

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13855
Docket No. 13737
05-2-04-2-13

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Kansas City Southern Railway Company)

STATEMENT OF CLAIM:

- “1. That the Kansas City Southern Railway Company violated the Controlling Agreement, particularly, but not limited to Rule 29, when Shreveport, Louisiana Electrician, S. R. Cain was unjustly and arbitrarily assessed a five (5) day suspension beginning June 22, 2003 through June 26, 2003, following investigation held on May 12, 2003.
2. That, accordingly, the Kansas City Southern Railway Company make whole Electrician Cain as follows:
 - (a) Compensate him for all wages lost at the prevailing rate of pay of electricians and all applicable overtime;
 - (b) Make him whole for all vacation rights;
 - (c) Make him whole for all health and welfare and insurance benefits;
 - (d) Make him whole for any and all other benefits including Railroad Retirement and Unemployment Insurance;
 - (e) Make him whole for any and all other benefits that he would have earned and/or received during the time withheld from service, and
 - (f) Any record of this arbitrary and unjust disciplinary action be expunged from his personal record.”

FINDINGS:

The Second 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 Claimant was notified by letter dated April 21, 2003 to attend an investigation over "alleged failure to properly perform assigned duties on April 17, 2003 resulting in train delay to I-DANO-16 KCS-2046 not equipped with Head End Device." After postponements, the investigation was held on May 12, 2003. Subsequently, the Claimant was found guilty and assessed a five (5) day suspension.

The Organization has raised both procedural and merits issues with the dispute at bar. On procedure, the Organization argues that the Carrier violated Rule 29 in failing to identify the "precise charge" "at a reasonable time prior to the hearing." The Organization points out that the Rules alleged to have been violated were read into the transcript in a perfunctory manner at the end of the investigation. The fairness of the process was violated in that the Hearing Officer not only read in the Rules, prejudged the matter, but also failed to remain impartial and testified in the case.

As for merits, there was no proof demonstrating that the Claimant's actions resulted in a train delay. The delay was due to traffic congestion in the yard. As for failure to equip the train with a Head End Device, the Car Department was not ready for the test, postponed the test and while it was never done, this was discussed with the Foreman. The Claimant signed paperwork in error, but neither indicated he performed the work, nor delayed the train. The Organization maintains that the

Carrier failed to prove otherwise. For a paperwork error, any discipline was excessive.

The Carrier denied any procedural errors. As for the merits, the Carrier held that the Claimant failed to properly perform his duties. He signed an FRA check list indicating that KCS-2046 had a proper Head End Device, that he had checked its operation and performed a pole test. He had not done so, and that falsification was serious and resulted in train delay.

A review of the procedural issues finds that they do not violate Rule 29 of the Agreement. The precise charge does not require the statement of the Rules alleged violated. It requires only what the language negotiated states, and that is to "be appraised of the precise charge." There is no language in this Rule that requires the precise Rule violated, but only knowledge of what actions are being investigated. This charge fully complied with fairness. The Claimant knew he had to defend himself for failing to properly perform his duties with regard to a specific date, train and Head End Device resulting in a train delay. Nor does this Board find any evidence persuasively demonstrating that the Hearing Officer acted inappropriately. There were no procedural errors that would negate a review of merits.

On merits, we have carefully studied the Organization's central points. Best summarized, the Claimant was called to perform the Head End Device test at around 2:30 to 3:00 a.m. The Car department was contacted and they were not ready to do so. The Claimant was extremely busy throughout the night working and just prior to leaving at 8:00 a.m., he was handed the paperwork to sign. There are two important points here. He made an error on the form indicating that hours earlier he had performed the test. Second and most importantly, he testified that after signing the form:

"Well, I told Russell Benefield that the Car Department hadn't gotten back with me on the EOT check prior to my getting off. And he said fine."

The Organization argues that he told his Foreman that the EOT check had not been made. He was not guilty of any of the charges, although he did make a mistake in signing the form.

The issue at bar is whether the Carrier has provided sufficient probative evidence to prove guilt. The charge against the Claimant is the failure to properly perform his duties. The proof presented is a report signed by the Claimant that Locomotive 2046 had a Head End Device and that the Device was tested. The Claimant testified that he did sign the Locomotive Outbound Consist Form clearly stating that the Locomotive had the device and that it was tested. The testimony in the record is that this was an established part of his duties as a Hostler. He was asked if he was "responsible for the information you put on that form as being accurate and correct" and responded, "Yes." This admittedly false report substantiates guilt and is sufficient to prove the charges, including to contributing to the delay of the train when the crew found no Head End Device and the train had to be held back for correction.

Finding no procedural errors and sufficient proof of guilt, the only question remaining is the assessed penalty. The Organization considers the sign off an error and not a false report. It argues that the Claimant's past discipline record and ten years of service, with the full circumstances of this case mitigates discipline. The Claimant had a heavy work load and the Car Department failed to call back. Had the Car Department called, the Claimant would have performed the EOT test that he checked by error. Accordingly, the discipline assessed was arbitrary, capricious and excessive.

The Board has reviewed these facts. They support the Carrier's conclusions. The Carrier argues that it has fully considered all of the above issues, but reached its decision due to the fact that:

"Claimant falsified a FRA check list. He reported a locomotive had a head end device, he claimed he checked the operation of the head end device and that a pole test was conducted. All three entries were false. In light of the fact this was a serious case, the discipline was not excessive."

The Carrier argued that it was serious in that it caused a "costly delay" to the train. We can find nothing to suggest the Carrier's actions were arbitrary or capricious. Nor can this Board find the discipline excessive under these full facts. The claim is denied.

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 Second Division

Dated at Chicago, Illinois, this 3rd day of May 2005.