Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 45446
Docket No. SG-47995
25-3-NRAB-00003-230491

The Third Division consisted of the regular members and in addition Referee Bill Bohne Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Northeast Illinois Regional Commuter Railroad Corporation (NIRCRC) d/b/a/ 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 K.D. McVey, for removal of the assessed discipline and compensation for all time lost, including overtime, with all rights and benefits unimpaired and with any mention of this matter removed from his personal record; account Carrier violated the current Signalmen's Agreement, particularly Rule 53, when it issued the harsh and excessive discipline of a 30 day record suspension and a 36-month review period 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 February 1, 2021. Carrier's File No. 112022-3, General Chairman's File No. 03-D-22, BRS File Case No. 6202, NMB Code No. 201 - Minor Discipline: Conduct."

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 letter dated December 18, 2020, Carrier notified the Claimant that an investigation was scheduled for him for December 23, 2020, to gather relevant facts and assess the Claimant's potential violation of Carrier's Rules as follows:

> **"Your alleged failure to prevent damage to Metra property and exercise care of Metra property when in possession of vehicle #0003 on Tuesday, December 15, 2020. When you had alleged clutch failure and did not report it to your supervisor by quickest means available" (emphasis added). Carrier charged him with violating the following rules: Employee Conduct Rules, Policy #IV; Rule F, K & L; and Metra Safety Rule 107.5, Item #9."**

Following mutually agreed-to postponements, the investigation was finally held on February 1, 2021. By letter dated February 9, 2021, the Carrier notified the Claimant that he had been found guilty of alleged charges and issued the Claimant a 30-day Record Suspension. The guilty finding and subsequent suspension were timely appealed on behalf of the Claimant by the Organization. By letter dated February 7, 2023, the Carrier issued their final denial. And on May 4, 2023, the Organization notified the Carrier that they rejected the decision in totality and would be progressing the case to arbitration for a final decision, which brings us to where we are today.

To be clear from the start, after a thorough review of the investigation transcript and all relevant documents, this Board has found that the investigation was conducted in a fair and impartial manner. Therefore, we won't entertain arguments to the contrary. As such, we will now discuss the merits of the case.

On December 15, 2020, the Claimant, Keith McVey – a three- and one-half year employee of the Carrier, was operating a "borrowed" Carrier-shared Boom Truck 0003 while performing services for Carrier. The term "borrowed" is used because for some reason the boom truck that his gang usually used was not available to him and his supervisor contacted another work gang to borrow their boom truck. According to testimony, although the Claimant had driven similar trucks in the past, he had never driven this truck prior to this date and had no idea as to issues with the truck or the

truck's mechanical record. Unfortunately, the truck encountered mechanical issues on 127th Street, rendering it inoperable and causing a buildup of traffic. Recognizing the potential safety hazard posed by the stranded vehicle on an incline, the Claimant contacted his Foreman Sam (last name not given) to report the situation. Due to feeling like the vehicle placed the public and himself in an unsafe situation, the Claimant made the decision to back the truck down the incline where it had stalled.

During this time, Carrier Officer Venegas happened to pass by and witness the situation firsthand. Despite acknowledging the unsafe conditions, Carrier Officer Venegas, whose department the truck was borrowed from, chose not to assist the Claimant and instead reported the incident to Carrier Officer Alonzo Smith, a supervisor of the Claimant. Apparently, Mr. Venegas didn't think the situation was serious enough to warrant parking his vehicle and approaching the Claimant to offer him any help or even to discuss the situation with him. He just kept on driving and called Supervisor Smith and advised him of the situation.

The specific rules the Claimant was charged with violating are as follows (all rules are from the applicable Code of Conduct):

> **"Rule F – Employees must report immediately to their supervisors, by the quickest available means of communication, the details of accidents; failure of motive power; failure in the supply of water or fuel; defects in tracks, bridges, or signals; or any unusual condition which may affect the operations of the railroad. Required reports on proper form must follow promptly.**
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> **Rule K – Metra employees must use all reasonable efforts to prevent damage to the Metra property by fire, theft, or other causes. Employees must exercise care in the use of Metra property, and when leaving service, employees must return property entrusted to their care.**
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> **Rule L – Constant presence of mind to ensure safety to themselves and others is the primary duty of all employees, and they must exercise care to avoid injury to themselves or others. Employees must observe the condition of the equipment and tools which they use in performing their duties and when found defective will, if practicable, put them in safe condition or report defects to proper authority."**

They also allege he violated Safety Rule 107.5 which reads:

"107.5 Operating a Vehicle Safely – Follow these requirements when operating a vehicle: 9. Avoid slipping the clutch."

In reviewing the entire case, including a thorough review of the transcript, there are many issues with this case that just don't add up with proving the Claimant was guilty as charged. As such, I will address the alleged rule violations one by one.

