

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37652
Docket No. MW-37862
05-3-03-3-236

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (record assessed with a written reprimand) imposed upon Messrs. L. Aguilera, G. Chavez, P. Chavez, J. Calderon, J. Nunez, M. Dominguez and L. Delgadillo in connection with their alleged failure to comply with the Engineering Department Instructional Notice – Clean Up on June 24, 2002 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier’s File MW-02-012).**
- (2) As a consequence of the violation referred to in Part (1) above, Messrs. L. Aguilera, G. Chavez, P. Chavez, J. Calderon, J. Nunez, M. Dominguez and L. Delgadillo shall now ‘. . . be exonerated and have the discipline removed (sic) their records.’ ”**

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.

At the time of the incident on June 24, 2002, the Claimants held seniority in their respective classes in the Track Subdepartment and were regularly assigned to work within the Blue Island Yard under the direct supervision of Foreman C. Jones, who in turn was working under the supervision of Assistant Supervisor L. Gonzalez.

The basic facts do not appear to be in dispute. During the week of June 17 through June 23, 2002, the Engineering Department Instructional Notice – Clean Up was posted. It required that job sites must be cleaned up at the end of each work day. Prior to June 24, 2002, the Claimants were replacing ties and rail in the Blue Island Yard. On June 24, 2002, the Claimants were engaged in repairing switches. It is uncontested that the work to be performed on June 24 was not completed at the conclusion of the work day. Prior to departing the work site that day, the gang was instructed to ensure that the area was free of obvious obstacles to train crews. The Claimants moved such obstructions to the side. This was inconsistent with the Notice that instructed employees to clean up such areas at the conclusion of each work day.

On the following day, June 25, 2002, J. C. Majeski and K. P. Blackman observed that the job site was in violation of the Notice because it had not been properly cleaned.

By letter dated July 1, the Carrier advised the Claimants that an Investigation would be held on July 10, 2002 “to determine the facts and your responsibility, if any, in connection with your alleged failure to comply with the Engineering Department Instructional Notice – Clean Up which was posted during the week of June 17 through June 23, 2002 . . . regarding clean up procedures of IHB property whereas on June 24, 2000 (sic) as evident by the observations made by Mr. J. C. Majeski and Mr. K. P. Blackman on June 25, 2002 when they arrived at your assigned job site on the Lead track, west end of the North Yard in Blue Island Yard, and found the area to be in an alleged violation of this Engineering Department Clean Up Notice.” The Hearing was held on August 13, 2002 by agreement of the parties. By letter dated August 23, 2002, the Carrier notified the Claimants that they were each being assessed a written reprimand.

The Organization claims that the discipline was unwarranted. It claims 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. It further contends that the Claimants were following the instructions of their supervisor who told them to merely move the materials to the side and not to clean up the area because their project was still in progress. The Carrier failed to allow a fair and impartial Hearing and imposed harsh and excessive discipline against the Claimants. According to the Organization, the Carrier was unable to prove that the Claimants were guilty of any alleged infractions. The Carrier should now be required to exonerate the Claimants' records.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimants were afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimants guilty as charged. According to the Carrier, a review of the transcript as developed during the Investigation reveals that the Claimants were familiar with and required to comply with the Engineering Department Instructional Notice.

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 Board cannot find substantial evidence in the record to sustain the Carrier's position. The Claimants were verbally instructed to merely move the debris aside at the end of the day and to fully clean up at the end of the project. They were merely following the explicit orders of their superior, which he allegedly received from his immediate supervisor. While the Claimants' supervisor may have been in error in giving these instructions, the Claimants should not be punished for following such orders.

Based on the record, the Board concludes that it was improper for the Carrier to issue the written reprimands to the Claimants. They are exonerated and their records shall be expunged of these reprimands.

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 7th day of December 2005.