

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36748
Docket No. SG-36562
03-3-00-3-772

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Canadian National Railway (former Grand Trunk
(Western Railroad Incorporated)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Grand Trunk Western Railroad (GTW):

Claim on behalf of P.E. Putt for compensation for all time lost and benefits as a result of his suspension from service and for any reference to this matter to be removed from his record. Account Carrier violated the current Signalmen’s Agreement, particularly Rule 42 when it failed to provide the Claimant with a fair and impartial investigation and imposed harsh and excessive discipline without meeting the burden of proving its charges in connection with an investigation conducted on November 19, 1999. Carrier’s File No. 8390-1-121. General Chairman’s File No. 99-90-GTW. BRS File Case No. 11522-GTW.”

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 10, 1999, the Carrier instructed the Claimant to appear for a formal Investigation in connection with the charge that he had violated GT Operating Rule F, in connection with an incident in which the Claimant allegedly caused interference for about 35 minutes at five active highway-railroad grade crossings in Charlotte, Michigan. After a postponement, the Investigation was conducted on November 19, 1999. As a result of the Investigation, the Claimant was found guilty as charged. By letter dated December 8, 1999, the Claimant was notified that he was suspended from service for 60 days (November 10, 1999, through January 10, 2000). The Organization thereafter filed the instant claim, contending that the Carrier violated the Agreement when it suspended the Claimant without benefit of a fair and impartial Investigation and without proving the charges against him.

The Carrier initially contends that the Claimant was afforded a fair and impartial Investigation in accordance with the Agreement. The Claimant was properly notified of the Investigation, and he was in attendance and represented by an Organization official who was allowed to cross-examine witnesses and present evidence on the Claimant's behalf. The Carrier asserts that it properly withheld the Claimant from service pending the Investigation because the Claimant was charged with a serious offense. The Carrier further argues that the record fully supports its finding that the Claimant was guilty as charged, and the assessed discipline was appropriate for the offense.

The Carrier further asserts that the Claimant's own testimony demonstrates that he is guilty as charged. The Claimant admitted that he cut the track wires and necessary support wires from the rail, but he did nothing to prepare the wires for reapplication to the rail. The Claimant further testified that he advised Signal Supervisor R. J. Posler that he would not have time to make track wire repairs to release the track to train traffic and that he possibly would have to apply Rule 132B at the affected crossings. Application of Rule 132B involves a train stopping and putting fusees on either side of the crossing, and then proceeding through the crossing. The Carrier emphasizes that there is no dispute that Posler advised the Claimant that implementation of Rule 132B was not acceptable because it was

unsafe due to the number of road crossings involved. Posler further instructed the Claimant to reconnect the track wires and properly repair the signal system before the Claimant could release the track to train traffic.

The Carrier maintains that the Claimant freely admitted that he had the authority to stop trains from operating on the track until the crossing warning devices were operable. The Claimant further acknowledged that it was not his understanding that Posler wanted him to manually put down the crossing gates for train operations. The Carrier points out that the Claimant and his representative attempted to defend his manual activation of the grade crossing warning devices for an extended period of time by asserting that it was a "normal movement" and, therefore, not considered interference with the normal functioning of the system. The Carrier points out, however, that the Claimant's admission that it was not normal for track wires to be disconnected and/or cut in the middle shows that he was fully aware of the impropriety of his actions.

The Carrier argues that the Claimant was not engaged in normal testing procedures, nor did he provide proper warning to highway users. The Carrier maintains that the Claimant violated federal regulations by interfering with the crossing warning system and creating an extremely dangerous condition for highway motorists and the crew on the approaching train. The Claimant acknowledged that it was unusual for crossing warning signals and gates to be operational for as long as 20 to 30 minutes without a train in sight. The Carrier emphasizes that road traffic was backed up throughout the city, and the Claimant's actions negated the purpose and intent of the governing federal regulations by causing vehicles to disregard the warning devices and drive around the crossing gates.

As for the Organization's assertion that this was an emergency situation and that the Claimant had no alternative but to interfere with the integrity of the crossing warning system, the Carrier emphasizes that the Claimant admitted that this was not an emergency. Moreover, the Claimant had an alternative, which was to reconnect the wires and return the signal system to working order. The Carrier maintains that its Operating Rules required that the Claimant do so. The Carrier argues that the Claimant instead chose to ignore the Operating Rules and Supervisor Posler's instructions. The Carrier further contends that there is no basis for the Organization's assertion that the Claimant could not be held responsible because Posler did not offer an alternative course of action on the urgency of the

train operation. The Carrier argues that by making the decision that he did, in conflict with his supervisor's directive, the Claimant must assume responsibility for it.

