Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40574
Docket No. SG-40663
10-3-NRAB-00003-080566

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Claim on behalf of J. W. Harwell and G. A. Palacios, for payment for all time lost with the discipline rescinded and any mention of this matter removed from their personal records, account Carrier violated the current Signalmen's Agreement, particularly Rule 53, when it imposed the excessive discipline of a three-day suspension against the Claimants without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation that began on May 31, 2007 and was concluded on June 25, 2007. Carrier's File No. 11-7-623. General Chairman's File No. 8-D-07. BRS File Case No. 14018-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 March 22, 2007, the Carrier directed the Claimants to report for a formal Investigation on March 29, which was mutually postponed several times and subsequently held on May 31 and continued on June 25, 2007, concerning the following charge:

> ". . . to develop the facts, determine the cause and assess responsibility, if any, in conjunction with the injury to Guido Palacios which occurred on March 20, 2007. The alleged injury to Guido Palacios' rib cage occurred when he was allegedly struck by the boom of the Vermeer digger and knocked off the equipment trailer and fell to the ground. In connection therewith you are charged with alleged violation of the following rules: Employee conduct rule L, paragraph 1 and Rule N, paragraph 3, Item 1, and Basic Safety Rule 100.1, Items 1 and 2, and 100.4, Items 1, 2 and 3."

On July 3, 2007, the Claimants were notified that they had been found guilty as charged and the Carrier assessed both of them a three-day deferred suspension.

It is the position of the Organization that the Claimants were denied a fair and impartial Investigation because Supervisor Moore, who was the Claimants' Supervisor, reported to the Hearing Officer. It argued that the Hearing Officer had determined the guilt of the Claimants before the Investigation.

On the merits the Organization further argued that the Carrier did not meet its burden of proof. It asserted that just because the Claimants were involved in a task that resulted in one of them being injured did not prove that the Rules were broken, or that they were at fault and subject to discipline. It closed by stating that

the accident was unavoidable and it requested that the discipline be set aside and the claim sustained as presented.

The Carrier argued that there were no procedural violations in the handling of the Claimants' case and the record evidence substantiates that both violated the Rules with which they were charged because the accident could have been avoided. Therefore, it concluded that the discipline was appropriate and should not be disturbed.

After thoroughly reviewing the transcript and record evidence, the Board has determined that the Claimants were not denied their Agreement due process rights. Therefore, the case will be resolved on its merits.

The facts that were not refuted indicate that on March 20, 2007, the Claimants were assigned to Signal Gang 9, along with Signalmen J. Hoff and R. Monty. Claimant Harwell, Hoff and Monty were changing the bucket on the Vermeer Digger (mini-loader type machine used for trenching and burying cable). Claimant Palacios came over to the work area to assist them. While Palacios worked to help attach the bucket to the Vermeer Digger, Claimant Harwell, the Operator, began to sit down in the operator's chair. On the first date of the Hearing Claimant Harwell testified that when he sat down, he inadvertently moved the lever controlling the right/left movement of the swing arm holding the bucket, moving the Vermeer Digger's arm, knocking Palacios off of the equipment trailer to the ground. Palacios verified the same thing on the first date of the Hearing. He also stated that the bucket was being attached to the Vermeer Digger while it was sitting on the trailer. Both Claimants acknowledged that no job briefing was held to discuss how best to safely attach the bucket to the Vermeer Digger before starting the task.

Again on the first day of the Hearing, Supervisor Moore testified that it would have been safer to have changed the bucket on the ground as opposed to it being attempted on the bed of the trailer. He further stated, without contradiction, that if the crew had done the work on the ground Claimant Palacios would have been in safer position so as to avoid an accident compared to the precarious position that he was in on the trailer at the time of the incident. Additionally, he testified and confirmed the Claimant's testimony that no job briefing was performed prior to the Claimants working on the Vermeer Digger.

Substantial evidence was adduced at the Investigation through the testimony of the Claimants and Supervisor Moore that the accident could have been avoided if the Claimants had exercised greater caution. It is clear that the Carrier met its burden to prove that the Claimants were guilty as charged.

The only issue remaining is whether the discipline assessed was proper. Our review of the discipline imposed reveals that it was in accordance with the Carrier's Progressive Discipline Policy. Therefore, the Board finds and holds that the discipline was appropriate because it was not arbitrary, capricious or excessive.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of June 2010.