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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37060
Docket No. SG-37628
04-3-02-3-758**

The Third Division consisted of the regular members and in addition Referee Joshua M. Javits when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Kansas City Southern Railway Company)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern Railroad (KCS):

Claim on behalf of J. W. Powell, for reinstatement to his former position with payment for all lost time including overtime and any reference to this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 34, when it imposed the harsh and excessive discipline of dismissal on the Claimant as a result of an investigation held on October 5, 2001, and failed to meet its burden of proving the charges. Carrier's File No. K06025556. General Chairman's File No. 01-118-KCS-185. BRS File Case No. 12252-GWWR."

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.

The Claimant was a Signal Maintainer for the Carrier until his discharge on October 12, 2001. The Claimant had been found to be unable to perform a test on a bridge derail as part of a Federal Railroad Administration inspection, resulting from lack of knowledge of the procedure and physical incapacity to operate the derail. Such test was within the Claimant's normal duties. The discharge was based upon a finding of a failure to perform duties, failure to submit proper documentation and falsification of records following an October 5, 2001 Investigation for which proper notice was given.

The Organization contends that Rule 34 of the Agreement of December 31, 1989 requires a "fair and impartial" Hearing prior to the institution of discipline. The Organization asserts that there were two procedural flaws at the Hearing: 1) FRA Inspector Lindstrom, who initially noted the Claimant's inability to perform, was not present at the Hearing; and 2) the Claimant was not present for the later stages of the Hearing following a family emergency. For the reasons stated below, the Board cannot sustain the challenge on these grounds.

The Organization is correct in its assertion that the right to cross-examine is imperative to prevent potential prejudice to an employee. See Second Division Awards 6083, 7606 and Third Division Award 23977. In this instance, however, the Claimant was not prejudiced by Inspector Lindstrom's failure to appear. Rather, the Claimant himself adopted Inspector Lindstrom's testimony stating that he was, in fact, physically incapable of performing the test and that he did not know the proper procedures (despite evidence of training). The Claimant's own testimony of his knowledge and abilities supports a finding of inability to perform even if all references to Inspector Lindstrom were stricken from the record. The Board also notes the Organization's assertion that the Carrier is liable for the failure to present a material witness. However, the Awards cited by the Organization only present cases where a carrier had the power to compel appearance of a witness. No evidence has been presented to show that the Carrier could compel a Federal employee's attendance at the Investigation, nor how the failure to appear prejudiced the Claimant.

In addition, the Claimant failed to object to the absence of Inspector Lindstrom. Similarly, the Claimant's representative did not object to the continuation of proceedings after the Claimant excused himself. Such procedural objections must be raised during the Investigation and may not be raised for the first time before the Board. See First Division Award 5251; Second Division Award 7452; Third Division Awards 25907 and 22325. The Organization asserted that statements by the Hearing Officer that Inspector Lindstrom would be absent and that the Hearing would continue in the Claimant's absence demonstrated that the Hearing Officer was "flexing his muscles." *The Board does not so find.* The transcript does not indicate a tone which would intimidate the Claimant or his representative and prevent them from stating objections. The statements at issue might also be procedural notations for the record. The Organization failed to demonstrate its interpretation is more likely than the other.

Additionally, the Organization cites Awards for the proposition that such discipline should be corrective and progressive, not punitive. See Second Division Awards 7836, 8157; Third Division Awards 19037 and 19537. The Claimant had been in his profession for 37 years and with the Carrier for ten of those years. The Claimant and the Organization contend that the Claimant should not be punished so severely inasmuch as it was the Carrier's responsibility to ensure that the Claimant could perform his assigned tasks. There is evidence that the Claimant received appropriate training in February 1995. Thus, the Board is presented with a scenario of an individual who has knowingly not performed part of his job for six years, has covered up his failures by falsifying and failing to submit documents, and has thus shown a disregard for safety. Such misconduct is serious, with such gravity that even with an otherwise unblemished record the Carrier was justified in terminating the Claimant's employment. See Third Division Award 35429.

Based on the foregoing, we have no alternative but to deny the claim.

AWARD

Claim denied.

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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 22nd day of June 2004.