Alleged violation of Rule F – reporting the incident to the supervisor. The Claimant claimed that he immediately reported the incident to his foreman that day, Sam (last name not provided), who was sent out on the job with him but was in another truck. This claim was not refuted by Carrier. However, the Carrier's position was that he should have reported the incident to Alonzo Smith, his manager. They claim Sam wasn't his "supervisor." In the eyes of this Board, this is simply a matter of semantics. Sam was a "foreman," not simply another fellow worker with no supervisory capacity. So, Claimant reported the incident to the first person in such a capacity that he thought of, his foreman for the job that day. This was a pressure situation the Claimant found himself in and he had to make a split-second decision as to just whom to call and report the incident to. We have to agree with the Claimant that the best person to immediately report this to was Sam, as he was assigned to the job with him and was out on the road with him. Truck broke down, traffic backed up, and under a lot of pressure due to the situation, the Claimant made a split-second decision and did what most others would have done if placed in a similar situation. Additionally, testimony was provided that Supervisor Venegas, after seeing the truck broke down, called the Claimants supervisor Alonzo Smith and notified him of the situation, and Smith called the Claimant before the Claimant had the chance to call him.

The Claimant's alleged violation of Rule K – Metra employees must use all reasonable efforts to prevent damage to the Metra property by fire, theft, or other causes. In the short period of time the Claimant had to react to the situation, he was the one driving the truck, he was the one best aware of the immediate situation, and he was the one who had to make the almost instantaneous decision as to what to do to address it. The Claimant decided to back the truck down the hill to get in on a level pavement in order to park it and properly and safely secure it. He did this with utmost care. No one was injured and no damage was done to any Metra equipment or any other property. The Claimant safely backed the truck down the hill and parked it until a tow truck arrived.

The Claimant's alleged violation of Rule L - Constant presence of mind to ensure safety to themselves and others is the primary duty of all employees, and they must exercise care to avoid injury to themselves or others. It's apparent to this Board that the Claimant exercised "presence of mind" in this, what must have been, very stressful situation. Only a person in that specific situation could tell you what he would have done had it been someone else. Five different people may have handled it in five different ways – it's all speculation. No one can say what they would have done unless placed in the exact same stressful situation. All speculation, no certainty.

And now we're left with one more alleged violation – that is violation of Safety Rule 107.5 9 - "Avoid slipping the clutch." This Board struggles with this accusation, and for good reason. The record shows the truck in question has had many ongoing mechanical issues in its recent past, including more than a few problems with the clutch and transmission.

During the course of the preliminary investigation into the breakdown of the truck, Metra Rock Island Supervisor Rene Venegas, whose gang the truck belonged to and who authorized the lending of the truck to Alonzo Smith and his gang, asked his lead signalman, Dave Bastardo, to provide him with a statement pertaining to the condition of the truck. His statement reads:

> **"Best of knowledge, boom truck 0003 was lent to another driver on December 15, 2020. · This boom truck, 0003, was used prior to this date and was without issues by gang 1 truck drivers. · I have no further information on this issue (statement signed by Dave Bastardo)."**

Supervisor Venegas also asked the CDL driver from his gang, Metra employee Michelle Quante, who frequently drove boom truck 0003 for Mr. Venegas' gang in the regular performance of her duties as the CDL driver in his gang, for a statement as to the condition of the truck prior to lending it to Alonzo Smith's gang. No one describes the condition of the truck better than she. Ms. Quante stated the following:

> **"I, Michelle Quante, Driver of the maintenance gang, have always had mechanical issues with boom truck #0003. It's been in and out of the shop countless of times. 0003 is the oldest truck in the fleet. 0003 is not in the best condition, not to mention not the most reliable. Everyone know this including the mechanics that work on 0003 (emphasis ours – "everyone" except those people who had to borrow and use the truck!). One time I**

> **took the 0003 to the mechanic shop, and they were joking and laughing saying "Oh the 0003 again, we have replaced the clutch so many times." On December 15th the 0003 was borrowed to the KDY maintenance gang. 0003 failed to work on 127th Street for a reason I don't know. I am not a mechanic, and 0003 breaks all the time. There is a very6 simple solution to all of this, replace 0003 with a more reliable truck. Our gang had the opportunity to get a brand new boom truck, but we were denied for whatever reason. All this could have been avoided if fleet and management weren't so negligent." (Signed Michelle Starr Quante).**

However, apparently Supervisor Venegas didn't like the statement she provided him with and demanded that she produce another statement, which she did. Her second statement reads:

> **"January 21, 2021, Statement #2 - Boom truck 0003 was working prior to loaning it to KYD maintenance. · Michelle Quante."**
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> **Testimony pertaining to Ms. Quante's second statement went as follows:**
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> **"BY HEARING OFFICER SORENSEN:**
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> **Q. Mr. Venegas, did you pressure Ms. Quante to write her second statement?**
>
> **A. No, I did not.**
>
> **Q. Did you instruct Ms. Quante what to write in her second statement?**
>
> **A. No. I just asked her if she can write a statement as to the condition of the vehicle before we lent it to KYD maintenance."**

