

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41800
Docket No. SG-42162
13-3-NRAB-00003-130087

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Pan Am Railways/Springfield Terminal Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Pan Am Railways (formerly Springfield Terminal):

Claim on behalf of J. W. Worcester, for reinstatement to his former position with all seniority and benefits unimpaired, compensation for all time lost, including overtime, and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Article 19, when it issued the harsh and excessive discipline of dismissal to the Claimant without providing him a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on November 16, 2011. Carrier’s File No. S-11-01. General Chairman’s File No. WHK-232-036-1011. BRS File Case No. 14717-ST.”

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 letter dated October 25, 2011, the Claimant was directed to report for an Investigation concerning an incident that occurred on October 7, 2011 wherein it was alleged that he was in violation of Safety Rules PGR-C (paragraphs 1, 2, 3 & 4), PGR-L (paragraph 1) and PGR-N (paragraph 2), which provide, in part, that employees (1) must not be insubordinate or quarrelsome, (2) must refrain from conduct adversely affecting the performance of their and other employees' duties and subjecting the Carrier to criticism, and (3) must not absent themselves from duty without permission of a supervisor. Following an Investigation conducted on November 16, 2011, and by letter dated November 28, 2011, the Claimant was found guilty of all charges and terminated immediately.

The evidence presented at the Investigation establishes that the Claimant was a Signal Department Construction Foreman running a crew at Field Road on October 7, 2011. The prior evening there was a hydraulic oil spill at East Elm Street that was still being dealt with by a B&B crew on October 7, and its cleanup was headed by Assistant Superintendent Pelletier (who had called in a Maine Department of Environmental Protection - MDEP - official as required, who was also on site) and Bridge Inspector Gessman. A determination was made that a small excavator was necessary to aid in the cleanup, Gessman got the approval of the Claimant's supervisor (Lawrence) to use the excavator that was with the Claimant's crew, and Gessman went to Field Road to obtain it after his attempts to reach the Claimant by telephone were unsuccessful and his messages were not returned. The Claimant told Gessman that the Signal Department does not clean up hazardous material; he was assured that it was not hazardous material; he indicated that he had to check with his Union representative, and was told to do so and have the equipment at Elm Street within 45 minutes. The Claimant sent Assistant Signalman Butland, who was a four-month employee, rather than its regular operator, to bring the excavator to the spill site. The Claimant stated that he was unaware that they also wanted an operator, because they only asked for the excavator, and he thought there was someone at the site who could operate the excavator.

After the excavator was unloaded, Butland was instructed what to do and where; he asked if they had anyone else who could operate the excavator because he

was inexperienced, and he was told by Pelletier and Gessman to take his time, it was a small area, that they would help him, and that the area would be cleared for him. Butland did as instructed, uncovered the soil, and, while waiting for the dumpster to arrive, received a text from the Claimant telling him not to partake in any way in the cleanup. Pelletier spoke with the Claimant over the phone and was told that the problem was that the Signal Department does not cleanup oil and is not trained to handle hazardous material. The Claimant testified that he was told by Pelletier that he was being insubordinate by questioning, so he decided to visit the site to find out what type of situation Butland was involved in, because he was responsible for the safety of his crew.

When the Claimant arrived at the site, he did not see, or look for, either Gessman or Pelletier, so he directly approached the MDEP representative on the tracks (after having called to get the working limits prior to going to the site) and asked what kind of dangers were involved in the oil spill cleanup and whether they are included in a report. He accompanied the MDEP representative to her truck and got a copy of her business card. When Pelletier saw the Claimant speaking with the MDEP representative, who only he was authorized to deal with, he approached and asked the Claimant what his problem was. He indicated that they did not deal with hazardous material and was going to file a good faith challenge, even though Pelletier again assured him that there was no hazardous material involved. Pelletier testified that the Claimant was arrogant, disrespectful and insubordinate in front of the MDEP representative, and Pelletier later apologized to her. He stated that he had to ask the Claimant to leave the site three times before he did so. The Claimant stated that once he learned that other supervisors were in charge of his employee's safety, he agreed to leave. The Claimant testified that the Signal Department has never cleaned up oil, that the General Chairman had told them not to do it, and that, on one prior occasion, a Signal Department employee was instructed to stop cleaning up oil by both the Carrier and the Organization.

The Carrier contends that the Claimant was given a fair and impartial Investigation, and that there is substantial evidence in the record to support the charges. It further contends that (1) the Claimant was insubordinate in a number of ways by continuing to challenge management's position that the spill was not hazardous and that it was appropriate for Butland to perform the work under the supervision of Gessman and Pelletier, (2) unnecessarily inserting himself into a cleanup assignment that did not fall under his auspices and delaying the work to be performed, (3) being argumentative and rude in front of a MDEP official and (4)

not putting the Carrier's best interests in seeing that the oil spill was cleaned up properly and timely ahead of his own self-interest. The Carrier points out that the Claimant (1) was quarrelsome and uncivil in his dealings with Pelletier, (2) was careless of his own safety by not properly following protection procedures, and (3) left his crew unsupervised without a valid reason or authorization to go to the Elm Street cleanup site. It notes that the penalty assessed was reasonable for the numerous serious violations and was progressive because the Claimant's file contained a reprimand as well as a 30-day suspension for similar type insubordinate conduct.

