

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40448
Docket No. SG-40062
10-3-NRAB-00003-070307
(07-3-307)**

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 J. S. Anderson, for payment for all time lost and to otherwise be made whole, as required by Rule 54 - Exoneration, and any reference to this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 53, when it issued the excessive discipline of a five-day suspension against the Claimant without providing a fair and impartial investigation, without providing a proper notice of investigation and without meeting its burden of proving the charges in connection with an investigation held on February 9, 2006. Carrier's File No. 11-7-548. General Chairman's File No. 3-D-06 ANDERSON. BRS File Case No. 13849-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 3 the Carrier directed the Claimant to report for a formal Investigation on January 11 which was postponed and subsequently held on February 9, 2006, concerning the following charge:

“ . . .The purpose of this investigation is to develop the facts, determine the cause and assess responsibility, if any, with your alleged failure to protect your position on Friday, December 30, and Tuesday, January 3, 2006. Therefore, you are hereby charged with alleged violation of Metra Employee Conduct Rule ‘Q’, Paragraph #1 and Engineering Special Instruction #1, Paragraphs #4 and #6. . . .”

The subject 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.”

Also at issue is Engineering Special Instruction No. 1, Paragraph No. 4, which quotes Employee Conduct Rule Q, Paragraph No. 1 verbatim. Paragraph No. 6 of the Special Instruction states:

“If an employee is going to be absent, for whatever reason, the employee must notify the designated supervisor prior to the start of the [employee's] assignment. However, this notification, including

voice mail messages, does not automatically give an employee an authorized absence.”

On February 15, 2006, the Claimant was notified that he had been found guilty as charged and was assessed a five work days’ suspension.

It is the position of the Organization that the Claimant was denied a fair and impartial Hearing, because the Investigation was held in absentia. It also argued that the concept of fairness would indicate that the Carrier improperly attempted to pyramid or “stack” like offenses within a small timeframe, which did not give the Claimant an opportunity to correct his behavior. Therefore, it concluded that the discipline should be set aside and the claim sustained as presented.

The Carrier argued that the Investigation was held in absentia after the Notice of Investigation was returned to it after three attempts at delivery to the Claimant's address. Based upon that, it was reasonable to go forward with the Hearing. On the merits it argued that the record speaks for itself that the Claimant was guilty as charged. 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 five cases involving the Claimant. As previously stated in Third Division Award 40445 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. We reaffirm the principle set forth in Award 40445 that the Claimant was not obligated to attend the Investigation, but failing to do so deprives the reader of the record of any rebuttal or alternative story.

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 December 29, 2005 and January 16, 2006, by separating or dividing that time frame into various time periods. The Board is in agreement with the Organization that the alleged violation in this instance is a continuation of the same violation that began on December 29, 2005. See Third Division Award 40449. In this dispute, just as we stated in Third Division Award 40444 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 Claimant's alleged violation in this instance was, in fact, part of one continuous violation which the Carrier pyramided into another in an apparent effort to expedite its Progressive Discipline Policy. The holding of the instant Investigation was simply the recharging of the Claimant with the identical offense arising out of the same continuous occurrence that began on December 29, 2005, which did not allow him any opportunity to correct his behavior. Therefore, the Board finds and holds, as we did in Award 40444, that the adding on or "stacking" of discipline by separating or dividing a singular continuous violation is contrary to the intent of fair and progressive discipline. Because of that, the discipline is set aside and the claim is sustained as presented.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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