

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42847
Docket No. MW-42919
18-3-NRAB-00003-140422**

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (Former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [five (5) working days suspension] imposed upon Mr. T. Verbunker by letter dated April 17, 2013 for alleged violation of GCOR 1.1.4 Conditions of Equipment and Tools in connection with charges on Notice of Investigation dated March 25, 2013 was on the basis of unproven charges, arbitrary, capricious, excessive and in violation of the Agreement (System File-D-15-13-445-04/8-00539 CMP)**
- (2) As a consequence of the violation referred to in Part (1) above, all references to the aforesaid discipline shall be removed from Mr. T. Verbunker’s record and he shall be compensated ‘...for all lost wages, straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare insurance, dental insurance, supplemental insurance, and any and all other benefits to which entitled, but lost as a result of Carrier’s arbitrary, capricious, and excessive discipline in assessing claimant a five (5) working day suspension, as set forth in Carrier’s hearing decision dated April 17, 2013. In other words, this appeal seeks to make claimant whole and expunge his record the same as if he was never affected by the discipline.***”**

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 Carrier issued a Notice of Investigation letter dated March 25, 2013, which gave notice of an Investigation in to the following incident:

“...An alleged incident that took place on June 20, 2012 and reported on June 21, 2012 on the Portal sub where there may have been a rules violation failing to perform work in a safe manner while unloading in Muskegon Yard located in Milwaukee WI while taking part in a proficiency/efficiency test that resulted in a vehicle noncompliance failure. The date of the alleged incident was on Monday, March 18, 2013.”

The Hearing was held on April 5, 2013. Following the Investigation, the Claimant received a Discipline Notice dated April 17, 2013, finding the Claimant in violation of GCOR, Rule 1.1.4 Conditions of Equipment and Tools resulting in a five day of suspension under the CP Policy. The Organization appealed the Carrier's decision by letter dated June 17, 2013. The Carrier denied the Organization's appeal on August 12, 2013. A formal conference was held on March 6, 2014. The claim was appealed and now is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim:

- “1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend and representation?**
- 2) If so, did the Carrier establish by substantial evidence that Claimant was culpable of the charged misconduct or dereliction of duty?**
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory or unreasonably harsh as applied to the facts and circumstances giving rise to this claim?**

The Carrier contends that the Claimant was afforded a fair and impartial Investigation in accordance with the governing Collective Bargaining Agreement. The Carrier produced substantial probative evidence of the Claimant’s conduct to prove the violation of Rule 1.1.4: Equipment and Tools. The penalty, a five working day suspension, was commensurate to the offense in consideration of the nature of the violation, the Claimant’s record and standing within the Carrier’s Discipline Policy, and the discipline imposed was not arbitrary, capricious, excessive, and was not in violation of the Agreement.

The Organization contends that the Carrier violated the Agreement when the Hearing Officer failed to sequester the witness when requested by the Claimant’s representative thus depriving the Claimant of his due process and contractual rights stated in the Agreement. The Organization further contends that Carrier failed to meet its burden of proof in establishing a violation of Rule 1.1.4: Equipment and Tools. In addition, the Organization contends that since the Carrier failed to establish a violation, discipline cannot be imposed.

Rule 18: Discipline and Grievances of controlling Agreement states:

“e) At the hearing the aggrieved employee shall have the right to be represented by an employee or duly accredited representative of his choice and to call witnesses to testify in his behalf. The parties recognize their joint responsibility in developing all fact related to the notice of charges during the investigation and will make all efforts to facilitate the process agreed upon in (a) of this rule. Witnesses will be sequestered upon request of either party.”

The transcript indicates that the Claimant’s representative requested that the witnesses be sequestered at the very commencement of the proceeding. The

representative asked “...when the witnesses are providing their testimony, the other witness be sequestered. And when Mr. Verbunker is providing his testimony they both be sequestered.” The Hearing Officer responded, “I am not aware of any requirement that we have to. I will take it under advisement.” From the remainder of the objections and rulings as reflected in the record, it is evident that the hearing officer was not familiar with the contractual procedural rules governing the Investigation Hearing and the rationale behind witness sequestration. Prior to the examination of the first witness, the Claimant’s representative asked whether the Hearing Officer was going to sequester the witnesses in order to avoid collaboration in their testimony. The Hearing Officer responded “if they’re both here they can’t collaborate” and those material facts would not change because someone heard something during the proceeding. The Hearing Officer did not sequester the witness.

The Board recognizes that the hearing officer's primary responsibility is to gather reliable facts of the circumstances to assess responsibility, if any while providing due process safeguards to the Claimant. It is thus incumbent upon the hearing officer to protect the process of gathering said information with established procedures. Sequestration is a means of discouraging and exposing fabrication, inaccuracies, and collusion by tailoring witness testimony to that of another. Sequestration assists the hearing officer in obtaining reliable testimony to determine the facts and circumstances giving rise to the charge. More importantly, the parties have codified this right into their Collective Bargaining Agreement which states that witnesses will be sequestered upon request. The Claimant’s representative made the request and it was denied. The Board is not in a position to assess the credibility of witnesses’ demeanor, voice tones, and gestures, and must rely on the hearing officer to enforce these procedural safeguards that have been established by their Agreement.

The Board finds that Claimant did not receive a full and fair investigation, and therefore, the Board cannot proceed to the merits of this case.

AWARD

Claim sustained.

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 10th day of January 2018.