

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40576
Docket No. SG-39550
10-3-NRAB-00003-060338
(06-3-338)**

The Third Division consisted of the regular members and in addition Referee Martin W. Fingerhut when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Providence and Worcester Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Providence & Worcester Railroad Co:

Claim on behalf of T. Arrighi, for reinstatement to his former position with compensation for all time and benefits lost and any reference to this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Article 13, when it issued the harsh and excessive discipline of dismissal against the Claimant without meeting its burden of proving the charges that the Claimant was in violation of Carrier’s Safety Rule E1010. General Chairman’s File No. WHK-62-150-0505. BRS File Case No. 13554-P&W.”

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.

Prior to a consideration of the merits of the claim, it is necessary to note that the Agreement between the parties contains only one provision with respect to discipline matters. The sole reference to "discipline" in the Agreement is found in Article 13:4, which provides that "for minor offenses discipline will not be implemented until after final conference with the Carrier." There are no provisions for charging employees with alleged violations of Carrier Rules, or for holding Investigations. Accordingly, all facts set forth below are taken from correspondence, including attachments, which were exchanged between the parties when the dispute was pending on the property. The burden of proof, of course, remains upon the Carrier to demonstrate that there was substantial evidence to support its assessment of discipline.

Turning to the facts of the case, on April 27, 2005, the Carrier sent the Claimant a letter, entitled "Notice of Termination" which, in pertinent part, provided:

"Thirty (30) days have now elapsed since the date of your accident and P&W still has not received any information from you, verbal or otherwise, concerning that event. As you are aware, employees of P&W are obligated, pursuant to P&W Safety Rule E1010, to provide P&W with information and a factual report of any accident or incident. Mr. Fisher reminded you of this rule in his letter to you dated April 6, 2005. Safety Rule E1010 states that:

'[e]mployees who withhold information or fail to give a factual report of any irregularity, accident, incident or violation of Rules will be subject to dismissal from service.'

Effective today, April 27, 2005, your employment with P&W is terminated based upon your violation of P&W Safety Rule E1010."

The facts further show that at 2:15 P.M. on March 29, 2005, Claimant T. Arrighi and co-employee Kenney were distributing crossbars in the area of Gardner Branch Milepost 5.2. In a statement furnished by Kenney, he stated that Supervisor Doyle had directed Kenney to operate a spiker while the Claimant was to ride a cart attached to the spiker. The Claimant was stationed on the cart and at eight-foot intervals he was to pitch angle bars from the cart to the ground. Kenney went on to state, in pertinent part:

“We had 2 sets of bars left when Todd acknowledged for me to move forward. When I turned around I saw Todd lying next to the tracks. . . .”

Kenney’s statement made it clear that he had not witnessed the Claimant’s fall from the cart. There was no other witness to the accident.

The events which culminated in the Carrier’s Notice of Termination are found in correspondence between the Carrier and the Organization representing the Claimant. On July 13, 2005, Engineer of Structures H. Charles denied the Organization’s appeal of the Claimant’s dismissal. The letter set forth the Carrier’s position as follows:

“On March 29, 2005, the date of the alleged accident, Mr. Arrighi left the hospital under his own power.

- * On March 31, 2005, Tom Doyle reported that he had spoken with Mr. Arrighi about his giving a statement concerning the alleged accident and that Mr. Arrighi had agreed to telephone Richard Fisher on April 1, 2005 to make arrangements to give his statement.
- * Mr. Arrighi did not telephone Mr. Fisher on April 1, 2005. Mr. Fisher, however, called Mr. Arrighi on his cellular telephone. Mr. Arrighi did not take Mr. Fisher’s call, therefore, Mr. Fisher left a message asking Mr. Arrighi to call him back.

