

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39916
Docket No. SG-40183
09-3-NRAB-00003-070454
(07-3-454)**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(BNSF Railway Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe:

Claim on behalf of T. R. Bookout, for reinstatement to his former position with compensation for all lost time, including skill pay, all seniority rights and benefits unimpaired and his personal record cleared of any reference to this incident, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal without providing a fair and impartial investigation and without meeting its burden of proving the charges against the Claimant as a result of an investigation held on May 12, 2006, in Tulsa, Oklahoma. Carrier’s File No. 35-06-0031. General Chairman’s File No. 06-022-BNSF-129-S. BRS File Case No. 13737-BNSF.”

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 in this case was assigned to the position of Signaller on Gang 2, based at Tulsa, Oklahoma. On May 4, 2006 the Claimant was working on the crossing at Sale Barn Road, Okmulgee, Oklahoma, when he allegedly failed to remove his jumper cables prior to releasing the crossing to train traffic. This left the crossing signal inoperative, creating a safety risk. Following a formal Investigation held on May 12, 2006, the Claimant was found guilty of violating Signal Instruction No. 7.2. In a letter dated June 7, 2006, the Carrier notified the Claimant that he was dismissed from employment. The Carrier asserts that, because this is the Claimant's second Level "S" violation in three years, the Policy for Employee Performance Accountability requires that the Claimant be dismissed.

The Organization protested the dismissal and filed the instant claim on behalf of the Claimant. The Organization maintains that the punishment of dismissal is unduly harsh in light of mitigating circumstances surrounding the events. The Organization contends that the Carrier failed the Claimant by not issuing proper equipment, not providing current instructions and training, and not providing adequate supervision from a Foreman.

The Carrier replies to these arguments by pointing out that the Claimant admitted his guilt. Further, the Carrier argues that the Organization's position amounts to an affirmative defense aimed at diminishing punishment, not a refutation of the charge. The Carrier asserts that the Claimant failed to prove that his assigned equipment was inadequate. The Claimant had not yet received his "authorized" jumpers, but the only meaningful difference between these jumpers was the newly added identifying tags. The Carrier points out that there were simple means available to deal with these deficiencies.

With regard to instructions, the Carrier points out that the Claimant had in his possession a copy of Instruction 7.2 at the time of the incident. This was not the most recent edition of the Instructions, but it contained all necessary information

for the Claimant's duties. Furthermore, its contents were not substantively different from the later edition. The Claimant was also briefed on the procedure for disabling and restoring crossings as recently as the morning of the incident. Setting the questions of instructions and equipment to rest, the Carrier points out that the Claimant was adequately outfitted as evidenced by his ability to satisfactorily manage crossing signals leading up to the incident.

Finally, the Carrier acknowledges that the Claimant had previously been returned to work by the decision rendered in Public Law Board No. 6517, Award 22. That Award required the Claimant to work "under the supervision of a foreman." The Carrier asserts that this requirement was met. The Claimant had ready access via radio to his Foreman and received routine direction from a Foreman. The Claimant did not always work in direct physical proximity, but his degree of direct supervision was identical to that of any other employee under the supervision of a Foreman. The Carrier contends that the Claimant had adequate equipment, instructions, guidance, supervision, and experience to have avoided this signal failure. Thus, the Carrier believes that the Claimant is entirely responsible for this incident.

Upon reviewing the record, the Board finds that there is substantial evidence to support the charges. The Claimant failed to follow required procedures for disabling and restoring the crossing at issue on May 4, 2006. His actions created a serious safety hazard to the general public, other employees, and any train passing through the crossing. We agree with the Carrier that there is no proper basis to absolve the Claimant from his misconduct and we are unconvinced that the Organization's defenses have merit. None of the Organization's arguments are sufficient to shift the blame from the Claimant.

The only remaining question is whether dismissal was the proper penalty. The Board does not interfere with the Carrier's assessment of discipline in the absence of a finding that its assessment was unreasonable, arbitrary or capricious. Based on the facts presented on this record, no such finding is warranted. This was the Claimant's second serious, Level S violation of the Carrier's Rules in less than three years and dismissal is required under the Carrier's PEPA provisions.

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Moreover, his disciplinary history offers nothing that would mitigate the seriousness of the proven offense.

Based on all the foregoing, we must rule to deny the claim in its entirety.

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 Third Division**

Dated at Chicago, Illinois, this 31st day of August 2009.