

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38365
Docket No. SG-38187
08-3-NRAB-00003-040103
(04-3-103)

The Third Division consisted of the regular members and in addition Referee Danielle L. Hargrove 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:

Claim on behalf of N. Nicholas, for removal of a written reprimand from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when it failed to provide a fair and impartial investigation and issued a written reprimand against the Claimant without just cause as a result of an investigation held on February 14, 2003. Carrier's File No. K0603-5692. General Chairman's File No. 03-030-KCS-185. BRS File Case No. 12745-KCS."

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 or about January 30, 2003, the Carrier employed the Claimant as a Foreman on Signal Gang No. 881, a construction gang working at Beaumont, Texas. One of the gang members under the Claimant's supervision injured his hand at approximately 9:00 A.M. on the date above. The Claimant did not report this incident to management until approximately 1:00 P.M., four hours after the injury to the employee, but well before his shift ending.

The Carrier issued the Claimant a notice dated February 6, 2003 instructing him to attend a formal Investigation to determine the facts and place responsibility, if any, in connection with the Claimant's alleged "late reporting" of the above-referenced employee's injury. The Investigation was held and the Carrier determined on February 21, 2003 that the charges against the Claimant had been proven. Specifically, the Claimant was assessed a Written Reprimand for his violation of Rules 1.1.3 and 1.2.5 of the General Code of Operating Rules, and Page 2, Item (h), and Page 3, Item 3, of the KCS Engineering Department STAR Book.

GCOR Rule 1.1.3 states:

"Report by the first means of communication any accidents; personal injuries; defects in tracks, bridges, or signals; or any unusual condition that may affect the safe and efficient operation of the railroad.¹ Where required, furnish a written report promptly after reporting the incident." (Emphasis added)

GCOR Rule 1.2.5 states:

"All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed." (Emphasis added)

¹ As it applies to this review, the Board interprets the wording of GCOR Rule 1.1.3 to require that employees are required to report by the first means of communication any . . . personal injuries . . . that may affect the safe and efficient operation of the railroad. Therefore, by its very terms, if the situation does not warrant it (if the safety and efficiency of the railroad are not implicated) employees would not report all personal injuries by the first means of communication.

STAR Book, Page 3, Item (e) states:

"We must comply with all KCS rules and policies and with local, state, and federal laws and regulations that relate to our job task(s)."

STAR Book, Page 2, Item (h) states:

"Oral and written reports of accidents and injuries are made to the supervisor or employee in charge as soon as possible but no later than end of shift." (Emphasis added)

After a careful review of the record in this case, the Board does not find that the Carrier sufficiently demonstrated that the Claimant's actions were inconsistent with the Rules the Claimant allegedly violated or that he clearly violated them. Therefore, although the Board recognizes the merit in the Carrier's position and focus on the literal interpretation of such phrases and words as "as soon as possible" and "immediately," we do not find it appropriate to discipline the Claimant in this case given the facts, the context of those facts, and the ambiguity of the Carrier's Rules. We also do not find that the Awards used to support discipline in this case are on point.

The evidence adduced at the Investigation established that the Claimant took appropriate measures to ensure the safety and well-being of all employees under his watch, including the injured employee, and that his actions in no way detracted from the Carrier's legitimate, stated goals of ensuring prompt, proper care for employees and ensuring safe conditions of employment. That is, he ensured prompt, capable medical care for the injured employee and stopped work by his gang to ensure no other injuries would occur or that damage to the Carrier equipment or the railroad would occur. Although the Board is not suggesting that it is always necessary, the Carrier produced no evidence that it would have taken any action or had the Claimant do anything differently had he contacted management sooner than he did. Such evidence would have provided some support for the insistence of reporting "as soon as possible" as was demanded in this case. We find the Carrier's inflexible emphasis on a portion of some of the Rules while virtually ignoring other portions to be arbitrary and misguided. Further, on the record, the Carrier's attempt to argue that the Carrier lost its opportunity to channel the Claimant to a

company doctor rings hollow and, perhaps, inappropriate. Additionally, we find that the Carrier's Rule requires some degree of discretion and judgment by employees based on experience and training pursuant to its core Safety Rules. Therefore, a Rule requiring reporting "as soon as possible" but not later than end of shift is sufficiently ambiguous when individuals use their own judgment and discretion as to whether "as soon as possible" is required or when reporting by the end of the shift is sufficient. The record makes clear that employees, including the Claimant, are expected to use good judgment and common sense when making such decisions. Based upon Rules, training and experience, an employee decides when to stop and make a phone call and when it can wait. We believe it is the Carrier's burden to demonstrate that the Claimant's decision was improper and worthy of discipline. We do not believe the Carrier met its burden.

It is also not lost on the Board that what the Carrier appears to be seeking is "notice" which is distinctly different from "a report"; therefore, if the Carrier wants "notice" at the earliest opportunity, it should make such a distinction in its Rules or provide training to employees of its intent, so that the Claimant's obligations are more reasonably understood. The Rules do not make a distinction between providing "notice" or "reporting." It is not clear if there is any intent by the Carrier to make a distinction. Nevertheless, such ambiguity potentially subjects employees to arbitrary or inconsistent discipline or potentially requires an employee to violate one Rule or policy at the expense of another. We believe that is what happened here. We also find that the Carrier's referenced Rules require and obligate employees to make reasonable judgments. We cannot find that the Claimant used poor or unreasonable judgment in this case that would support administering discipline. There was a great deal of questioning on record of what the words of the Rules say and mean; however, no evidence that such interpretations or training had ever been provided the Claimant or any other employee regarding same at the time of this incident.

Finally, it is true that the Claimant could have sought out a telephone when one was not immediately available to him. He could have used a radio or telephone while driving, or he could have also made a telephone call at any given time while waiting for the employee. However, even given those facts, we do not find that the Carrier's expectations are clear that the first part of the sentence in STAR Rule 1.h. supercedes the last part of the sentence that, in any event, requires reporting before the end of shift. The Claimant understood that it was necessary to have meaningful

information to report to his supervision. That is, the record reveals that the Claimant positioned himself to wait a relatively nominal period to obtain the complete assessment of the employee's injury. We do not find his decision to provide complete information to be an unreasonable decision, particularly because it was only a matter of a few hours between the injury and the employee's return to work.

The Carrier second-guesses the Claimant's decision to wait to make his report to management concerning an injury. We note that during the approximately four hours from the employee's injury until his return to work, the Claimant took the employee to the emergency room of a local hospital; assisted in the employee's registration at the hospital; attended to the apparent personal and emotional needs of the employee²; returned back to the yard to direct the work of those remaining in his gang; returned back to the hospital to pick up the employee; and made a complete, oral report to his supervisor.

The Board recognizes the importance of prompt, even immediate reporting in most cases involving personal injury. In this case, we find the discipline of the Claimant to be overreaching and excessive to make its point about the importance of providing notice of personal injuries. Reporting within a matter of hours, given the facts of this case, and well before the Claimant's shift expired, does not beg for discipline in this employee's personal record. However, it does call for the Carrier to clarify with all employees regarding its expectations concerning providing notice and reports of personal injury. We simply cannot find that the Claimant did not comply with the Carrier's Safety Rules concerning reporting.

AWARD

Claim sustained.

² The record also revealed that given the particular injured employee ("one who was 'different' and subject to excitability") the Claimant remained available to him more than he likely would have with other employees.

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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 20th day of November 2007.