

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39608
Docket No. SG-39372
09-3-NRAB-00003-060275
(06-3-275)

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Northeast Illinois Regional Commuter Rail
(Corporation (Metra)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Northeast Illinois Regional Commuter Rail Corp. (Metra):

Claim on behalf of M. S. Musgrave, for the discipline assessed against the Claimant to be rescinded, with all lost wages and benefits restored and reference to this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 53, when it failed to provide the Claimant with a fair and impartial investigation and then imposed the discipline of a three-day deferred suspension without meeting its burden of proving the charges in connection with an investigation held on May 6, 2005. Carrier compounded this violation by not holding the investigation within the five-day time limit as required in Rule 53 after it suspended the Claimant prior to investigation. Carrier’s File No. 11-13-492. General Chairman’s file No. 9-D-05. BRS File Case No. 13620-NIRC.”

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.

Claimant M. S. Musgrave, an employee with tenure dating from September 23, 1996, was regularly assigned as a Signalman on the Milwaukee District at the time pertinent herein. On the night of April 30, 2005, beginning at 12:01 A.M., Canadian National Railroad (CN) and Metra were scheduled to test a signal cutover involving, among other areas, the Grayslake Interlocking. At the Grayslake Interlocking, Metra and CN main tracks cross, and the interlocking itself protects the crossing, switches and connection track between the two mains. CN's main track travels north from the Chicago Terminal into Wisconsin. Metra's main track travels west from the Chicago Terminal into Wisconsin. Train operations through the interlocking are controlled by CN's South Desk Dispatcher in Stevens Point, Wisconsin. The physical work of the cutover had been completed on a previous weekend, April 15 and 16, 2005.

On April 29, 2005, a job briefing was held from 11:05 P.M. to 11:30 P.M. CN's John Pennington was assigned as the Employee In Charge (EIC) of Planned Work and Dispatcher Coordinator. The Claimant was assigned to perform as Metra's EIC. CN employee John Friel was designated the signal employee in charge and contact for the CN signal support group. Metra Signal Testman Thomas Stone was in charge of testing from within the signal bungalow. A bulletin had been issued, including to train crews, that the area would be out of service beginning at 12:01 A.M. on April 30, and that all trains were to treat signals within the limits, regardless of the aspect displayed, as an absolute stop. Trains were then to contact the CN South Desk Dispatcher to obtain authorization to pass the signals and travel through the interlocking at restricted speed. The three EICs were to ensure that all personnel were in the clear before any train proceeded. The Claimant was assigned to handle protection on the Metra main track on either side of the interlocking, as well as protection at the interlocking.

As a normal part of the testing program, Stone manipulated the signals on the CN track, lining the No. 1 switch in reverse position toward a track that was not yet operational. He then unexpectedly observed CN Train 119 entering the interlocking. Because of the reversed switch, the train traveled north on a track that was not yet in service, and crossed a highway at grade where no crossing warning system was yet installed before finally being ordered to stop.

By letter dated May 2, 2005, the Claimant was instructed to report for a formal Investigation on May 6, 2005, to:

“Develop the facts, determine the cause and assess responsibility, if any, with your alleged failure to properly perform your duties as the Metra Employee in Charge at the Grayslake signal cutover being performed on Saturday, April 30, 2005. In conjunction with alleged failure to properly perform your duties, you are hereby charged with the alleged violations of Metra Safety Rules and General Procedures Manual Rule 1.1, Rule 1.1.2, Rule 142.2.2, Rule 142.3 and Metra Employee Conduct Rules . . . ‘L’ . . . and ‘N’”

Subsequent to the Hearing, the Claimant was issued a Notice of Discipline dated May 12, 2005, assessing a three days deferred suspension for **“Failure to properly perform your duties as the Metra Employee in Charge at the Grayslake signal cutover being performed on Saturday, April 30, 2005,”** and citing the same Rules violations as contained in the charge letter. Although the Claimant had incurred no prior discipline, the Carrier assessed the Claimant discipline at Step 2 of the progressive discipline sequence because of the safety issues involved in the Claimant’s alleged violations. On June 5, 2005, the Organization filed an appeal of the Claimant’s discipline, which the Carrier denied. The parties exchanged further correspondence and discussed the matter in conference. Having failed to resolve the matter during on-property handling, the parties submitted it to the Board for final and binding resolution.

