

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42259
Docket No. SG-42731
16-3-NRAB-00003-140425**

The Third Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Terminal Railroad Association of St. Louis:

Claim on behalf of G. P. Engel, M. Heflin, B. M. Nemeth, and J. J. Proffer, for reinstatement to their former positions with all seniority rights and benefits unimpaired, payment for all lost time, including overtime, and any reference to this matter removed from their personal records, account Carrier violated the current Signalmen’s Agreement, particularly Rule XI, when it issued the harsh and excessive discipline of dismissal to the Claimants without providing them a fair and impartial Investigation and without meeting its burden of proving the charges in connection with Investigations held on July 24 and September 10, 2013. Carrier’s File No. Engel-Heflin-Nemeth-Proffer. General Chairman’s File No. UPGC-XI-1833-TRRA. BRS File Case No. 15019-TRRA.”

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.

At the outset, the Organization raises four procedural errors it asserts the Carrier committed which denied the Claimants their contractual right to due process that, if concurred in by the Board, would bar consideration of the merits of the Carrier's decision to impose the ultimate discipline of dismissal on the four named Claimants. The Organization asserts that all four errors taken together failed to provide the Claimants with a fair and impartial Investigation and all four errors were committed by Hearing Officer Steve Heidenreich, Senior Manager Operating Practices in the manner in which he conducted the Hearing. The following are the four procedural issues and the Board's response to each issue:

1. The Hearing Officer interjected his testimony into the record and asked leading questions.

Board Response: We reviewed that part of the transcript central to the Organization's position and find the Hearing Officer's verbal responses do not meet the definition of leading questions.

2. The Hearing Officer restricted relevant evidence from being considered.

Board Response: The evidence denied by the Hearing Officer was evidence that was outside of July 9, 2013, the date of the written notice to the Claimants informing them of the formal Investigation to determine the facts of their alleged misconduct.

3. The Hearing Officer presented evidence in an unfair and partial manner.

Board Response: The essence of this alleged error is that the Claimants testified ahead of some Carrier witnesses which, according to the Organization, hindered the Claimants' Agreement due process rights. We concur with the Carrier's position that numerous arbitral tribunals have held that there is no violation of due process when the Claimants testify ahead of other Carrier witnesses.

4. The Hearing Officer denied a prolonged recess.

Board Response: The Hearing Officer did not grant the Organization's request for a two week recess to review documents, but did offer the Organization a recess of a full day, which the Organization rejected. The Board concurs in the Carrier's position that its conduct in not granting the Organization's request for a prolonged recess did not deny the Claimants a fair and impartial Investigation.

Based on the foregoing responses, the Board finds that the Carrier did not commit any of the procedural errors raised by the Organization. Accordingly, we rule to consider the merits of the claim.

The Organization's account of the events that led to the dismissal of the four Claimants is not in accord with the information subsequently gleaned by the Carrier.

According to the Organization, Claimant Proffer made written notification to Adam Mahlandt, the Carrier's General Superintendent on July 3, 2013, that he had sustained an on-duty injury on May 21, 2013, and that Claimants Engel, Heflin, and Nemeth were witnesses to the circumstances surrounding the injury. However, later in the day on July 3, 2013, Claimant Proffer left both a voice mail and text message to Mahlandt retracting the incident date of May 21, 2013, as the date he sustained the injury and indicated the correct date to be May 20, 2013.

On the incident date identified by Claimant Proffer, May 20, 2013, the Organization asserts that Claimant Heflin asked Claimants Engel, Proffer, and Nemeth for assistance in retrieving a set of six signal batteries from the basement of the Carrier's 6th Street Building. Due to a General Order that condemned this building, Heflin called Manager of Signals Ricky Gaertner and requested permission to enter the building to retrieve the batteries. Gaertner granted Heflin's request, but told him not to use the garage door. That afternoon, Heflin and Claimants Proffer, Engel, and Nemeth arrived at the building, unlocked the building and proceeded to the basement to locate the batteries. Upon locating the batteries, Heflin, Proffer and Nemeth each carried two batteries – each weighing approximately 70 pounds – up several flights of stairs to Heflin's truck. After moving the batteries, Proffer noted his back was sore, but concluded it was nothing serious.

Between May 20 and June 19, 2013, Proffer suffered minor back pain. On June 19 however, Proffer, while stepping off of his riding lawnmower, experienced severe back pain. On June 20, 2013, Proffer took an approved vacation day and reported to Cliff Trice, the Carrier's Director of Signal Communications, that he was experiencing severe back pain and was going to see a physician the following day, June 21 and get a MRI to determine the cause. On June 24, 2013, the Claimant was informed by his physician that he had a herniated disk, but that it was not caused by stepping off of his lawnmower. In light of this information, Proffer knew at that point that his injury was caused by having moved the 70-pound signal batteries up five flights of stairs. However, because he was in severe pain and was experiencing side effects from the pain medication that he was prescribed, such as vomiting, he did not call the Carrier on June 24 to report his on-duty injury. It was not until July 3, 2013, as indicated elsewhere above – the first day Proffer felt well enough to fill out a report – that he called General Superintendent Mahlandt and informed him that the back pain that he reported on June 20 was due to having sustained an on-duty injury caused by carrying signal batteries out of the basement at the 6th Street Building. Further, as indicated hereinabove, Proffer met with Mahlandt on July 3 and submitted a written statement first indicating on the statement that the on-duty injury occurred on May 21, 2013, but later that day – after recalling that he worked the safety barbeque on May 21 – sent a text message to Mahlandt and changed the date that he sustained his on-duty back injury to May 20.

