

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39003
Docket No. MW-39629
08-3-NRAB-00003-060415
(06-3-415)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1) The discipline (withheld from service beginning August 16, 2005 and an Actual Suspension for time served on September 20, 2005) imposed upon Mr. R. Cuellar for alleged violation of Maintenance of Way Operating Rules 1.2.7, Furnishing Information, 1.6 Conduct and 10.3 Track and Time, on charges of failure to release Track and time at approximately 1145 hours on August 14, 2005 and alleged failure to comply with instructions from Assistant Roadmaster M. Kranz on August 16, 2005 in connection with alleged refusal to provide a written statement of the incident on August 14, 2005, was arbitrary, capricious, unwarranted and in violation of the Agreement [System File C-05-D040-3/10-05-0297 (MW) BNR].
- 2) As a consequence of the violation referred to in Part (1) above, Mr. R. Cuellar shall now receive the remedy prescribed by the parties in rule 40(G).”

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.

By notice dated August 16, 2005, the Claimant was directed to attend a formal Investigation and Hearing on charges that the Claimant allegedly failed to release Track and Time at about 11:45 A.M. on August 14, 2005, resulting in a delay of one hour, 54 minutes to Train ZWSPALT9-14, and had allegedly failed to comply with instructions to provide a statement on this incident. The Investigation was conducted on August 22, 2005. By notice dated September 20, 2005, the Claimant was informed that as a result of the Investigation, he had been found guilty as charged and was being assessed an actual suspension of time served. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discipline him. The Carrier denied the claim.

The Carrier initially contends that the record clearly supports its position that the Claimant violated the Operating Rules and was appropriately punished. The Carrier asserts that during the Hearing, the Claimant freely admitted that he failed to properly and promptly release his track and time authority and that he also failed to provide a written statement to his superiors when requested to do so. The Carrier emphasizes that the Organization has not disputed the fact that the Claimant voluntarily and freely confessed to the charged offenses. Instead, the Organization has presented a defense that is based not on the merits, but only on procedural arguments. The Carrier maintains, however, that this tactic does not

absolve the Claimant from his offenses, and the clear establishment of admitted guilt renders moot all of the Organization's procedural arguments.

The Carrier points to numerous Board Awards supporting the assertion that where there is an admission of guilt, there is no need for further proof. The Carrier additionally maintains that the discipline imposed upon the Claimant was proper. The Carrier insists that the Rules relating to track and time are intended to prevent undue delays of trains while also preventing derailments, collisions, injuries, and even death. The Carrier contends that the Claimant's offense clearly falls within the category of "serious" offenses under the Carrier's disciplinary policy.

The Carrier argues that allowing employees to pick and choose which instructions they wish to follow undermines the authority of the officer giving the instructions. This also is detrimental to the Carrier's entire authority structure. The Carrier asserts that for this reason, all Boards have held that insubordination is a dismissible first offense. The Carrier further contends that by assessing only an actual suspension of time served in this case, and not pursuing dismissal, it has exercised leniency toward the Claimant.

The Carrier goes on to maintain that the Organization has attempted to confuse the issue by asserting a myriad of charges. As for the Organization's argument that for the Claimant to have provided a written statement as requested would have violated his right against self-incrimination, the Carrier maintains that this position clearly is incorrect, as prior Board Awards have held. With regard to the Organization's claim that the fact that Roadmaster Kranz provided a statement but was not present at the Hearing, denying the Organization from cross-examining Kranz, the Carrier emphasizes that the Board has dealt with this issue on numerous occasions, finding that such statements are admissible. Moreover, Kranz had indicated that he would be available to answer any questions by telephone, but this offer repeatedly was rejected. The Carrier further points out that if the Organization needed to cross-examine Kranz, it could have sought an adjournment for that purpose. The Organization chose not to do so, however, and it therefore voluntarily waived its right to object.

Addressing the Organization's contention that the Carrier denied the Claimant's due process rights because the Local Chairman did not receive a copy of the Investigation notice, the Carrier emphasizes that the purpose of this notice is to fairly inform the Claimant of the subject matter at issue and to enable the Organization to prepare its defense. The transcript demonstrates that the Local Chairman was present at the Investigation provided the Claimant with rigorous representation.

The Carrier then maintains that the Organization is incorrect in asserting that by asking one question that the Organization deemed "coaching," the Hearing Officer failed to act as a neutral party. The Carrier points out that the Organization is complaining about only one of the 225 questions that were posed at the Claimant's Hearing. The Carrier insists that admitted guilt renders moot all procedural arguments.

