

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40632
Docket No. SG-39549
10-3-NRAB-00003-060337
(06-3-337)**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(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 K. G. Michaels, for reimbursement for all time and benefits lost from the time he was removed from service until he was reinstated and any reference to this matter removed 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 dismissal against the Claimant without meeting its burden of proving the charges in connection with an investigation that started on February 8, 2005 and concluded on April 26, 2005. Carrier’s File No. NEC-BRS(S)-SD1061D. General Chairman’s File No. JY321010125-102058. BRS File Case No. 13539-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.

After appropriate Notice of Investigation dated January 31, 2005 and a lengthy inquiry, the Carrier evaluated the charges. The Carrier had four major charges (after removal of charge 3) stated, in pertinent part:

- “1) Your acts of insubordination on Thursday, January 13, 2005 . . . when you refused and/or failed to comply with directives from Assistant Division Engineer Tom Tompkins 1) to put on and wear the required Personal Protection Equipment (PPE). 2) to show the ADE your employee identification, and 3) to submit to Drug and Alcohol Tests.
- 2) Your conduct unbecoming an Amtrak employee when you engaged in rude, argumentative, confrontational, and/or disrespectful behavior toward Assistant Division Engineer Tom Tompkins on January 13, 2005.
- 4) Your violation of Amtrak’s ‘Workplace Violence Policy’ (PERS-42) . . . when you engaged in threatening behavior towards Assistant Division Engineer Tom Tompkins through your display of a confrontational and belligerent manner.
- 5) Your violation of M/W Safety Rules 4040, 4047, and 4120.”

Assistant Division Engineer (ADE) Tompkins stated in testimony and in his written statement of what occurred that the Claimant engaged in a threatening action to a request that he wear personal protective equipment (PPE). The Carrier contends that it reached the proper conclusion of guilt in its evaluation of the facts. The Claimant was initially dismissed from service by Notice of May 10, 2005 and subsequently returned to service with a lengthy suspension.

The Organization argues that the Claimant was improperly treated and disciplined without any proof. It maintains that he was denied a fair and impartial

Investigation. The Organization argues that the issue at bar is the behavior of Tompkins, not the Claimant, who complied with orders and acted appropriately. The Organization notes on the property that the ADE was aggressive, relieved the Claimant of his duties, and ordered him to leave the property. The Claimant complied with the instructions, except he found himself trapped. The ADE had ordered two vehicles blocking the Claimant to remain parked, so that the Claimant could not leave. Further, there is no evidence whatsoever that the Claimant was guilty of any of the charges: he was not abusive, aggressive, or insubordinate. The Organization maintains that the Claimant never raised his voice, used foul language, acted unprofessionally, and certainly was never instructed to take a drug and alcohol test. The Organization maintains that ADE Tompkins lacks credibility and gave false testimony.

The Carrier argues that the Claimant was provided a fair and impartial Investigation that proved the charges. The ADE gave clear instructions to the employees on vehicle parking and, thereafter, indicated to the Claimant to put on his PPE which the Claimant refused to do, adding that he would only do it “when the f***ing contractor starts working.” His refusal led to a major confrontation when the ADE indicated his services were no longer required. As the Claimant went to his vehicle, he used profanity in refusing a direct order to show his identification. The ADE requested police assistance from Officer Santos. The ADE requested a drug and alcohol test and the Claimant refused and drove off. The Claimant’s guilt was clearly proven as he was aggressive, vulgar, confrontational, insubordinate, unprofessional, and refused direct orders, including a drug and alcohol test.

The Board has gone through the testimony in both depth and detail due to the fact that the ADE had charged and the Claimant totally denied all details of this incident to which only the two of them seem to have been clearly and directly involved. The witnesses called to testify stated at various times answers which are utilized by the Carrier and Organization to support their conclusions.

The Board notes that on the date of the incident, January 13, 2005, the statements provided were fresh. Foreman Nesmith reports the ADE asked the Claimant:

“... why you don’t have on your PPE. [Claimant] says it is in my van. He told him to go get it.” Mr. Cardona states, “[Claimant] said

he was going to get his safety gear out of his vehicle . . . [ADE] Tompkins . . . told [Claimant] he was not prepared for work and Mr. Michaels said he was. At that point Mr. Tompkins told Mr. Michaels communication was not needed, go home.”