Conversely, the Organization initially took issue with the Carrier's refusal to allow the Claimant to attend the claims conference, and argues that his Agreement due process rights were violated by the Hearing Officer's conduct in prejudging the Claimant's guilt and not granting him an impartial Investigation. Regarding the merits, the Organization contends that the Carrier failed to prove all of the charges listed in the discipline letter, asserting that the Claimant was Butland's Foreman, and being responsible for his safety, he took reasonable actions to assure that Butland was not involved in cleaning up a hazardous oil spill that he was not trained to handle. It points out that the Claimant's conduct was consistent with his evidence that the Carrier only asked him for the excavator, and not an operator, which was not unusual, and that he had no knowledge of the situation at Elm Street when he instructed Butland not to take part in such clean up, and needed to satisfy himself that his employee's safety was being considered, necessitating his site visit. The Organization notes that once the Claimant was satisfied that Butland was not being put in an unsafe position and was under the supervision of others, he left the site as requested. The Organization argues that dismissing the Claimant, a 15-year employee, was excessive and arbitrary under the circumstances. On that basis, it requested that the discipline be overturned, and the Claimant returned to work and made whole.

Initially, the Board finds that the Claimant received a fair and impartial Investigation and that his Agreement due process rights were not violated. A careful review of the record convinces the Board that the Carrier met its burden of proving, by substantial evidence, that the Claimant was guilty of engaging in certain misconduct, but did not prove all of the charges cited in the discipline letter. The evidence supports the finding that the Claimant was both insubordinate in violation of PGR-C (paragraph 3) and quarrelsome in violation of PGR-L (paragraph 1), in his dealings with Pelletier when he continued to refuse to accept the assurances of

supervisors that the oil spill did not constitute a hazardous material situation, argued about the propriety of their orders, continued to persist in his position that Butland was not to perform the work, and attempted to exercise a good faith challenge at the site to prevent him from doing so, even after receiving additional assurances from the MDEP representative that the cleanup was being conducted appropriately and that no hazardous substances were involved, and refused to leave the job site until directly ordered to do so on three separate occasions. The record supports Pelletier's belief that the Claimant was overreacting to the situation in an attempt to exercise control over a matter that was under the auspices of his superiors, and, in so doing, was undermining his authority. This constitutes serious misconduct, even if it was initially based on a safety concern, and constitutes insubordination.

Additionally, there is no doubt that the Claimant should have been aware of the seriousness of approaching an official of the MDEP, especially without first attempting to locate his supervisors who he knew were on site, and voicing safety concerns about the manner in which the cleanup was being conducted. The Claimant could not have legitimately understood that he was not entitled to deal directly with a government official overseeing the cleanup, let alone, to criticize the manner in which the Carrier was performing that task. There is no doubt that the Claimant's conduct in this regard supports the charge that he violated PGR-C (paragraph 4) by failing to conduct himself in a manner so as not to subject the Carrier to criticism or a loss of good will.

On the other hand, the Carrier did not prove that the Claimant failed to devote himself exclusively to the Carrier's service (he was dealing with a safety issue concerning his employee's role in an oil spill cleanup), was dishonest, immoral, vicious or uncivil, or that he improperly absented himself from the workplace without supervisory permission, because it was shown that a Foreman may leave a job site to attend to duties without securing permission from his supervisor. Based on the Claimant's initial understanding that only the excavator was being requested, and not the operator, his concern with Butland's safety arose when he learned that Butland was being asked to perform a job that he was not trained for and was inexperienced at. The Claimant's comments to both Gessman and Pelletier that he would have to check with the Union about his Department's involvement with an oil spill cleanup arose from alleged instructions received from the General Chairman that Signal Department employees were not to clean up oil spills, and a prior experience where a Signal employee was told to stop doing so. Within this

context, the Claimant's concern for, and involvement with, the safety of his junior employee, and his overreaction to the situation, can be more easily understood.

Considering the fact that the Carrier failed to prove all of the charges levied against the Claimant, and that the context of his involvement partially explains his unrelenting concern – but does not excuse his insubordinate conduct – the Board finds that the penalty of dismissal was excessive in this case. Considering the Claimant's prior disciplinary record of similar insubordinate conduct and the seriousness of his actions in this case, the Board concludes that the Claimant is entitled to reinstatement to his former position without loss of seniority, but is not entitled to any compensation for lost wages and benefits. The Claimant's dismissal shall be converted to a long-term suspension and he shall be offered reinstatement as soon as practicable.

