

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 40444  
Docket No. SG-39440  
10-3-NRAB-00003-060097  
(06-3-97)

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 (Metra):

Claim on behalf of O. K. Coney, for payment for all lost wages, the discipline against him rescinded and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 53, when it imposed a 10-day suspension against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on March 9, 2005. Carrier's File No. 11-13-487. General Chairman's File No. 6-D-05 Coney. BRS File Case No. 13545-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 January 27, 2005, the Carrier directed the Claimant to report for a formal Investigation on February 3, which was postponed and subsequently held on March 9 concerning the following charge:

“You are hereby instructed to attend a formal investigation which will be held on Thursday, February 3, 2005 at 9:00 a.m. in the office of Director of Engineering, 2067 W. 123rd Street, Blue Island, IL. The purpose of this investigation is to develop the facts, determine the cause and assess responsibility, if any, when you allegedly failed to protect your position on Tuesday and Wednesday, January 25 and 26, 2005 and Thursday, January 27, 2005 when you allegedly failed to follow instructions to attend a CPR/First Aid class. Therefore, you are hereby charged with alleged violation of Metra Employee Conduct Rule ‘Q,’ Paragraph #1. Your work record, copy of which is attached, will be reviewed at this investigation.”

The pertinent 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 March 15, 2005, the Claimant was notified that he had been found guilty as charged and was assessed a ten workday suspension.

It is the position of the Organization that the Claimant was denied a fair and impartial Investigation because it was held in absentia after it requested another five day postponement without the Carrier finding out whether the Claimant was medically fit to appear, especially in view of the fact that the Claimant's wife on January 25, 2005, advised Supervisor Hettman that her husband had an accident on

January 22 in which he allegedly sustained a head injury. Additionally, it argued that the Carrier has attempted to pyramid or “stack” one alleged failure to protect his assignment from January 22 through 30, 2005, into multiple disciplinary offenses. Therefore, it concluded that the discipline should be set aside and the claim sustained.

The Carrier argued that the Investigation was held in absentia after two previous postponements. When the Organization belatedly asked for another at the onset of the Hearing and it could not guarantee that the Claimant would report for the next scheduled date, or that he was legitimately unable to appear, the Carrier denied the request. Therefore, the Carrier argued that it was within its right to proceed with the Hearing.

The Carrier also offered for the Board's consideration Third Division Award 39607 which according to it rejected the Organization's argument regarding the “stacking of alleged violations.”

On the merits, the Carrier argued that the record speaks for itself that the Claimant did not work on the days with which he was charged and coupled with the fact that he chose not to appear at the Investigation, he has not rebutted its case. Furthermore, it argued that the Claimant never offered any proof after the Hearing was concluded that he could not appear for the formal Investigation. In closing, it stated that the discipline was appropriate and should not be disturbed.

The Board thoroughly reviewed the transcript and record evidence which constituted the second of three cases involving the Claimant. The Claimant offered no evidentiary proof that he was physically unable to attend the Hearing. Therefore, it must be concluded that he chose not to appear at the Investigation. As the Board previously stated in Second Division Awards 13957, 13989, and 13990:

“It is further noted there is no requirement that an accused must attend their formal Investigation, but when a charged employee chooses not to attend, he does so at his own potential peril because he offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360, 13491, and 13924.”

Despite the fact that the Claimant offered no assistance in his defense, the Organization set forth a sound argument on his behalf regarding the pyramiding of alleged multiple violations for one alleged failure to protect his assignment between January 22 and 30, 2005, by separating or dividing that timeframe into various time periods. We have reviewed Award 39607 offered by the Carrier as its counter argument to the Organization's position. We do not disagree with its ultimate decision, however, we take exception to the Carrier's characterization of one sentence from that Award to mean that in all instances multiple day absences that are continuous can be divided into separate disciplinary matters, therefore, the Board concurs with the Organization that the alleged violation in this instance is a continuation of the same violation that began on January 22, 2005. See Third Division Award 40445. In this dispute the splitting of that continuing violation was in error and is contrary to the Carrier's Progressive Discipline Policy, which allows employees an opportunity to work discipline off of their record by correcting their behavior.

The Carrier set forth an interesting hypothetical argument, which is not without some merit and needs to be addressed. Normally the Board does not address hypothetical arguments, but in this instance the parties are well served by confronting it. The argument made by the Carrier was essentially a question: What if in the present dispute the Claimant had been absent without authority beginning on January 22, 2005, and did not reappear until one year later, does that mean that because it was one continuous violation the Claimant would still be at Step 3 in its Five Step Progressive Discipline Policy? The answer is "no," because the Progressive Discipline Policy has a safeguard which prevents that from happening. It states that infractions of any Rules can result in dismissal regardless of an employee's status in the discipline steps. That safeguard prevents anyone from successfully sharpshooting the Progressive Discipline Policy in the described manner.

In the instant case, the Board finds and holds that the adding on or "stacking" of discipline by separating or dividing a singular continuous violation is contrary to fair and progressive discipline. Because of that, the discipline is set aside. While the claim was being handled on the property the Carrier argued that the Claimant did not lose any pay which was not refuted. Therefore the claim is sustained, but without any compensation because the record substantiates that the Claimant never actually served the suspension.

**AWARD**

Claim sustained in accordance with the Findings.

**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.