

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43077
Docket No. MW-44281
18-3-NRAB-00003-170379**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(National Railroad Passenger Corporation (Amtrak) -
(Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. S. Estrada by letter dated November 22, 2016 was arbitrary, unwarranted and in violation of the Agreement (Carrier’s File NEC-BMWE-SD-5474D AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall rescind the aforesaid dismissal decision and Claimant S. Estrada shall be reinstated to service immediately with full seniority unimpaired and compensated for all lost wages and benefits resulting from his improper termination.”**

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 notice dated October 31, 2016, the Claimant was directed to attend a formal Investigation and hearing on charges that the Claimant allegedly had violated Carrier rules in connection with an October 27, 2016, incident in which the Claimant allegedly failed to wear proper safety gear and failed to properly document a job safety briefing. The Investigation was conducted, as scheduled, on November 14, 2016. By letter dated November 22, 2016, the Claimant was informed that he had been found guilty as charged, and that he was being dismissed from the Carrier's service. The Organization filed the instant claim on behalf of the Claimant, challenging the Carrier's decision to discipline him. The Carrier denied the claim.

The Carrier contends that the instant claim should be denied in its entirety because the Claimant was afforded a fair and impartial Investigation, because substantial evidence establishes that the Claimant is guilty as charged, because there is no merit or mitigating value to the Organization's arguments, because the requested remedy is inappropriate, and because the discipline imposed was appropriate under the circumstances. The Organization contends that the instant claim should be sustained in its entirety because the Carrier subjected the Claimant to disparately harsh and discriminatory treatment, because the Carrier failed to meet its burden of proof, because the Carrier failed to properly consider mitigating circumstances, because the Carrier has failed to apply an appropriately progressive discipline policy, and because the discipline imposed was clearly excessive.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of failing to conduct a proper pre-work job briefing as well as failing to fill out the required job-briefing paperwork. Moreover, the Claimant was properly found guilty of not wearing the proper PPE to safely complete his job assignment. The Claimant did admit to not completing the job briefing on October 27, 2016, at both the hearing and in a written statement. The Claimant also admitted in a written statement that he was not wearing the required protective safety glasses while he was working that day. The Claimant's admitted violations clearly subjected the Claimant to disciplinary action.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case had worked for the Carrier for twenty-two years. Given that lengthy seniority, coupled with some other mitigating factors that appear in the record, the Board must find that the Carrier acted unreasonably and arbitrarily when it terminated the Claimant's employment. Therefore, the Board orders that the Claimant be reinstated to employment but without back pay. The period of time that the Claimant was off work shall be considered a lengthy disciplinary suspension for his wrongdoing.

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 2nd day of May 2018.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 43077 - DOCKET 44281

(Referee Peter Meyers)

The Carrier dissents to this Board's findings in the above-referenced matter.

This Board has exceeded the scope of its authority by improperly exercising leniency when it reinstated Claimant despite sufficient evidence to support the guilty finding. It is well-established that such an exercise of leniency is impermissible (see, e.g., NRAB-2/Award No. 12778 and NRAB-3/Award Nos. 29250 and 28525).

In addition to leniency being outside of the Board's authority, leniency is also not appropriate because Claimant committed egregious safety violations that could have had fatal consequences. In particular, conducting and documenting the on-track safety briefing is critical as it is what ensures that individuals working on the track are aware of their protection and that specific safety concerns are brought to their immediate attention before beginning work. Such briefing is required by the Carrier's Roadway Worker Protection Rules as well as Cardinal Rules, which is a set of rules that put life and limb at risk when violated. There is no discretion for employees to decide that they are safe enough without the on-track safety briefing as the briefing is what informs employees of safety issues.

The Carrier has established safety rules, and the Carrier's employees are expected to know and obey these rules every day. This principle applies critically to the safety sensitive role Claimant was working in at the time of the violation as he worked directly on the live tracks and was a Foreman. He was fully expected to demonstrate the importance of the Carrier's safety rules by example.

Violations of such critical safety rules routinely justify termination (see, e.g., SBA 986/Award Nos. 215 and 247 and PLB 3186/Award No. 44). Termination was justified in the instant matter consistent with arbitral precedent and in order to make clear the importance of safety for all parties.

Therefore, this Board's decision to reinstate Claimant is erroneous. I respectfully dissent.

Sharon Jindal

Sharon Jindal

Matthew R. Holt

Matthew R. Holt

May 2, 2018