AWARD

Claim sustained in accordance with the Findings.

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 17th day of December 2013.

Carrier Members' Dissent

to

Third Division Award 41800; Docket SG-42162

(Referee Margo R. Newman)

The flawed reasoning used by the Majority to inappropriately afford the Claimant leniency in this case, even though he was found to be responsible for serious dismissible offenses pertaining to insubordination, should not be used as a precedent or as a persuasive decision in any future cases.

The Award states, "A careful review of the record convinces the Board that the Carrier met its burden of proving, by substantial evidence, that the Claimant was guilty of engaging in certain misconduct, but did not prove all of the charges cited in the discipline letter." The Claimant was found responsible for various portions of the charge - chief among them were insubordination in violation of PGR-C (paragraph 3) and quarrelsome PGR-L (paragraph 1) - relative to certain of his dealings with Assistant Superintendent Pelletier. The Board recognized that the Claimant's behavior ". . . constitutes serious misconduct, even if it was initially based on a safety concern, and constitutes insubordination." Either of these proven violations standing alone constitutes a dismissible offense. Coupled together, there should have been no doubt that the Claimant's dismissal was proper under the facts and circumstances of this case. Furthermore, the Board noted: "There is no doubt that the Claimant's conduct in this regard supports the charge that he violated PGR-C (paragraph 4) by failing to conduct himself in a manner so as not to subject the Carrier to criticism or a loss of good will."

Yet, the Majority concluded: "On the other hand, the Carrier did not prove that the Claimant failed to devote himself exclusively to the Carrier's service (he was dealing with a safety issue concerning his employee's role in an oil spill cleanup), was dishonest, immoral, vicious or uncivil, or that he improperly absented himself from the workplace without supervisory permission, because it was shown that a Foreman may leave a job site to attend to duties without securing permission from his supervisor." However, the record established that the Claimant lost any legitimate claim to having a genuine safety concern when he was apprised by Carrier supervisors of the relevant facts pertaining to the oil spill cleanup, Assistant Signalman Butland's involvement in that cleanup and the roles of the various supervisors overseeing that cleanup, prior to the Claimant ever leaving his work site. Therefore, his purported defense was quickly nullified, but he still persisted in egregious insubordinate behavior.

Nevertheless, the Majority concluded that based on “. . . alleged instructions received from the General Chairman that Signal Department employees were not to clean up oil spills . . . the Claimant’s concern for, and involvement with, the safety of his junior employee, and his overreaction to the situation, can be more easily understood.” Even accepting as true (which the undersigned do not concede) the fact that the Claimant genuinely had an initial question concerning the role that Signal Department employees may play in oil spill cleanups, the Board has consistently recognized that employees must “obey now and grieve later.” The principle applies in this case. No matter how thinly you slice it, the Claimant was still responsible for insubordination relative to this portion of the charge. After all, the Majority acknowledged that the Claimant was clearly “overreacting” to the situation. The Majority erred in not following its own reasoning relative to the Claimant’s responsibility for his proven violation of PGR-C (paragraph 3) and PGR-L (paragraph 1). As already noted, the Majority recognized that: “This constitutes serious misconduct, even if it was initially based on a safety concern, and constitutes insubordination.”

When it is alleged that an employee is engaging in insubordinate behavior, a defense sometimes raised by the employee is that he possesses a legitimate concern for his safety, at which time the burden shifts back to the employer to proactively address the employee’s concern – assuming it is, in fact, a “legitimate” concern. In this case, although the Claimant may have initially voiced an alleged concern over the safety of a co-worker (not even himself), the record evidence demonstrated that Carrier supervision did in fact remove any legitimate concern for safety that any person similarly situated to the Claimant would have had. A reasonable person possessing the Claimant’s experience, knowledge, training, years of service and prior discipline record would not have had a legitimate safety concern, relative to the oil spill cleanup and the activities of the Claimant’s co-worker, who was participating in that clean-up. Given the unique facts and circumstances present in this case, the Claimant’s continued insubordinate behavior constituted egregious and unacceptable behavior.

The instant dispute, coupled with the Claimant’s prior 30-day suspension for insubordination, evidences the fact that the Carrier’s decision to terminate the Claimant was neither arbitrary nor capricious. There are countless Awards in which Section 3 tribunals have held that carriers have the sole discretion to extend leniency. The Carrier soundly determined that leniency was not warranted in this case. In our view, the Carrier did not abuse its discretion to terminate the Claimant for his proven dismissible offenses. Accordingly, it was inappropriate for the

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Neutral to substitute her own brand of industrial judgment for that of the Carrier under the facts and circumstances present in this case.

For all of the foregoing reasons, we vigorously dissent.

Anthony Lomanto

Anthony Lomanto

Michael C. Lesnik

Michael C. Lesnik

December 17, 2013