- * On or about April 6, 2005, Mr. Fisher wrote to Mr. Arrighi reminding him of his obligation to provide a statement in accordance with Safety Rule E1010 and requesting that Mr. Arrighi telephone him to arrange a time for the recording of his statement.
- * On that same day, April 1, 2005, Mr. Fisher reported that you [Local Chairman Wagner] telephoned him, informing him that Mr. Arrighi had telephoned you, told you that he was taking strong medication and did not feel well enough to give a statement.
- * On April 6, 2005, Dick Ross reported that on April 5, 2005, he made several telephone calls to Mr. Arrighi. Mr. Arrighi did not accept Mr. Ross' calls, therefore, Mr. Ross left messages asking Mr. Arrighi to call him back.
- * On April 6, 2005, Mr. Ross reported that Mr. Arrighi's father telephoned him later in the day on April 5, 2005. Mr. Ross informed the father that Mr. Arrighi needed to telephone Mr. Fisher so that Mr. Fisher could get a statement from him. The father indicated that Mr. Arrighi would call Mr. Fisher.
- * On April 7, 2005, Mr. Arrighi's father telephoned Mr. Fisher, informed him that Mr. Arrighi was experiencing headaches and would not be able to provide a statement at that time. Mr. Fisher asked that he be kept apprised of Mr. Arrighi's condition and reiterated that he needed to take Mr. Arrighi's statement.
- * On April 11, 2005, Mr. Arrighi's father again telephoned Mr. Fisher, informing him that Mr. Arrighi would give a statement if Mr. Fisher came to his house in Pawtucket, RI. Mr. Fisher agreed to make the trip and an appointment was scheduled for 2:00 p.m. on Friday, April 15, 2005.

- * On April 15, 2005, Mr. Arrighi's father telephoned Mr. Fisher to confirm the appointment for later that day.
- * On April 15, 2005, Mr. Fisher went to the scheduled appointment. Upon his arrival, Mr. Arrighi's father informed Mr. Fisher that he had received a call from Bill Keebler (Asst. General Chairman, BRS) who told him that Mr. Arrighi would not give any statements while he was under the influence of his medications. The father also informed Mr. Fisher that Mr. Arrighi had taken some medication approximately one (1) hour before the scheduled meeting and was sleeping. The father indicated that if Mr. Fisher could leave him a form, Mr. Arrighi would write out a statement. Mr. Fisher replied that he did not have any such forms and that he needed to take a recorded statement. The father indicated that Mr. Arrighi did not like to be recorded while speaking. Mr. Fisher then left the premises.
- * On May 12, 2005, forty four (44) days after the alleged accident and almost two (2) weeks after his termination, you telephoned Mr. Fisher, asking whether you could bring Mr. Arrighi in to give a statement."

The letter added:

"Despite the inferences in the Grievance that, between the date of his purported accident and his termination, Mr. Arrighi was physically or mentally unable to give the required statement, there can be little doubt that Mr. Arrighi clearly had the ability to comply with Rule E1010. P&W has not been provided with any substantial evidence that Mr. Arrighi was physically or mentally unable to give the required statement. . . . Further, Mr. Arrighi's unfulfilled promise(s) to contact Mr. Fisher and his failure to keep an appointment set by his father are evidence of bad faith on his part."

The Organization, in its response dated August 12, 2005, described its version of the facts in the following manner:

“On August 4, 2005 we met for a second level claim meeting on this subject and the following points were made by the Brotherhood of Railroad Signalmen:

‘Mr. Arrighi was injured following Supervisor Doyle’s orders.

Todd was performing the work in the same manner that it has always been done in the past.

No one from the carrier talked to Mr. Arrighi after his injury to the time he was dismissed. Todd did call one of his supervisors.

Mr. Arrighi was under heavy medication as after he returned from the hospital he had to return to get more medication for the pain.

The Local Chairman did talk to Mr. Fisher about Todd and that Todd wanted union representation when he gave his statement.

Mr. Fisher did not notify Mr. Wagner (Local Chairman) when he went to get a statement from Todd.

Mr. Keebler did have a conversation with Mr. Conti and agreed that the Local Chairman would be present when a statement was given. It was clear that Todd wanted representation.

Mr. Ross (Supervision) did his own investigation without talking to the principles in the case and charged Todd with a number of violations the following day. Even though statements from the employee he was working with said he was following supervisor’s orders. Also, the members I have talked to state the work Todd was doing was always done that way.

The Carrier never called the Local Chairman to find out what was going on with Todd, even though supervision has called him many times in the past for any information they wanted at any time, on or off the payroll clock.

Mr. Arrighi did put a statement together at the Local Chairman's request and sent a copy to the P&W.¹

Todd's father notified Mr. Fisher he was experiencing headaches and would let Mr. Fisher know when Todd would be able to give a statement. Mr. Arrighi was terminated without anyone checking to see if his condition changed so he was able to give a statement.'"

