

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41826
Docket No. SG-41390
14-3-NRAB-00003-100308

The Third Division consisted of the regular members and in addition Referee Michael Capone 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 Railroad Corp. (Metra):

Claim on behalf of W. T. Merriweather, for payment for all time lost with the discipline rescinded and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 53, when it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 the excessive discipline of a nine-day suspension against the Claimant, that resulted in seven days and one hour and 15 minutes of lost pay, without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on July 10, 2009. Carrier's File No. 11-21-719. General Chairman's File No. 16-D-09. BRS File Case No. 14433-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.

The Claimant was suspended without pay for nine days on July 15, 2009 for violating the Carrier's Employee Conduct Rules "N," paragraphs "1" and "3." The suspension was a result of a formal Investigation held on July 10, 2009, after the Claimant had been removed from service for his "alleged argumentative, quarrelsome, and insubordinate behavior" toward his Supervisors on July 6, 2009.

The Carrier contends that the Claimant used profanities, and also exhibited threatening and aggressive behavior toward Signal Supervisor E. Hettman and Director of Engineering Moses Richardson. The Carrier argues that the language used by the Claimant, as well as his behavior, are well beyond what is commonly referred to as "shop talk," especially when it is directed at Supervisors. It cites Third Division Awards 38994 and 4326, as well as Second Division Award 13664, to support its contention that the type of language used by the Claimant in the instant case is not what is considered to be mere "shop talk" but, rather is conduct where discipline is routinely imposed. The Carrier finds the testimony of Hettman and Richardson as reliable and trustworthy. In contrast, the Carrier finds that the Claimant is not credible because he made inconsistent statements when he first stated that he uses profanities when agitated, but then claimed that he did not remember if he used any vulgarities during a heated exchange with his Supervisors on July 6, 2009.

The Carrier also refutes the Organization's contention that settlement discussions, as part of the offer to waive the Investigation, constitute proof that the Carrier was being arbitrary in suspending the Claimant when an agreement was not reached. The Carrier asserts that the Board, when reviewing the discipline imposed, should not consider such discussions. It relies on Award 13664, cited above, to support its position. The Carrier argues that the discipline assessed is not excessive or harsh given the nature of the charges and the Rules violated.

The Organization argues that the Carrier committed procedural error and, therefore, failed to provide a fair and impartial Investigation that ultimately led to its arbitrary and excessive disciplinary action. The basis of the Organization's claim is that the Carrier perpetrated a fatal error of Agreement due process when it permitted Director of Engineering Richardson, a primary and material witness during the

Investigation, to also act as the official responsible for assessing the disciplinary penalty. The Organization asserts that there is ample precedent and support for its contention that the Carrier failed to show impartiality by not safeguarding the proceedings with an independent review. It cites First Division Award 26268, Second Division Award 12520, and Third Division Award 23427 to demonstrate that it is a fatal flaw when the person who testifies that he was a target of the Claimant's misconduct is the same official who made the decision to remove him from service and then determined the punishment to be imposed.

At this juncture it is not necessary to describe the Organization's position regarding the merits of the charges and its argument of the substantive issues. There is enough evidence of a procedural defect that the Board does not need to go further with its analysis of the merits. A review of the on-property record supports the Organization's contention that the Carrier committed a fatal procedural error when it not only allowed Director of Engineering Richardson to assess discipline after he removed the Claimant from service and issued the Notice of Investigation, but also testified as an accusing witness.

It is well established that the Carrier must insure the fairness and impartiality of the disciplinary process. As enunciated in Third Division Award 23427, it "is a flagrant abuse of 'due process'" where the Carrier's officer issues the charges, as Richardson did in the instant matter, appears as a witness against the Claimant, and then assesses the discipline. It is a long-standing precept in the industry that the "judicial" process that the Carrier controls on its property must afford the Claimant an untainted Agreement due process procedure. The role played by Richardson, as confirmed by the record, is one of a chief accuser, witness, and then judge. The Carrier failed to insure the standards of fairness required in the disciplinary process. Awards 26268 and 12520 cited above provide a strong foundation for the reasoning described herein that the Carrier committed a fatal flaw, which leads to the conclusion that the discipline assessed must be set aside.

AWARD

Claim sustained.

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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 20th day of March 2014.