

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40521
Docket No. SG-39340
10-3-NRAB-00003-060228
(06-3-228)

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corp.:

Claim on behalf of J. E. Gilbert, Jr., for reimbursement for all time and benefits lost and the removal of any reference to this matter from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 57, when it failed to provide the Claimant with a fair and impartial investigation and then issued the harsh and excessive discipline of a 30-day suspension without meeting its burden of proving the charges in connection with an investigation held on April 18, 2005. Carrier’s File No. NEC-BRS(S)-SD-1057D. General Chairman’s File No. JT321010114-114056. BRS File Case No. 13621-NRPC(S).”

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.

There is an extensive transcript of argument pertinent to this instant discipline. The facts that are undisputed establish that on January 20, 2005, Train 132 derailed at Washington, D.C. Signal Supervisor Dent gave a clear order to Signal Inspector Denaro on January 21, 2005 to instruct four employees who were currently working, which included the Claimant, that due to the emergency, they would be extending their work days to the maximum hours which would be permitted under the Hours of Service Act. It is factually clear that Denaro reported to Supervisor Dent that his order had been carried out and that all four employees had been instructed to continue working or if they had any problems to contact Dent.

The dispute herein is clear. Denaro testified that he instructed the Claimant at Track 43 to continue working past his regular hours of 7:00 A.M. to 3:00 P.M. due to the emergency. The Claimant testified that he never talked with Denaro, was never instructed to work overtime, worked his entire shift at the Wye Bridge, and after completing his tour of duty, properly went home.

The Organization argues that the Claimant did not receive a fair and impartial Investigation. It argues extensively that the Carrier failed to provide two necessary witnesses to prove that the Claimant was not ordered by Signal Inspector Denaro to continue working. In fact, the Organization maintains that the Carrier did not properly investigate, provide proof, or make appropriate credibility decisions. The Organization maintains that beyond fatal procedural error, the Claimant was innocent of all charges.

The Carrier maintains that the charges of failing to comply with orders and leaving his assignment were proven in the testimony at the Hearing of April 18, 2005. There were four postponements and sufficient time for the Organization to prove its assertion that the Claimant was at the Wye Bridge and not at Track 43 during his assignment. Further, the Hearing Officer made a credibility determination that, "There was no plausible reason for Mr. Denaro to fabricate his statement or his testimony. . . ."

The Carrier has the burden to prove the charges. The Carrier has the responsibility to provide a transcript and record to demonstrate substantial evidence adequate to support a conclusion of guilt. It is not the Organization's burden to provide witnesses, but the Carrier's to assure that all facts to support the Carrier's

conclusions are recorded. The Board agrees with the Carrier that the Hearing Officer is given great weight to any credibility decision, as they observe testimony and demeanor first hand. However, that credibility decision must be supported by "substantial evidence" to assure appellate concurrence. The Board is seriously constrained from overturning such decisions when they are based on supportive detailed examination.

In this case, the Board notes that the primary Carrier witness, Signal Inspector Denaro, reported to his Supervisor that he had instructed the Claimant to work. However, there is proof that only three of the employees, H. C. Beachley, Jr., J. Gordon and E. Childs were together at "K" Tower. The Claimant was not there. Denaro provided a statement on January 26, 2005 that states:

"On 2/21/05 at approximately 9:40 AM, I told C&S Maintainers H. C. Beachley Jr., J. E. Gilbert, Jr., J. Gordon, and Electronic Technician E. Childs they were to work until their hours of service are exhausted as instructed by Supervisor C. A. Dent, Jr. They were also told they had any questions or wanted to talk to Supervisor Dent go see him."

He testified that he told the Claimant "on 43 Track" while the Claimant was in the truck, that he had been ordered by Dent to work and that the Claimant "just said he wasn't working." Yet, nothing further was said by Denaro to the Claimant or to Dent about the Claimant's refusal. This was clear insubordination and disregarding of an instruction without further comment at the time. Nor is it listed in Denaro's statement of what occurred, supra.

While the Carrier maintains that Denaro's testimony has credibility because there is no reason to fabricate, the Board notes that if Denaro failed to instruct the Claimant, he failed to comply with his own Supervisor's direct order.

The Board's study of the extensive testimony finds that the Claimant is unmistakable in his denial. The Claimant states that he never talked with Denaro. The Claimant was asked: "At any given time were you ever asked, requested or ordered to work overtime on January 21, 2005?" The Claimant responded, "No." The Claimant states that after the job briefing in the morning, he went to the Wye Bridge for the day to "troubleshoot a switch failure" working with the Track Department from 7:30 A.M. to 1:20 P.M. The two Track Department witnesses at Wye Bridge were not called to testify. Two other employees who were requested to work overtime at the K Tower

both testified that not only was the Claimant not there, but the Claimant was not in the area and neither was his truck. Childs testified that: "After our job briefing, Dave sent him to Wye Bridge. There was trouble with the switch out there."

The Board is unable to determine from the record how Denaro could have given the order to the Claimant at 9:40 A.M. at Track 43. The Carrier did not elicit the information during the Hearing. The Carrier's credibility decision in this instance is not based upon any detailed analysis or record of support. Nor is there any proper explanation to this appellate body as to why Danero's testimony should be given the weight specified.

The Board carefully studied the record. The Carrier has the burden to provide substantial evidence, defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. vs. Labor Bd. 305 U.S. 197, 229). It failed to do so. There is no proof that the Claimant ignored an instruction to work overtime. The claim is sustained.

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 Divisio

Dated at Chicago, Illinois, this 15th day of June 2010.