In comparing the two letters our focus is confined solely to one area, namely, whether the Claimant complied with Rule E1010 which requires the employee to provide information in connection with the accident of March 29. Whether the Claimant did or did not violate other operating Rules in performing his duties is irrelevant to that issue.

There can be no serious dispute that the Carrier made numerous attempts via mail and phone calls in a futile attempt to meet with the Claimant. At the very least, the Organization's appeal letter of August 12 did not deny that the Carrier sent a letter to the Claimant on April 6 reminding him of his obligation under Rule E1010 and requesting a meeting to obtain a statement. Likewise, the Organization did not dispute that a meeting had been arranged to take place at the Claimant's home on April 15. The meeting was abruptly cancelled by the Claimant's father. There is no reason to doubt the Carrier's contention that several other telephone attempts had been made to contact the Claimant with similar negative results.

In essence, the bottom line issue is whether the Claimant complied with Rule E1010 notwithstanding his failure to provide information about the accident. Two bases for such finding are suggested by the Organization. First, the Organization argues that the Claimant was physically unable to meet with the Carrier's

¹ The record of on-property handling does not contain any statement by the Claimant, nor the date it was allegedly sent to the Carrier.

representative. It states that the Claimant was under “heavy medication” and was “experiencing headaches,” apparently for the entire period from March 25 to April 27. There is no question that the Organization’s contention, if found to be factual, would have excused the Claimant from meeting with the Carrier. It likewise is clear, however, that inasmuch as the Organization’s position constitutes an affirmative defense, the burden of proof rests with the Organization. In this case, there is not a scintilla of evidence corroborating the assertion that the Claimant’s physical condition prevented him from complying with Rule E1010. There is no information provided from any objective medical source describing the Claimant’s physical condition as one that would have prevented him from providing a statement required by Rule E1010 during the period of March 29 to April 27.

The only information presented came from the Claimant’s father and the Organization. In its July 13, 2005 letter to the Organization, the Carrier challenged the Organization to provide “any substantial evidence that Mr. Arrighi was physically or mentally unable to give the required statement.” The challenge went unanswered. In essence, the Organization’s position would require the Board to interpret Rule E1010 as allowing the Claimant to avoid his obligation to comply with the Rule solely on the basis of statements by his father and a member of the Organization with no independent corroboration. In our view, such an interpretation would render Rule E1010 with no force or effect. We are not able to accept such an interpretation.

The Organization further contended that the Carrier acted improperly when it sought to obtain a statement from the Claimant at his home on April 15 without the presence of his Organization representative. It is the Organization’s belief that the burden rested on the Carrier to notify the Organization of the meeting. The Board disagrees. There is no issue in this case whether the Claimant had the right to have an Organization representative present when he provided a statement. The Carrier made it clear that it would allow such representation regardless of whether there was any compulsion to do so. In effect, the issue is which side was required to inform the Organization of the April 15 meeting. It is the view of the Board that inasmuch as the presence or absence of the Organization was entirely a decision to be made by the Claimant, it is reasonable that the Claimant should have issued the invitation if he desired the Organization’s presence. In this case, the Claimant’s father had set up the April 15 meeting in his call to Fisher on April 11. If the Claimant had wanted an

Organization representative to be present, there was no reason he could not have so notified the Organization.

In summary, the Board finds that the Carrier had substantial evidence upon which to find that the Claimant violated Rule E1010. The consequence of such failure has been the subject of numerous Awards. For example, in Third Division Award 26663, in upholding the dismissal of an employee for failing to submit a report of an on-duty accident, the Board stated:

“It is well-accepted, especially on this property, that the failure to promptly report an injury as required by Rule 1 is grounds for dismissal. Third Division Awards 25162, 24014. As explained in those awards, the purpose of the reporting requirement is that the Carrier is entitled to receive such reports promptly since such incidents may involve liability on the part of the Carrier. The reporting requirement also benefits the employee due to the obligation of the Carrier to furnish medical care to an injured employee. Third Division Award 24654; Fourth Division Award 4199. Indeed, as we stated in Third Division Award 25162, ‘any employee who does not comply with the accident reporting rule does so at his peril.’ Claimant clearly did not meet his obligations under the Rule and we can find no reason to justify disturbing the Carrier’s action of dismissal.”

The rationale of the Board in Award 26663 is equally applicable here. The Carrier’s decision to dismiss the Claimant was neither arbitrary nor unreasonable and the claim will be denied.

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 27th day of August 2010.