

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44874
Docket No. SG-47296
23-3-NRAB-00003-220391**

The Third Division consisted of the regular members and in addition Referee Michael D. Phillips when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Canadian Pacific Railway**

STATEMENT OF CLAIM:

“Claim on behalf of the Soo Line General Committee of the Brotherhood of Railroad Signalmen on the Canadian Pacific Railway:

Claim on behalf of A. Kaski, for compensation of all lost time including overtime, compensation for any loss of benefits he may have suffered, and any reference of the matter removed from the Claimant’s personal record; account Carrier violated the current Signalmen’s Agreement, particularly Rule 28(a), when Carrier failed to provide the Claimant with a fair and impartial investigation on December 3, 2020, failed in its burden of proof, and assessed the Claimant with a 45-day suspension on November 23, 2020, through January 7, 2021, resulting in a loss of wages to the Claimant. Carrier’s File No. 2021-00020446. General Chairman’s File No. 2021-00020446. BRS File Case No. 5391. NMB Code No. 204.”

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.

On November 9, 2020, Claimant Adrian Kaski reported for training in St. Paul, Minnesota. During the training, the Claimant reported not feeling well, and he was removed from class and instructed to contact the Carrier's Pandemic Line for instruction. The Claimant underwent testing, and he reported to the Pandemic Line that he was positive for COVID-19 on November 11, 2020. Also, the Claimant reported that the onset of COVID symptoms, including loss of smell and taste, had begun on November 7, 2020, prior to his reporting for training.

By letter dated November 23, 2020, the Claimant was notified to attend a hearing to develop the facts and place responsibility, if any, in connection with his allegedly failing to comply with instructions and properly report COVID-19 symptoms to the CP Pandemic team on November 7, 2020; instead waiting to report until November 9, 2020 while attending training in St. Paul. The notice indicated possible violations of US Rulebook for Engineering Employees 1.3.3 Circulars, Instructions, and Notices and 1.13 Reporting and Complying with Instructions, System Bulletin – September 3, 2020, and System Bulletin – October 23, 2020. The hearing was held December 3, 2020, after which the Claimant was found to be in violation of the cited rules, and by notice dated December 18, 2020, he was assessed a 45-day suspension.

The Organization submitted the instant claim, which the parties handled on the property according to the applicable agreement. The matter now comes to us for resolution.

The Organization challenges the discipline assessment, stating that the Carrier failed to consider the merits of the case when it assessed a 45-day suspension to the Claimant simply because he got sick during a global pandemic. It asserts that the Carrier's entire case rests on the contention that the Claimant did not contact the Pandemic Line in the timeframe the Carrier deemed fit. The Organization states that the Carrier weaponized the System Bulletin and the information provided to employees to build a case against the Claimant, which is insufficient to meet the applicable burden of proof. It also contends that the hearing was not fair and impartial, and that the hearing officer's bias was evidenced by his questioning regarding violations not related to the charges.

The Organization maintains that the Carrier did not establish that the Claimant willfully neglected the necessary steps in reporting to the company Pandemic Line. It notes the Claimant's testimony that he had previously experienced loss of taste and

smell in association with allergies, and that he was not aware that such symptoms could be related to COVID-19. It also points to his testimony that he was not feeling bad on the morning of November 9, 2020, and that he became sick only after reporting to the training.

The Organization also asserts that the Carrier's decision to issue a 45-day suspension in these circumstances is harsh, excessive and unwarranted on the facts of this case. It states that the Claimant was not attempting to conceal facts, and that he was forthcoming in his testimony about the extent of his knowledge of COVID and the Carrier's policies related to the pandemic. The Organization avers that the Carrier arbitrarily ignored principles of corrective and progressive discipline in assessing such a suspension, and it argues that the correct course of action would have been much lesser discipline, such as coaching. The Organization concludes that the claim should be sustained.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessment. It states that the Claimant received a fair and impartial investigation, and that he was afforded all applicable rights during that process. The Carrier also states that there is no indication that the hearing officer was biased or had prejudged the Claimant, or that his actions during the hearing were improper.

With respect to the merits, the Carrier states that the record contains substantial evidence to support the finding of guilt. It points to the testimony of the manager who explained the company policies and rules related to the pandemic, including those which require employees who experience symptoms to contact the Pandemic Line for instructions and clearance. The Carrier states that the obvious reason for those requirements is the unprecedented health crisis which was in full swing at the time of this occurrence.

The Carrier also points to the Claimant's admission that he experienced loss of taste and smell prior to reporting to the training, which it avers are classic and well-known symptoms of COVID-19 infections. It states that the Claimant clearly violated the cited rules and policies when he ignored those symptoms and came to work, possibly exposing other employees to the virus. The Carrier maintains that the Claimant was responsible for understanding and following the rules, bulletins and policies, and that if he had done so, he would have reported his symptoms prior to coming to training and putting other employees at risk. It also states that the Claimant's professed unawareness of the requirements of the bulletins was unconvincing, in light of the well-publicized advice at that time to stay home and quarantine if one was feeling sick.

With respect to the discipline assessment, the Carrier states that the Claimant's conduct constituted a Major offense under its Hybrid Discipline and Accountability Guidelines. It asserts that the Claimant put other employees and the community at risk of catching COVID-19, which cannot be condoned. The Carrier states that there was nothing arbitrary or capricious about the assessment here, as the Claimant could have been dismissed for such an infraction, and it requests that the claim be denied.

We have carefully reviewed the record, including the correspondence, attachments, and citations of authority, and we find no procedural barrier to our consideration of the merits. We find no indication that the hearing officer was biased or that the Claimant's guilt was prejudged. We have reviewed the arbitral authority submitted by the Organization on this point, and we do not believe it requires a different conclusion.

Turning to the merits of the case, we find that the record contains sufficient evidence to support the finding of guilt in this matter. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline assessment, which has been defined in prior awards as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

Here, we believe the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that the Claimant was in violation of the cited rules and bulletins when he reported for training after having experienced classic COVID-19 symptoms. We concur with the Carrier that the record establishes that the requirements to report such symptoms and to refrain from exposing others to possible infection was adequately disseminated to the workforce, and that the Claimant should have been aware of them.

Having found that the violations were established, we turn to the level of discipline assessed. To overturn the Carrier's assessment would require the Board to find that the Carrier acted arbitrarily or capriciously so as to constitute an abuse of discretion. An employee's reporting to work while experiencing COVID symptoms obviously has the potential for serious consequences for other employees and those with whom they might come in contact, and the suspension assessed is consistent with the Carrier's discipline policy for such an event. On this record, we cannot find that the Carrier's actions were an abuse of discretion. Therefore, we will not substitute our judgment for the Carrier's now.

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 10th day of March 2023.