois Regional Commuter Rail Corp.:

Claim on behalf of W. K. Williams, for the letter of reprimand to be rescinded and any reference to this matter removed from the Claimant's personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 53, when it issued a letter of reprimand to the Claimant without providing a fair and impartial investigation and without meeting its burden of proof in connection with an investigation held on December 8, 2004. Carrier's File No. 11-13-479. General Chairman's File No. 3-D-05 Williams. BRS File Case No. 13547-NIRC.”

FINDINGS:

The Third 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 November 29, 2004, the Carrier directed the Claimant to report for a formal Investigation on December 8 concerning the following charge:

“Arrange to attend a formal investigation to be held at the Wire Shop, Tinley Park, Illinois, at 9:00 a.m., on Wednesday, December 8, 2004.

The purpose of this investigation is to develop the facts, determine the cause, and assess responsibility, if any, in connection with your allegedly reporting late for your assignment as Signaller, headquartered at the Tinley Park Wire Shop, with assigned hours of 7:00 a.m. to 3:00 p.m., on November 29, 2004.

In connection therewith, you are charged with possible violation of Metra Employee Conduct Rule Q, Paragraph 1. . . .”

The Rule in dispute is Metra Employee Conduct Rule Q, Paragraph No. 1, which states the following:

“Employees must report at the appointed time, devote themselves exclusively to their duties, must not absent themselves, nor exchange duties with, or substitute others in their place, without proper authority.”

On December 17, 2004, the Claimant was notified that he had been found guilty as charged and the Carrier issued a Letter of Reprimand that was placed in his personnel record.

It is the position of the Organization that the Claimant was denied a fair and impartial Hearing, and as an example of that unfairness, it argues that it objected to the Hearing Officer asking questions of the Claimant's Supervisor about an alleged prior discussion with the Claimant regarding tardiness. After an objection by the

Claimant's representative, the Hearing Officer agreed to strike from the record all conversation regarding that line of questioning. Despite that ruling, the transcript contains all of the language. Therefore, according to the Organization, the Carrier has attempted to prejudice anyone who reads the transcript. It asks that the discipline be set aside on the basis that the Hearing was unfair and the transcript was tainted.

Turning to the merits, it argued that the Claimant testified that it was 7:00 A.M. when he entered the office and not 7:01 A.M. The Organization further argued that the global clock relied upon by the Supervisor cannot be considered as being accurate because it did not display seconds. Thus, it concluded that the Carrier did not meet its burden of proof and it asked that the discipline be set aside and the claim be sustained as presented.

It is the Carrier's position that on the day in question, the Claimant arrived at work one minute late, which was a violation of Conduct Rule Q, Paragraph No. 1. It argued that Supervisor Heim testified that when the Claimant entered the office, the global clock showed the time as 7:01 A.M. as opposed to the Claimant's testimony that it was 7:00 A.M. It further argued that the Supervisor's testimony was more credible than that of the Claimant. It concluded that the discipline assessed was in accord with its well advertised progressive discipline steps in effect on the property and it requested that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and record evidence. We will first address the Organization's argument that the Claimant was denied a fair and impartial Hearing because it objected to the Hearing Officer asking questions of a Supervisor about an alleged prior discussion with the Claimant regarding tardiness and the Hearing Officer agreed to strike it from the record but, nonetheless, that testimony still appeared in the transcript. The Board does not agree with the Organization's argument in this instance because the agreement by the Hearing Officer to strike his questioning regarding an earlier discussion between the Claimant and his Supervisor is an indication on his part that he recognized that line of questioning was not pertinent to the matter at hand. Contrary to the Organization's allegation, the Hearing Officer's ruling demonstrated that he held a fair Hearing and the Claimant was not denied Agreement due process. In accordance with the Hearing Officer's ruling and the Organization's objection, that

line of questioning has not been considered as being relevant by the Board in its resolution of this dispute.

Turning to the merits, the Board has determined that Rule Q, Paragraph No. 1 states, in part: "Employees must report at the appointed time. . . ." (Emphasis added) It does not state begin work. Therefore, in this instance the issue is whether or not the Claimant reported to work on time. There was a great deal of discussion between the parties over the accuracy of the clock in the office as to whether it was 7:00 A.M. or 7:01 A.M. when the Claimant reported. The testimony was "one against one" as to what time it was. There was no confirmation of either the Claimant's or the Supervisor's testimony and, in this instance, the burden of proof was on the Carrier. In Third Division Award 32890, the Board held:

" . . . The record contains a direct conflict of testimony between Claimant and Carrier's primary witness against him, with no supporting testimony for either's position. In such a situation, where the contradictory evidence can truly be said to result in a 'net wash,' the party with the burden of persuasion - in this instance the Carrier - must lose. . . ."

The rational and logic expressed in Award 32890 applies in the instant case as well. Therefore, the Board finds and holds that the discipline must be set aside and the claim allowed as presented. The Board also offers the Claimant a forewarning that in the future it would be advisable to not cut it so close when reporting.

AWARD

Claim sustained.

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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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 14th day of May 2010.