The Organization contends that the Carrier failed to prove that the Claimant violated any Rules. The Claimant was not the Foreman in charge, the Test Man in charge of signal testing, or the Signal Supervisor in charge of signal testing. Pennington, a CN employee, was in charge of Roadway Worker Safety. The Claimant’s only function was to ensure that Metra personnel were in the clear of train traffic, a function he performed by reporting the status of the Carrier’s personnel to Pennington. The Organization argues that the **“transcript showed numerous faults with [Carrier] management of this cutover and used the Claimant as a scapegoat for their mistakes.”** CN Signal Supervisor Thomas Rose told the employees at the initial 11:00 P.M. job briefing that everything would be the same as on the previous weekend. However, Metra employees were not given CN radios, as they had been the weekend before. The Organization points out that the Claimant is a nine-year employee with a spotless record and asserts:

“A thorough review of the transcript reveals a breakdown of communications on the part of the CN employees, not the Claimant. . . . Mr. Pennington was the employee in charge of contacting the testman (Metra employee Thomas Stone) inside the signal bungalow prior to any train movements, and the CN dispatcher controlled the movement of trains across the interlocking.”

Moreover, the Organization argues, the record shows that Pennington was fatigued (having been off-duty only four and one-half to five hours prior to starting work on April 29) and stayed in his truck where there was a radio, while the previous work weekend a radio had been supplied inside the command trailer, and Pennington had been in and out checking the track and going into the signal bungalow to verify that switches were properly aligned prior to a CN train passing through the interlocking.

The Board carefully reviewed the record and finds that the Carrier failed to prove the Claimant guilty of the charges alleged against him. Indeed, the Carrier utterly failed to explain what the Claimant should have done differently on April 30, 2005, and appears to have charged him merely because he was present when the incident with CN Train 119 occurred. Nearly all witnesses at the Hearing testified that during the 11:00 P.M. job briefing, the employees were told that everything would proceed in the same manner that it had on April 15 and 16. Unlike the previous weekend, however, Pennington remained in his truck to monitor Channel 3, the road channel, on his plug-in radio because no radio was present in the EIC trailer. He did not go in and out of the bungalow to apprise the personnel within regarding CN train movements. Employees in the field, including the Claimant, were not given radios on which they could monitor Channel 3, as they had been the previous weekend.

The record is also replete with a multitude of examples of miscommunication or even the entire absence of communication. It is clear that in the early hours of April 30, 2005, one hand did not know what the other hand was doing. There is no evidence, however, that this was in any way the Claimant's fault. The supervisors involved on the April 29-30 shift bear at least as much if not more responsibility than anyone else. Thomas Rose, CN's Assistant Manager, S&C, Metra project North Central Expansion, was in the bungalow where the testing was being carried out. Rose had a portable radio in his pocket and heard on Channel 3 that CN Train 119 was being authorized to proceed north through the interlocking. Rose was the only person in the bungalow with Channel 3 available to him. When asked, “And when you heard a train being cleared

to come through the interlocking, as a supervisor you didn't see any need to ask the employees what they had lined up?," he replied, "No, sir." Joel Winchester, Metra Project Signal Engineer, who was responsible for overseeing construction for signal capital projects, stressed to Pennington and the Claimant the importance of ensuring switch alignment was correct, but then left it up to the two EICs to decide how to conduct the verification of such alignment. He testified, "And the agreement that they came up with between the two, I am not sure of." Moreover, when CN Train 119 was being readied to cross the interlocking at approximately 2:00 A.M., Winchester was in the back of the bungalow (behind a rack which blocked his view of the testing) watching Rose set up a computer program that allowed Rose to see the location of all CN trains because Winchester "[found] that kind of interesting." CN's John Friel, Signaller for the construction aspect of the Signal Department, after being notified by Pennington that CN Train 119 was coming, said nothing to anyone in the bungalow other than looking at Otis Harwell (a contractor) and asking, "You're in the clear, correct?"

