

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41830  
Docket No. SG-41612  
14-3-NRAB-00003-110247**

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 of 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 16, 2010. Carrier’s File No. 11-7-752. General Chairman’s File No. 6-D-10. BRS File Case No. 14543-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 dismissed from service on March 23, 2010 for violating the Carrier's Maintenance Manual, Section 1.3 - Territories, paragraph "G," as well as Section 6.2 - Bond Inspection and Installation, paragraphs "A" and "D," when on March 8, 2010, he responded to an emergency call and failed to make the proper repairs to a defective crossing gate. In addition, the Claimant was charged with violating Employee Conduct Rules "B," paragraph "1;" Rule "F;" as well as Rule "N," paragraph "1," items (3) and (6) for confrontational, quarrelsome, and insubordinate behavior toward his Supervisor on March 12, 2010.

The Carrier contends that the Claimant admitted making an unauthorized repair on March 8, 2010 when he used "zip ties" instead of a "kerney" which is the appropriate procedure for making the required repair as described in the Maintenance Manual. Further, alleges the Carrier, the Claimant did not complete the required paperwork that would have notified his Supervisor of the repairs he made. The Carrier argues that these transgressions are supported with substantial proof in the record through the testimony of employees who had to make the subsequent repairs to correct the continuing problem with the crossing gate, as well as the official documentary evidence.

The Carrier further alleges that upon being questioned by his Supervisor on March 12, 2010 regarding the errant repairs the Claimant made, the Claimant became insubordinate. The Carrier cites the Claimant's own testimony, as well as that of Signal Supervisor Earl Hettman, two Signal Electronic Technicians and a Metra Police Lieutenant, to support its contention that his conduct was aggressive and insubordinate in violation of the above-mentioned Employee Conduct Rules. The Carrier argues that the Claimant's confrontational behavior included profane and abusive language that cannot be categorized as "shop talk" as argued by the Organization. The Carrier cites Second Division Award 13664 in support of its contention that the type of misconduct engaged in here by the Claimant, as confirmed through the credible testimony of its witnesses, constitutes a "breach of acceptable employee conduct," and, therefore, the discipline imposed should be upheld.

The Carrier asserts that in addition to having established substantial evidence warranting dismissal of the Claimant for insubordination, the Claimant's failure to follow proper maintenance and repair procedures exacerbated the safety issue the Claimant was assigned to repair. Such conduct, it argues, further supports its decision to dismiss the Claimant.

Conversely, the Organization argues that the Carrier committed procedural error and, therefore, failed to provide a fair and impartial Investigation that led to its arbitrary and excessive disciplinary action. The basis of the Organization's claim that the Carrier perpetrated a fatal error of Agreement due process is when it permitted one of the primary and material witnesses during the Investigation, Director of Engineering Richardson, 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 as evidence that it is a fatal flaw for the Carrier official who issued the charges and testified during the Investigation to also perform the function of reviewing the record and determining the punishment to be imposed.

The Organization asserts, in the most strenuous terms and without waiving its procedural objection that the Carrier failed to meet its burden to prove with substantial evidence that the Claimant was insubordinate toward his Supervisor. The Organization maintains that the record lacks any proof that the Claimant was hostile or aggressive. At best, it argues, the Claimant may have used some foul language when confronted by his Supervisor that is no more than "shop talk." The Organization points to Second Division Award 9230 as support for its contention that foul language used when tempers flare is common in the workplace and where no violent conduct is proven, severe discipline is not upheld.

The Organization also contends that the Carrier did not provide sufficient proof that the Claimant failed to properly repair the crossing gates on March 8, 2010. It argues that the Claimant made the repairs that he felt would remedy the malfunction in a diligent manner given the materials he had available to him. Further, the Organization maintains that the Claimant lacked the proper training or experience to make the necessary repairs.

The Organization further argues that the discipline imposed was excessive and an abuse of discretion by the Carrier, particularly when it committed a procedural error. The Organization contends that the Board should not have to review the merits of the matter given it should be dismissed because the Claimant was not afforded fair and impartial Agreement due process.

In first addressing the Organization's allegation of a procedural defect, the Board finds the argument unpersuasive. The testimony provided by Richardson was not that of a key and material witness as asserted by the Organization. Richardson's testimony was limited to his responsibility as the Director of Engineering in following up on the report of a crossing gate malfunction. The interaction between the Claimant and Richardson was based on an inquiry made before receiving the report of the wrong repair. The record reveals that Richardson had no cause to think that the Claimant had done anything wrong when he spoke to him, nor did he question him about what he actually did. The pertinent part of the record indicates that Richardson had a brief telephone conversation with the Claimant because Signal Supervisor Hettman was out sick the day after the improper repairs were made. The relevant testimony by Richardson reads as follows:

"So at that time, I called Mr. Merriweather on the phone and asked him what did he find the night before; and, he said he found a broken bootlegger bond, and I asked him if he found anything else, and he said no."

Further, the record does not contain any evidence that Richardson witnessed any of the misconduct that led to the charges of insubordination. His actions in this matter were limited to the administrative role that he plays in investigating operational problems with the signal system and personnel matters. There is no evidence that Richardson acted or made any statements that prejudiced the formal Investigation or the determination of discipline. Therefore, there is no basis to find that the Claimant did not receive a fair and impartial Investigation.

In discipline cases, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. There is substantial evidence that the Claimant did not make the proper repairs to the defective crossing gates. He also did

not submit the required report to his Supervisor that would have provided the Carrier with notice of the “temporary” and “unorthodox” repair as defined by the Claimant in his testimony. If the Claimant had made such a report, as required, the Carrier would have known of the potential unsafe situation at the crossing, which was exacerbated by the Claimant’s malfeasance.

The Claimant’s own testimony, as well as that of the Signal Electronic Technicians and the Signal Supervisor confirms that the use of a plastic zip tie is not the proper repair for a malfunctioning crossing gate mechanism. There is no testimony by the Claimant that he did not know how to make the repair; he stated that he did not have the proper materials to make the appropriate repairs.

The Claimant also testified that he did not seek help when he realized that he did not have the necessary “kerney” to make the repair so he instead used an “unorthodox” method. The Claimant’s failure to notify anyone of his unauthorized repair demonstrates a lack of understanding of the potential safety hazard created by making such a repair to defective crossing gate. His willingness to use an unreliable and unsanctioned method and to ignore the well-documented procedure established by the Carrier to repair such a device indicates a reckless disregard for the potential serious injury, or worse, that a defective crossing gate could cause.

The record also confirms through the testimony of the Claimant and the Carrier’s witnesses that he was insubordinate on March 12, 2010. It is evident that the Claimant used vulgarities toward his Supervisor and that he acted in an unprofessional, disrespectful and belligerent manner. The Board rejects the Organization’s valiant effort to portray his language as mere “shop talk.” There is substantial evidence, provided by the testimony of witnesses, that the Claimant’s language and misconduct was directed at his Supervisor in a manner that transcends the “salty” language often used by co-workers in the workplace. Here, the Claimant acted in an offensive way toward his Supervisor while using profanities and denigrating language as well.

The Claimant’s disciplinary record also contains evidence of his previous violations of maintenance and repair procedures, in addition to misconduct as defined by the Employee Conduct Rules. Therefore, there is no basis for the Board to find the Carrier’s discipline excessive or arbitrary. Leniency, absent a finding of an abuse of

discretion, is reserved to the Carrier. As such, the Board has no basis to modify the Carrier's determination to dismiss the Claimant. Accordingly, the claim must be denied.

**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 20th day of March 2014.