

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40445
Docket No. SG-39441
10-3-NRAB-00003-060098
(06-3-98)**

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 (Metra):

Claim on behalf of O. K. Coney, for payment for all lost wages, the discipline against him rescinded and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 53, when it imposed a five-day suspension against the Claimant, plus three days that were formerly deferred, without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on March 2, 2005. Carrier's File No. 11-13-486. General Chairman's File No. 5-D-05 Coney. BRS File Case No. 13543-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 January 26, 2005, the Carrier directed the Claimant to report for a formal Investigation on January 31, which was postponed and subsequently held on March 2 concerning the following charge:

“You are hereby instructed to attend a formal investigation which will be held on Monday, January 31, 2005 at 9:00 a.m. in the office of Director of Engineering, 2067 W. 123rd Street, Blue Island, IL. The purpose of this investigation is to develop the facts, determine the cause and assess responsibility, if any, when you allegedly failed to protect your position on Saturday and Sunday, January 22 and 23, 2005. Therefore you are hereby charged with alleged violation of Metra Employee Conduct Rule ‘Q,’ Paragraph #1. Your work record, copy of which is attached, will be reviewed at this investigation.”

The pertinent Rule in dispute is Metra Employee Conduct Rule Q, Paragraph No. 1 which states the following:

“Employees must report at the appointed time, devote themselves exclusively to their duties, must not absent themselves, nor exchange duties with, or substitute others in their place, without proper authority.”

On March 9, 2005, the Claimant was notified that he had been found guilty as charged and was assessed a five-day suspension, plus three days that were formerly deferred.

It is the position of the Organization that the Claimant was denied a fair and impartial Investigation because it was held in absentia after it requested another five day postponement without the Carrier finding out whether the Claimant was medically fit to appear, especially in view of the fact that the Claimant's wife on January 25, 2005, advised Supervisor Hettman that her husband had an accident on January 22 in which he allegedly sustained a head injury. Additionally, it argued that the Carrier has attempted to pyramid or "stack" one alleged failure to protect his assignment from January 22 through 30, 2005, into multiple disciplinary offenses. Therefore, it concluded that the discipline should be set aside and the claim sustained as presented.

The Carrier argued that the Investigation was held in absentia after two previous postponements. When the Organization belatedly asked for another at the onset of the Hearing and it could not guarantee that the Claimant would report for the next scheduled date, or that he was legitimately unable to appear, the Carrier denied the request. Therefore, the Carrier argued that it was within its right to proceed with the Hearing.

On the merits, the Carrier argued that the record speaks for itself that the Claimant did not work on the days with which he was charged and coupled with the fact that he chose not to appear at the Investigation, he has not rebutted its case. Furthermore, it argued that the Claimant never offered any proof after the Hearing was concluded that he could not appear for the formal Investigation. In closing, it stated that the discipline was appropriate and should not be disturbed.

The Board thoroughly reviewed the transcript and record evidence which constituted the first of three cases involving the Claimant. That record indicates that the Claimant never offered any evidentiary proof that he was physically unable to attend the Hearing. Therefore, it must be concluded that he chose not to appear at the Investigation. As the Board previously stated in Second Division Awards 13957, 13989, and 13990:

"It is further noted there is no requirement that an accused must attend their formal Investigation, but when a charged employee chooses not to attend, he does so at his own potential peril because

he offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360, 13491, and 13924.”

It is clear that the Investigation was properly held in absentia. We will next address the Organization's procedural argument that the Carrier attempted to pyramid (“stack”) multiple violations on top of one alleged failure by the Claimant to protect his assignment. That argument has no relevance in this instance because the subject case was the initial violation and the “stacking” argument only applies to any subsequent cases that were allegedly improperly pyramided on top of this dispute.

The Board, having determined that the Claimant was not denied his Agreement due process right turns its attention to the merits. Our review of the transcript indicates that Carrier witnesses’ testimony, which was not refuted, substantiates that the Claimant failed to protect his position on January 22 and 23, 2005, in violation of Rule Q, Paragraph No. 1. The Organization's vigorous effort to defend the Claimant without his assistance could not overcome the un-refuted testimony of the Carrier's witnesses. The Board has concluded that the Claimant's behavior was not appropriate. It is clear that the Carrier met its burden of proof that the Claimant was 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 the discipline was appropriate because it was not arbitrary, capricious, or excessive.

AWARD

Claim denied.

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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 14th day of May 2010.