The record fails to demonstrate that the Claimant neglected to carry out any responsibilities assigned to him, or even to establish what the exact extent of those responsibilities were. There was contrary testimony as to whether the Claimant was responsible for verifying the switch lineup only for Metra train movements or for all train movements. David Crader, Project Manager for Metra North Central Service Expansion on the CN Chicago Terminal, testified that Pennington was responsible for ensuring that workers were clear of tracks and that switches were properly lined for train movements by contacting Friel to clear CN signal personnel and contacting the Claimant to clear Metra signal personnel and confirm that switches were lined and locked for anticipated movements. Stone testified that because Rose stated at the 11:00 P.M. job briefing that they were all there to do the same thing they had done two weeks prior, it was Stone's understanding that "Pennington would come into the bungalow before every train and after every train to tell us that we would have to stop testing . . . and then after the train would go by he'd come back in again and tell us I got block back, we can go ahead and start testing again." When asked, "And you did or did not have conversations with Mr. Pennington regarding the movement of 119?" Stone answered, "Did not." The Claimant came in and told those in the bungalow about all movements on the Metra tracks and verified the switch alignments. CN's Friel, on the other hand, testified that it was his understanding that the Claimant would contact his people who would relay back that they were in the clear and all switches were lined for train movements even on CN track.

Pennington and the Claimant also testified to a diametrically opposed understanding of who was to verify that switches were lined properly for CN train movements. Pennington testified that he had told the Claimant that when CN trains called him, he would notify the Claimant to get Metra personnel in the clear "and let me know if the switch was lined for the train's movement." Pennington stated that when he authorized CN Train 119 into his limits, the Claimant reported that his men and equipment were in the clear. Pennington stated, "I asked him if the switch was lined for the northbound train and he got back to me and said the switch was lined for the northbound train."

The Claimant, on the contrary, testified to his understanding that he was responsible only for ensuring that his people were in the clear for all train movements, and for verifying switch lineups for Metra train movements. He believed that Pennington was going to verify switch lineups for CN Train movements as he had two weeks previously. The Claimant adamantly denied that Pennington ever asked him if the switches were lined for northbound CN Train 119, or that the Claimant ever told Pennington that they were. The Claimant insisted, "That conversation did not take place. . . . All that took place was that men and equipment were in the clear and my route was lined for the WSOR." The WSOR was stopped at the signal before the interlocking on Metra's tracks, and the Claimant walked over to Pennington's vehicle to tell him that the WSOR would be passing through the interlocking and CN's people should get in the clear. Moreover, the Claimant stated that he would never have expected to be responsible for verifying switch alignments for both Metra and CN movements because "I felt uneasy about clearing [CN] trains on a foreign railroad, not knowing their territory. . . . Also . . . I did not have direct communication at any time with any CN dispatcher. . . ." Asked, "If you had a conversation and confirmed the order of the trains, if Mr. Pennington advised you that it was a CN movement to be made first, he asked you if switches were lined and locked, what would your response have been?" the Claimant replied, "My response would have been the switches are lined and locked for my WSOR and that I didn't check his route." Asked by Pennington, "The guys in the bungalow never knew about our train movement? The Claimant answered, "If you didn't tell them, no."

The factual inconsistencies regarding who was responsible for what, and whether or not the Claimant was responsible for checking switch alignments for all train movements were not resolved by the Hearing Officer. The Board, as an appellate body, is without authority to make such findings of fact. Moreover, such inconsistencies demonstrate that the Carrier did not prove the charges it alleged against

the Claimant. For all of the foregoing reasons, the Board finds that the Organization's claim must be sustained. Having come to this conclusion regarding the merits of the instant case, the Board elects not to reach the procedural issue raised by the Organization regarding the timeliness of the Investigation.

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 1st day of April 2009.