The Carrier's account of Proffer's reported back pain varies from that put forth by the Organization. On June 20, 2013, Proffer called General Director of Signals Communication Cliff Trice and told Trice that he had been seen by a doctor on June 19 about his back being sore, explaining that he had been moving things into a new house and was cutting grass on a riding mower. Proffer told Trice that when he got off of the mower, he felt a sharp pain in his lower back and then fell to the ground. Although on June 20 Proffer was informed by his doctor that he might have a herniated disk and that he ordered an MRI to be done on the following day, June 21, Proffer said nothing to Trice during his June 20 conversation with him that his back pain problem was the result of a work-related injury.

When on July 3, 2013, the Carrier was informed by Proffer that his herniated disk had been sustained due to an on-duty injury that reportedly occurred on May 20, 2013, the Carrier initiated an investigation into the matter, and because Proffer had indicated that Claimants Engel, Heflin, and Nemeth had witnessed how he had hurt his back, the Carrier secured written statements from them regarding what they had witnessed on that date.

Through an analysis of work schedules for all four Claimants, the Carrier determined that the only date the batteries could have been removed from the 6th street building – given that the bank of six batteries were installed by Claimant Heflin on May 22, 2013 – was on May 20. However, upon examination of the work schedules of all four Claimants on the specified date of May 20, 2013, the Carrier determined that they all could not have been together at the 6th Street building location at one time on that date as indicated in their written statements for the approximate 20 to 40 minute span of time necessary to have removed the batteries. The Carrier submits its review of the Claimants' respective work schedules reveals that if the Claimants were at all together at the 6th Street Building at the same time on May 20, 2013, it was only possible to have been there for a total of six minutes. Upon reaching this determination, the Carrier ordered all four Claimants to appear at a formal Investigation eventually convened on July 24, 2013, and again for a second day on September 10, 2013, to develop the facts, discover the cause, and determine their responsibility, if any, in connection with their alleged false, misleading, and incomplete information when providing statements to Carrier Officers on Wednesday, July 3, 2013 regarding an alleged on-duty injury to Jeremiah Proffer on, or about, May 20, 2013 at the Carrier's 6th Street Building. Additionally, all four Claimants were cited with having allegedly failed to immediately report Proffer's alleged on-duty injury to a Carrier Officer at the time of its alleged occurrence. All four Claimants were apprised that the Investigation would determine if any Operating Rules, Safety Rules, or Special Instructions were violated in connection therewith.

By letter to each Claimant dated September 17, 2013, the Carrier informed them that, as contained and developed throughout the transcript of the Investigation, it clearly showed that the charges against them were proven and that they were thereby in violation of General Code of Operating (GCOR) Rules 1.13 – Accidents, Injuries, and Defects; Rule 1.2.5 – Reporting; Rule 1.6 – Conduct; and Rule 1.2.7 – Furnishing Information. The following GCOR Rules read, in pertinent part, as follows:

“Rule 1.1.3 Accidents, Injuries, and Defects - Report by the first means of communication any accidents; personal injuries; . . . that may affect the safe and efficient operation of the railroad. Where required, furnish a written report promptly after reporting the incident.”

The Carrier found Claimants Proffer and Nemeth in violation of this Rule.

“Rule 1.2.5 Reporting All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed.

If an employee received a medical diagnosis of occupational illness, he or she must report it immediately to the proper manager.”

The Carrier found that Claimants Proffer and Nemeth failed to immediately report the injury that allegedly occurred on May 20. The Carrier found that Claimant Proffer failed to immediately report his medical diagnosis [herniated disk] of an on-duty injury to a Manager on June 24, 2013 – the date that he asserts he was informed of his physical malady.

“Rule 1.2.7 Furnishing Information – Employees must not withhold information, or fail to give all facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violation.”

The Carrier found all four Claimants in violation of this Rule. Because it was proven by substantial evidence that the Claimants could not have been together at the same time on the incident date of May 20, 2013, the information that each Claimant provided to Carrier Officers regarding the asserted on-duty injury sustained by Proffer was established to be fallacious.

“Rule 1.6 Conduct – Employees must not be: 4. Dishonest.”

The Carrier found all four Claimants to be in violation of this Rule.

The Carrier argues that the quantum of discipline assessed the Claimants was proper in accord with its Performance Management and Accountability Policy, which classifies the infractions of Dishonesty and Late Reporting of an on-duty injury as “Major Rule Violations” that warrant removal from service pending a formal Hearing and possible dismissal from service for a single occurrence if proven responsible.

The Board finds upon the record evidence in its entirety before it that the Carrier has proven by substantial evidence through the conduct of an impartial formal Hearing that the Claimants committed the major offenses for which they were charged, and that said Rules infractions warrant the assessment of dismissal even, as

here, for a single occurrence. Accordingly, the Board rules to deny the subject claim in its entirety.

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 29th day of February 2016.