

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40569
Docket No. SG-40064
10-3-NRAB-00003-070315
(07-3-315)**

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 M. W. Gercken, for any reference to this matter removed from his personal record and to otherwise be made whole, as required by Rule 54 - Exoneration, account Carrier violated the current Signalmen's Agreement, particularly Rule 53, when it issued the excessive discipline of a three-day deferred 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 February 1, 2006. Carrier's File No. 11-7-540. General Chairman's File No. 2-D-06-GERCKEN. BRS File Case No. 13853-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 11, 2005, the Carrier directed the Claimant to report for a formal Investigation on November 18, 2005, that was mutually postponed and held on February 1, 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 properly operate a Capital Signal Department trencher/plow on Wednesday, November 9, 2005. While operating trencher, you allegedly struck a Metra employee's personal vehicle in the rear tail gate; therefore, you are hereby charged with alleged violations of Metra Employee Conduct Rule ‘N’, Paragraph #3, Item #2.”

The Rule in dispute is Metra Employee Conduct Rule "N," Paragraph No. 3, Item No. 2 which states the following:

“Employees must not be:

2.) Negligent.”

On February 10, 2006, the Claimant was notified that he had been found guilty as charged and the Carrier assessed a three workdays deferred suspension that was placed on his personal record.

It is the position of the Organization that the Investigation was procedurally flawed because the Carrier charged the Claimant with damaging a personal vehicle belonging to employee D. Booth, who had parked his pickup truck on the Carrier's right-of-way while performing flagging duties for a contractor which was repaving 191st Street on the day in question. However, even though Booth was an employee and intimately involved with this incident, the Carrier chose not to call him for the Investigation. That failure, it argued, denied the Claimant his right to a fair and impartial Investigation because it was the responsibility of the Carrier to call everyone who could shed light on the event whether it aids the Carrier's case or not.

On the merits the Organization argued that the Claimant followed the Rules in reporting the minor accident. It further argued that Booth, who's vehicle was struck, was just as liable, if not more culpable than the Claimant in this incident, but was never charged or even called to testify. It further argued that the Claimant's record does not reflect the kind of recurring misconduct that would justify the Carrier's assessment of a three workday deferred suspension. It concluded by requesting that the discipline be set aside and the claim be sustained as presented.

It is the Carrier's position that the Hearing was held in a fair and impartial manner and the record substantiates that on the date in question the Claimant was negligent while operating a trencher that struck a fellow employee's vehicle. It concluded by arguing that the accident was avoidable and it asked that the discipline not be disturbed.

After thoroughly reviewing the transcript and record evidence, the Board has determined that no procedural errors occurred during the handling of this dispute and the Claimant was not denied his Agreement due process rights.

Having determined that the Claimant's Investigation was held in a fair and impartial manner, the Board turns its attention to the merits. Testimony indicates that the Claimant was the Foreman of Signal Gang 7. He and his gang were installing cable and a cantilever foundation, trenching and using a backhoe to dig a hole for the cantilever and cable at 191st Street in Mokena, Illinois. The crew was shorthanded that day because the regular Machine Operator was at Joliet; so the Claimant chose to operate the trencher. Also present at the site was Booth (a Metra employee working under the jurisdiction of the Transportation Department) who was acting as Flagman for an outside contractor that was working close to the tracks.

At the close of the workday, the Claimant was putting the trencher away. After partially clearing the truck, the right rear auger blade of the trencher struck the rear left corner of Booth's truck causing damage.

The Claimant testified that Booth's truck was in the foul of his work area. When questioned as to why he did not ask Booth to relocate his vehicle if it was still in the foul of his work area, he replied: "I don't know. . . ." Given the tight

quarters the Claimant was maneuvering in, he should have taken the precaution of having Booth move his vehicle rather than proceeding as he did. The bottom line is the Claimant was responsible for movement of the trencher and the facts indicate the accident could have been avoided. The record is clear that the Carrier met its burden to prove that the Claimant was guilty as charged.

The only issue remaining is whether the discipline assessed was proper. At the time of the incident, the Claimant had more than 16 years of seniority with an unblemished record. Therefore, the Board finds and holds that the discipline was excessive. Because of that it will be reduced to a Letter of Reprimand.

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 29th day of June 2010.