This Board spent hours reviewing the record and has given Supervisor Venegas' testimony much thought and consideration. It is the opinion of this Board that, when considering the entirety of the situation, with the aforementioned statements and testimony, that his testimony is basically speculation. Supervisor Venegas had already received a written statement from Ms. Quante, so it's quite apparent that he had already asked her once for a statement. Maybe he did not like the thoroughness of her statement, or maybe it was just too lengthy for him to read, but for some reason he ordered her to provide him with another statement, a second statement. He claimed that her first

statement did not answer his question "to acknowledge the condition of vehicle 0003, as to whether there were any issues with that prior to us lending it to Metra Electric District." We find that she did an excellent job of explaining all of the mechanical issues with the truck, in fact probably too good of a job. As to the question Did you instruct Ms. Quante what to write in her second statement, well he claimed that he didn't instruct her what to write. It seems a bit strange to this Board that her second statement was almost identical to the statement that Mr. Bastardo gave. Just a coincidence – we don't believe so. Ms. Quante's first statement was very thorough and, we believe, provided more information about boom truck 0003 than Supervisor Venegas wanted anyone to know. We also believe that if Ms. Quante had not written at the top of her second statement "Statement #2" her first statement would never have been presented at the investigation.

The record is replete with evidence that the boom truck in question was not in a good state of repair. Not only was this evidenced by Ms. Quante's statement, but also with the vehicle repair records entered into evidence. All of the information about the condition and history of the truck should have been provided not only to Supervisor Alonzo Smith, but also to the Claimant prior to his taking possession of the truck. While we cannot state with certainty that this would have prevented the Claimant from experiencing issues with Boom truck 0003, but it most likely could have prevented the final situation that the Claimant found himself facing.

And one more issue from Supervisor Venegas' testimony. Venegas was asked, "Could that clutch have gone out with Mr. Bastardo or Ms. Quante driving the truck?" his response "Sure!" Well for a guy who doesn't know anything about driving a boom truck or a "clutch," he sure knew how to answer this question! And why did he know the answer seems pretty obvious to us – because it had already been replaced numerous times, and most likely because either Mr. Bastardo or Ms. Quante were driving when it went before!

So much of the testimony deduced during the investigation was "speculation," especially when it came to that of Mr. Venegas" testimony about the actions of the Claimant. As stated before, no one knows for sure exactly what happened, nor do they know what they would have done if placed in the identical situation the Claimant found himself in. Were the Claimants' actions in direct conflict with the stated rules he was charged with violating? Well, taking into consideration the entirety of the situation, this Board does not find enough credible evidence, in fact practically none, to sustain the finding of guilt! This is like a case from "What Would You Do." Put five other people

in this exact situation, you would probably get five different answers. As stated before, this was an emergency situation and the Claimant responded in the way he thought best to protect himself, other people, and the Carriers property! There were no injuries to employees, pedestrians, or equipment, both Carrier property and property belonging to others. The Claimant handled the situation cool, calm, and collectively and brought the matter to a head all the while avoiding any serious, or even minor, issues.

As stated earlier, this Board has struggled with this case for quite a while. We have reviewed the investigation transcript, and all additional documents and evidence found in the record numerous times. Our review has not found enough "substantial evidence" to support a finding of guilt, therefore rendering the guilty decision by the Carrier arbitrary, capricious, and unjust. NRAB First Division Award states in pertinent part:

> **"In these investigations as to whether discharge was wrongful, the Carrier is not bound to prove justification beyond a reasonable doubt as in a criminal case or even by a preponderance of the evidence as does the party having the burden of proof in a civil case. The rule is that there must be substantial evidence in support of the Carrier's action."**

The substantial evidence rules referred to was set forth by the Supreme Court of the United States as follows:

> **Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Consol. Ed. Co. vs. Labor Board 305 U.S. 197, 229)"**

The decision of this Board is rooted in a fair assessment of evidence and principles of justice. Upon the thorough examination of records, testimonies, and additional documents, it is evident that the case lacked substantial evidence to justify the Carrier's actions against the Claimant. This conclusion aligns with the standards set forth by the Supreme Court regarding substantial evidence, which necessitates more than a mere scintilla of proof.

This Board has reviewed all remedies sought by the organization. We have made the determination that the only remedies allowable in accordance with the agreement are that the Claimant be made whole for any and all lost wages and benefits incurred

because of the discipline imposed on him by the Carrier, and that his record be cleared of any and all mention of said charges and discipline assessed.

We would be remiss if we didn't address the additional remedies sought by the Organization. During the progression of this case the Organization requested additional remedies to this dispute, those being that a personal apology from the Chief Engineering Officer be given to the Claimant, and that the Organization be reimbursed for all expenses incurred by it in preparing and progressing this case on behalf of the Claimant. After careful review of the record and the collective bargaining agreement, we find that nothing in the agreement provides for such remedies. If not contractually provided for, there is no way that such remedies may be entertained by this Board. Accordingly, all such claims for an apology and for reimbursement to the Organization shall be dismissed.

It is the decision of this Board that sufficient relevant evidence was not provided by the Carrier in this case to sustain a finding of guilt. Accordingly, we order that the Claimant's record be cleared of all mention of this discipline case, and that he be made whole for any and all losses incurred as a result of said discipline.

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 3rd day of April 2025.