Another statement as to what occurred is that the ADE:

“ . . . questioned Kevin Michaels from C&S Dept why he did not have on his safety gear. Kevin said that he was ready for work but he was changing his gear to heavier work clothes due to the temperature dropping. At that point Mr. Tompkins stated to Kevin Michaels that, “I don’t think you’re really needed here tonight, so you can go home. I don’t think C&S is needed here for tonight’s work.” Kevin walked over to his vehicle to leave the property. Mr. Tompkins walked over to Kevin as he was leaving. A few minutes later, Kevin Michaels drove away.”

These statements are in direct contradiction to ADE Tompkins’ statement that:

“ . . . I then asked Mr. Michaels why he was not wearing his P.P.E. . . . his respond to me was the contractors are not f***ing working yet, I then asked Mr. Michaels to please put on his P.P.E., he stated to me as soon as the contractors start f***ing working I will. That is when I told Mr. Michaels if this is your response then go home. Verbal abuse from Mr. Michaels continued for Approx: 10 minutes. Mr. Michaels then started walking over to his personal vehicle.

At this time I started walking behind Mr. Michaels and asked to see his employee ID, Mr. Michaels then turned and walked towards me pressing his stomach against mine talking right in my face and stated (you said I should go home, so I’m off the f***ing payroll and I don’t have to show you my f***ing employee ID) . . . I felt very threatened at this time so I approached the Amtrak Police Officer. . . . The Amtrak Police Officer . . . then approached Mr. Michaels driver side window and asked . . . to show me his employee I.D. Mr. Michaels still refused to show me his employee I.D., but did show the Amtrak

police officer. At this time due to Mr. Michaels irrational behavior I then asked Mr. Michaels with the police officer present to submit to a Drug and Alcohol test, Mr. Michaels stated to me with the police officer present (you said I should go home, so I'm off the f***ing payroll and I do not have to submit to any f***ing Drug and Alcohol Test) at this time the Amtrak Police Officer asked Mr. Michaels if he would submit to Drug and Alcohol Test for Amtrak Management, Mr. Michaels then stated (Amtrak Management said I should go home, so I'm off the f***ing payroll and I'm not submitting to any f***ing Drug and Alcohol Test you know where I live). I then informed Mr. Michaels that he was Out of Service. . . “

The only real evidence or testimony that confirms the charges were those of ADE Tompkins. We carefully studied the Amtrak Officer's testimony as to what he observed, factually. The Officer did not witness any refusal to put on PPE and neither did anyone else. The Officer did not witness a failure to show his ID. There was no evidence in this record and the police testimony and report support no reason for a drug and alcohol test. When asked, the Officer reported that the ADE was upset but again the Officer testified he observed the ADE “requesting Mr. Michael's to show him his employee ID” and that Mr. Michaels took it out, and in fact, that the Claimant complied with all requests. The Officer testified clearly that he had no evidence that the Claimant had been requested to perform a drug and alcohol test and then drove off and in fact, reports no evidence of any profanity. The Amtrak Officer was asked; “Was his conduct bad or ill-mannered in any way at your observation?” and answered, “not through my observations.” This is in direct contradiction to the statement and testimony of ADE Tompkins. The Amtrak Police Officer never supported the ADE's statement supra or testimony that he refused to show the Police Officer the ID; the Police Officer ever heard of a request to take a drug and alcohol test; that with the Police Officer present the Claimant was swearing, using the “f” word repeatedly; or in fact supported the testimony in any significant manner.

The Board studied the ADE's testimony as to how the Claimant was belly to belly and how “he's practically spitting in my face.” There is no persuasive evidence of a confrontation that lasted ten minutes. Most importantly, ADE Tompkins continues to testify that “I then went to the Amtrak Police Officer to get him involved . . . [Claimant] continued to be very aggressive, very arrogant, erratic behavior. I

then ordered Mr. Michaels for a drug and alcohol test, which he refused” There is no support for this statement in the factual record. The testimony the Carrier points to in support of this argument is totally unpersuasive to the Board.

The burden of proof rests with the Carrier. It must provide a transcript and record that provides substantial evidence of probative value to support the finding of guilt. The full testimony in this record is not sufficient. There is no factual basis for a finding that the Claimant acted in an insubordinate manner; failed to follow a direct order to put on his PPE, show his ID, take an ordered drug test; was rude, aggressive, confrontational, threatening or any of the actions for which he was charged. A studied evaluation of the Hearing, testimony and statements reveals that the Carrier’s actions are based on unsupported testimony, linked to conjecture, assumptions, suspicion and surmise, which are not sufficient to prove guilt. The claim must be 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 Division

Dated at Chicago, Illinois, this 27th day of August 2010.