The Carrier further contends that there is no support for the Organization's argument that Posler had decided, earlier in the day, to take the Claimant out of service and charge him. The Carrier points out that the transcript establishes that Posler's first contact with the Claimant on the date in question was between 3:15 P.M. and 3:45 P.M. hours, when Posler observed the Claimant sitting on a battery tub and the Claimant informed him that he would not have time to make repairs to the track and was going to apply Rule 132B at all of the road crossings. Posler then informed the Claimant that this was not acceptable, and that he should begin reconnecting the wires. Posler sent some signal gang members to help the Claimant. The record further shows that Posler also informed Track Maintenance Supervisors that in the event of a train delay, the Signal Department would accept responsibility and that there may be an investigation into the matter. The Carrier argues that this certainly was not evidence of prejudice toward the Claimant.

The Carrier also argues that there is sufficient evidence to warrant a finding of guilt in this matter. The Carrier maintains that the Claimant created the situation by not performing any work to prep the wires for reconnection. When the Claimant realized that he may be responsible for unnecessary delay in releasing the track, he deliberately took action that violated both the Carrier's Operating Rules and federal regulations, as charged. The Carrier maintains that the 60-day suspension and EAP counseling was not excessive in light of the safety issues and the seriousness of the Claimant's offense, in addition to the Claimant's past discipline record.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization contends that the Carrier violated the Agreement, particularly Rule 42, by suspending the Claimant from service without just and sufficient cause and without meeting its burden of proof. The Organization maintains that on the date in question, several problems arose that prevented the Claimant from reconnecting the track wires and properly testing the system prior to the next train movement. The Claimant asked to be allowed to place stop and flag protection at the crossings, but his supervisor denied this request. In order to

insure the safety of the motoring public from the danger of oncoming trains, the Claimant activated the grade crossing warning devices while he continued the work of reconnecting the wires. The Organization emphasizes that the task of reconnecting between 16 and 28 different track wires, and insuring that they are connected correctly, is not a simple one. The Organization points out that the Claimant also was faced with the task of repairing a damaged cable. The Claimant clearly took the safe course when he opted to activate the grade crossing warning devices, rather than leaving it to chance that an unsuspecting vehicle may be struck by a train. The Organization maintains that the Claimant's actions did not result in any accidents or injuries on the date in question. The Organization further asserts that under the circumstances, the Claimant had no reasonable alternative to activating the grade crossing warning devices.

The Organization further argues that the evidence demonstrates that not all five of the crossings were activated as the Carrier alleged. In addition, the record does not indicate that the Claimant committed any Rule violations. The Organization maintains that the Carrier has not met its burden of proof in this matter and failed to substantiate the charges against the Claimant. The Organization also asserts that there was no basis for the Carrier to take any disciplinary action against the Claimant. The penalty imposed in this matter demonstrates that the Carrier's sole intent was to punish the Claimant, not to guide him in the performance of his work. The Organization points to Board decisions holding that the Carrier abuses its discretion when it imposes discipline only to punish an employee, and not to correct or guide the employee's conduct. The Carrier did not impose discipline as a corrective matter in this case, but solely as punishment, so the Carrier abused its managerial discretion.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Board reviewed the procedural arguments raised by the Organization, and finds them to be without merit. We find that the Claimant was provided with a fair and impartial Investigation and that none of his procedural rights were violated.

The Board reviewed the evidence and testimony in this case, and finds that the Carrier failed to meet its burden of proof that the Claimant was guilty of violating GT Operating Rule F and Section 234-209 of the Federal Railroad

Administration Regulations. The Claimant was charged with failing to take a safe course of action in that he left the grade crossing warning devices activated. However, a review of the record makes it clear that the Claimant had requested the right to place stop and flag protection on the crossings and he was not allowed to do so. Moreover, there was no alternative plan suggested by supervisor. The Claimant took what he thought was the safest action and began to make the repairs that he was required to perform. It appears that the Claimant performed work that day that could easily have kept several employees busy. The Board does not believe that the Claimant created an extremely dangerous condition, but rather performed his job successfully without accidents or injury. The Claimant was there all by himself and the Carrier failed to prove that he violated the Rules as he completed his work. The fact that the Claimant had previously incurred safety violations is not a sufficient basis to issue discipline in this case. There must be a showing that he violated the Rules and such a finding was not supported with substantial evidence.

Because the Carrier bears the burden of proof in discipline cases and it has failed to prove a violation of the Rules by the Claimant, the Board has no choice other than to sustain the claim.

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 22nd day of October 2003.