

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40452
Docket No. SG-40185
10-3-NRAB-00003-070421
(07-3-421)

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.:

Claim on behalf of J. S. Anderson, for payment for all wages lost with any reference to this matter removed from his personal record and to otherwise be made whole, as required by Rule 54 - Exoneration, account Carrier violated the current Signalmen's Agreement, particularly Rule 53, when it issued the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on March 10, 2006. Carrier's File No. 11-7-568. General Chairman's File No. 11-D-06-ANDERSON. BRS File Case No. 13851-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 25, the Carrier directed the Claimant to report for a formal Investigation on February 1, which was postponed several times and subsequently held on June 10, 2006, with the Claimant in attendance concerning the following charge:

“ . . . The purpose of this investigation is to develop the facts, determine the cause and assess responsibility, if any, with your alleged failure to protect your position on Monday, Tuesday and Wednesday, January 23, 24, and 25, 2006. Therefore, you are hereby charged with alleged violation of Metra Employee Conduct Rule ‘Q,’ Paragraph #1 and Engineering Special Instruction #1, Paragraphs #4 and #6.”

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

“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.”

Also at issue is Engineering Special Instruction No. 1, Paragraph No. 4 which quotes employee Conduct Rule Q, Paragraph No. 1 verbatim. Paragraph No. 6 of the Special Instruction states:

“If an employee is going to be absent, for whatever reason, the employee must notify the designated supervisor prior to the start of the [employee's] assignment. However, this notification, including voice mail messages, does not automatically give an employee an authorized absence.”

On June 13, 2006, the Claimant was notified that he had been found guilty as charged and was dismissed.

It is the position of the Organization that the Claimant was denied a fair and impartial Investigation because the Hearing Officer had previously assessed discipline against him and he was the Hearing and Disciplinary Officer in this instance. Additionally, it argued that the concept of fairness would indicate that the Carrier had improperly attempted to pyramid or “stack” like offenses within a small timeframe, which did not give the Claimant an opportunity to correct his behavior. Simply stated it asserted that the Claimant was off continuously between December 29, 2005 and January 25, 2006, and this case was a continuation of the alleged violation already addressed by the Board in Third Division Award 40449 and there was no basis for separating this dispute from the aforementioned case.

On the merits the Claimant testified that he did not ask Supervisor Heim to be off because he was under the assumption that his Testman position had been abolished, and Heim was no longer his Supervisor. The Organization concluded that the discipline should be set aside and the claim sustained as presented.

It is the Carrier's position that the record indicates that the Claimant did not report to work on January 23, 24 and 25, 2006, and he did not request permission to be absent. It further argued that the Claimant's testimony that he did not ask Supervisor Heim to be off on the aforesaid dates because he thought his position had been abolished, and Heim was no longer his Supervisor lacks credibility. According to the Carrier, that testimony is completely contradictory to that of Heim who testified that he told the Claimant that he would abolish the Claimant's position after he returned to work. Lastly, it points out that the Claimant's job was not abolished and it never issued a notice of job abolishment. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and record evidence, which constituted the fourth in a series of five cases involving the Claimant.

We will first address the Organization's procedural argument that the Hearing Officer should not have rendered the discipline. Rule 53 - Investigations and Discipline does not address who shall sign the Notice of Investigation, nor does it state who shall hold the Hearing or sign the Discipline Notice, but it does require a "fair and impartial" Investigation. Countless decisions have been rendered regarding multiple roles filled by a Hearing Officer. In Third Division Award 35506 the Board ruled as follows:

"The issue of multiple roles by one officer in discipline proceedings in this industry has been the subject of many Awards. While these Awards caution the Carrier against this practice because of the obvious due process risks involved, the better reasoned majority of these Awards also provide that, in the absence of Agreement language specifically prohibiting one officer from serving multiple roles, each case must be reviewed to determine if the employee's due process rights were actually compromised or prejudiced in any way." (Emphasis added)

Contrary to the Organization's argument in this case, it has often been argued that the Hearing Officer should render the decision after the Investigation rather than someone who was not in attendance, because he was in the best position to make credibility decisions. (See Third Division Awards 14031, 17165, 17901, 20164, 30601, 31174 and 32297). On this same property in First Division Award 25401 the Board reviewed a case wherein the Hearing Officer scheduled the Investigation, conducted the Hearing, and issued the discipline. Therein the Board held:

". . . The mere fact that a Hearing Officer wears several hats does not, in itself, constitute a violation of due process."

The Board reiterates its concurrence with the principle that whenever multiple roles are filled by one officer in disciplinary matters, the Carrier must exercise caution because of the potentiality for the violation of an employee's Agreement due process rights. As stated above, the specific Agreement in dispute does not prohibit the multiplicity of roles in the disciplinary process, however, it does require the Board to examine each case on an individual basis to ensure that employees were provided fair and impartial investigations. In this instance, the transcript and record evidence substantiates that the Claimant's Agreement due process rights were not trampled upon and he was provided a fair and impartial Investigation.

The Board next turns its attention to the Organization's pyramid argument. In prior cases the Board has determined that in some instances the Organization's argument that the Carrier had improperly attempted to pyramid like offenses within a small time frame by separating or dividing one continuing violation had merit because it was contrary to the Carrier's Progressive Discipline Policy. In this case, that argument has no validity, because the record proves that the Claimant requested time off which was granted between January 16 through 20, 2006. Therefore, that granted time off (leave of absence) breaks the Organization's continuance argument that this case is tied to another. The instant case is a stand-alone-case and is not part of any prior continuing violation.

Turning to the merits, testimony at the Investigation reveals that the Claimant did not report for work on January 23, 24, and 25, 2006 and he did not request permission to be off. Supervisor Heim testified that the Claimant did not call in prior to his absences on any of the aforementioned dates to request permission to be absent. The Claimant admitted that he did not request permission to be off work.

He further testified that he did not request permission to be off on the aforesaid dates because he thought his Testman position had been abolished, and Supervisor Heim was no longer his immediate Supervisor. The Claimant's testimony was totally contrary to Heim's testimony. Heim testified that he did not tell the Claimant during their January 15 conversation that his job had been

abolished. Instead, Heim asserted that he told the Claimant that his job would not be abolished until after he returned to work.

The record verifies that the Claimant's job was not abolished, nor was there a notice of job abolishment issued. The Claimant had no logical reason to conclude that his job had been abolished and he no longer needed to receive authority to be absent. Based upon the record produced at the Hearing there is not one shred of evidence that aids the Claimant in his defense, including his own self-serving testimony, which lacked credibility. The record is clear that the Carrier met its burden of proof that the Claimant was guilty as charged.

The only issue remaining is whether dismissal was appropriate. At the time of the incident, the Claimant had approximately 19 years of service with a less than stellar work record. That record included more than one dozen disciplinary infractions, including one prior dismissal for Rule "Q" which was reduced to a suspension with reinstatement on a leniency basis. The Carrier has attempted to use progressive discipline over the years to alter the Claimant's inappropriate behavior to no avail. The Board finds and holds that the discipline was appropriate because it was not arbitrary, capricious or excessive.

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 14th day of May 2010.