The Carrier additionally argues that the Claimant's own testimony contradicts the Organization's assertion that because the Claimant had worked a large number of days prior to the date of the incident, this contributed to any mistake that the Claimant had made. The Claimant stated his belief that he was mentally and physically capable of performing his duties on the date in question.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier violated Rule 40 by failing to provide the Local Chairman with copies of the Investigation notices. The Organization asserts that, as the Board repeatedly has found, the use of the mandatory word "shall" in Rule 40 means that this Rule must be upheld to ensure the integrity of the Agreement and to protect the rights of the employees. The Organization argues that the Carrier's failure to comply with the clear and unambiguous language of Rule 40 requires that the instant claim be sustained.

The Organization maintains that the record demonstrates that the Claimant was found guilty based on two typewritten statements allegedly provided by Assistant Roadmaster Kranz and read into the record by the Carrier's only witness.

The Organization insists that the Carrier's failure to produce Kranz to testify at the Hearing violated the Agreement and denied the Claimant a fair and impartial Hearing.

The Organization goes on to argue that by removing the Claimant from service effective August 16, 2005, the Carrier further violated the Agreement and denied the Claimant a fair and impartial Hearing. The Organization acknowledges that in certain circumstances, the Carrier has the right to remove and withhold employees from service pending the outcome of a formal Hearing. The Organization emphasizes, however, that this right is limited to situations where retaining the employee in service may endanger the employee himself, other employees, the public, or otherwise adversely impact the Carrier's operations. The Organization asserts that retaining the Claimant in service following his refusal to provide a written statement clearly would not have endangered the Claimant's safety or that of his fellow employees or the public, nor would it have interfered in any way with the orderly performance of work. The Organization contends that there can be no question that the Carrier's decision to withhold the Claimant from service was unwarranted and a violation of the Agreement.

The Organization additionally points out that the Carrier's right to withhold the Claimant from service pending a Hearing was further restricted by Rule 40 to those cases involving serious Rule infractions. The Organization insists that the incident at issue simply does not rise to the level of a "serious infraction," as contemplated by the Agreement. The Organization maintains that the Carrier violated the Agreement when it unjustly removed and withheld the Claimant from service beginning on August 16, 2005. The Carrier's actions equated to the issuance of discipline without benefit of a Hearing, and these actions constitute a clear indication that the Carrier had pre-determined that the Claimant was guilty of the charges prior to the Hearing. The Organization therefore maintains that the Claimant was denied his contractual and due process right to a fair and impartial Hearing.

The Organization contends that the Claimant already received the initial notice of Investigation before he was asked to provide a written statement. The Organization asserts that the Claimant was not required to give a written statement

that may be used against him at the Investigation. The Organization emphasizes that the Claimant was very forthcoming about the incidents at issue, and he indicated that he would provide a written statement if the Investigation was cancelled.

The Organization goes on to assert that the purpose of discipline is to rehabilitate, correct, and guide employees. The Organization argues, however, that in the instant case, it is clear that the discipline issued to the Claimant was punitive in nature and intended as retribution for his well-reasoned refusal to provide a written statement that in all likelihood would have been used against him at the Hearing. The Organization insists that the Claimant provided his supervisors with a complete and detailed verbal account of the incident, and he never attempted to mislead his supervisors or hide any of the details. The Organization therefore argues that the discipline imposed was excessive, capricious, improper, and unwarranted.

The Organization then asserts that the record in this matter demonstrates the existence of an on-going problem contacting the Dispatcher in the area where the incident occurred. The Organization maintains that this and other problems had a direct effect on the Claimant's ability to contact the Dispatcher by radio. The Organization argues that the record fails to justify the discipline imposed upon the Claimant. The Organization emphasizes that where discipline is shown to be excessive, capricious, improper, and unwarranted, it cannot stand.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board reviewed the evidence and testimony in this case, and we find that the Carrier met its burden of proof that the Claimant was insubordinate when he refused to provide a written statement of what had occurred on August 14, 2005, as was demanded by his Supervisor. The Claimant was given a second opportunity to

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give the statement, and he refused a second time. The Claimant stated that he had "made his decision and would abide by the consequences."

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The record in this case revealed that the Carrier originally decided to dismiss the Claimant and then reduced that dismissal on a leniency basis to a 34-day suspension. Given the seriousness of the insubordinate behavior engaged in by the Claimant, the Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it suspended the Claimant for the 34 days. Therefore, the claim will be denied.

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 27th day of March 2008.