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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37112
Docket No. SG-37325
04-3-02-3-252

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Canadian National Railroad (former Grand Trunk
(Western Railroad, Inc.)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Canadian National (CN):

Claim on behalf of G. Arrington, for payment for all lost time and benefits, with all reference to the discipline imposed in connection with an investigation conducted on March 29, 2001, removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 42, when it failed to provide the Claimant with a fair and impartial investigation and imposed harsh and excessive discipline without meeting the burden of proving the charges against the Claimant. Carrier's File No. 8390-1-133. General Chairman's File No. 01-40-GTW. BRS File Case No. 11877-GTW.”

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.

The Claimant was employed as an Assistant Signalman at the Signal Shop located in South Bend, Indiana. At the time of the incident on March 19, 2001, he had accumulated approximately three years of service with the Carrier.

When the Claimant reported for duty on March 19, 2001 at approximately 7:20 A.M., he was approached by BRS Signal Foreman N. A. Seggerman and advised Seggerman that he had forgotten his safety boots and indicated that he wanted to purchase a pair of boots. Seggerman told the Claimant to wait for him in the shop office area while Seggerman completed organizing the Signal Gang and instructing them of their work assignment and safety briefing for the day.

Seggerman then returned to the shop and telephoned his Supervisor, R. B. Perschbacher to inquire as to how he should handle the situation. Perschbacher instructed Seggerman to send the Claimant home because he had not reported to work with proper work attire in compliance with Carrier policy. Seggerman then looked for the Claimant, but was unable to find him. The Claimant, unbeknownst to Seggerman, had left the signal shop and proceeded to a local K-Mart to purchase work boots. When the Claimant returned to the signal shop wearing his new work boots, he was advised by Seggerman that Perschbacher had issued instructions that the Claimant was to be sent home.

However, the Claimant did not leave as instructed. Instead, he remained in the signal shop and made a number of telephone calls. Shortly thereafter, the Claimant told Seggerman that his BRS representative had told him that the Carrier could not send him home. Seggerman told the Claimant that he could not overrule Perschbacher's orders, and that if he desired to have this order changed, he must personally contact Perschbacher. The Claimant then contacted Perschbacher who reiterated the order to the Claimant that he must go home pursuant to Carrier policy, which does not permit employees improperly attired when reporting for work to commence duty. The Claimant then hung up the phone with Perschbacher and was very angry. He stepped back and made threatening remarks about people "going postal" and about people getting shot at work.

Signalmen in the shop reported this incident to K. J. Bagby, Manager, Signal Installations, who asked that Perschbacher look into the incident. Perschbacher then performed an investigation.

By letter March 21, 2001, the Carrier advised the Claimant that a formal Investigation would be held on March 29, 2001 to determine his responsibility, if any, for an incident at the South Bend Signal Shop on the morning of March 19, 2001, when he allegedly made this threatening remark to several of the signal employees: "This is what makes people go postal. This is how people get shot at work." The Claimant was charged with an alleged violation of CN/IC USOR General Rule 1 in connection with the incident. Because of the seriousness of the charge, the Claimant was withheld from service pending the outcome of the disciplinary proceedings.

In a letter dated April 18, 2001, the Claimant was advised that after a review of the Investigation, it had been determined that the Claimant was guilty as charged in violation of Rule 1. The letter also advised the Claimant that for his violation he was assessed a 60-day suspension, 30 of which would be held in abeyance to be imposed only if there was another disciplinary incident during a one-year probationary period beginning on April 30, 2001.

The Organization claims that the discipline was unwarranted. The Organization asserts that the burden of proof in a discipline matter such as this is on the Carrier and that burden of proof has not been met. The Organization contends that the Carrier failed to allow a fair and impartial Hearing and imposed harsh and excessive discipline against the Claimant. According to the Organization, the Carrier's decision to discipline the Claimant constitutes an abuse of its discretion and it should now be required to compensate the Claimant for all lost time and benefits, with all reference to the discipline and Investigation to be removed from his personnel record.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Signalmen's Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, the Claimant's own admissions during the Investigation demonstrate sufficient evidence to support the Claimant's culpability for the charge. The Carrier asserts that it met its burden of proof and that the discipline was appropriate based on the nature of the offense.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166.)

The Carrier proved that the Claimant made the alleged remarks on March 19, 2001 regarding people "going postal" at work. That was clearly inappropriate behavior and a clear violation of CNIC General Rule 1.

However, we find that the degree of discipline was too severe. It is well established that discipline should be progressive and not punitive. As the Board indicated in Second Division Award 8157:

"Carrier is certainly aware that, on many occasions, this Board has stated that it would not substitute its judgment for that of the carrier when violations are proven and discipline is reasonable. It should also be aware that this Board has consistently recognized that employee discipline should be progressive and viewed as corrective in nature, not punitive."

Based on the record, the Board concludes that the 60-day suspension (30 days to be served, 30 days held in abeyance) is too severe a penalty to impose. In the instant case, there are a number of mitigating factors. First, the Claimant had no prior discipline. Although highly inappropriate, the Claimant clearly made the remarks out of frustration only after making his best effort to comply with the relevant Safety Rule. We find that while discipline is certainly required in this case, the degree of discipline was punitive and, therefore, must be reduced. The discipline is reduced from a 60-day suspension to a 45-day suspension (15 days to be served with 30 days held in abeyance). Thus, the Claimant shall be made whole for the additional 15 days served.

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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 25th day of August 2004.