

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40299
Docket No. SG-40346
10-3-NRAB-00003-080014**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Railroad Signalmen**
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of J. T Windschitl, for reinstatement to his former position with payment of all time lost, including overtime, with all seniority and benefits restored unimpaired and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it imposed the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on September 19, 2006. Carrier compounded this violation by failing to charge the Claimant within 15 days as required by Rule 68. Carrier’s File No. 1457967D. General Chairman’s File No. N 68-642. BRS File Case No. 13807-UP.”

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 Windschitl was employed by the Carrier for six years in various positions including as a Signal Maintainer in Carrier's Signal Department in Missouri Valley, Iowa. On September 12, the Claimant was notified to appear for an Investigation on September 19, 2006 for allegedly falsifying "the completion of legally mandated Federal Railroad Administration (FRA), Signal Department DOT-RS&I Tests, and related reports for various signal apparatus on the following dates" in 2006: January 9, June 8, July 3, July 4, July 10, July 18, July 19, and August 21. On October 4, 2006, the Claimant was notified that he had been found guilty of violating Rule 1.6 – Part 4 (Conduct-Dishonest) of the Union Pacific Railroad General Code of Operating Rules and was dismissed from service.¹

The Organization took exception to that action on October 19, 2006 contending that there was no substantial evidence to support the finding of falsification in violation of Rule 1.6. The Organization further objected on procedural grounds including the contention that the Claimant was not charged within 15 days from knowledge of the infraction because the reports at issue concerned dates ranging from 21 days to more than eight months before the charge was issued.

In response to the above procedural issue, General Director Labor Relations Wayne E. Naro clarified in a letter dated December 14, 2006 addressed to BRS General Chairman G. Pankey that:

¹ Rule 1.6 "Conduct" provides, in pertinent part,

Employees must not be: . . .

4. Dishonest

Any act of hostility, misconduct or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or the performance of duty will not be tolerated.

“Claimant was charged with dishonestly completing FRA Reports. The completion of these reports occurred on the day Claimant actually signed the reports. Claimant signed the reports on 5 September 2006. Prior to Claimant signing the reports, there was no ‘dishonest completion’ for two reasons. First, the reports were not complete without a signature. Second, Claimant could have corrected or changed the reports prior to signing them to reflect the accurate test dates. In that event there would have been no basis for the charge. Since Claimant signed the FRA reports on 5 September, that is [the] day that he represented that the reports were accurate and consequently that is the day the dishonest conduct occurred.”

In short, the Claimant appears to have been charged not with failing to perform the required tests, but dishonestly representing that the tests occurred on dates that proved to be inaccurate. Following denial in case handling on the property, the case was advanced to the Board for final resolution.

The Board reviewed the record carefully. The allegation of dishonestly completing FRA Reports was based on the following evidence.

Signal Maintainers are responsible for performing and documenting FRA-mandated periodic inspections and tests of various parts of the Carrier’s signal system according to a specific schedule. Signal Maintainers are required to sign and date the requisite forms attesting to their accuracy. The central reasons for the government-required tests are to prevent activation failures, false clear signals, and to provide a safe crossing for the general public. As the Claimant conceded, “we make tests that would ensure the safety of the public and the trains.”

With respect to the above process, the Carrier’s Missouri Valley Signal Department has long used paper documents. This changed in 2006 when the Carrier began to switch over to the use of hand-held computers (aka personal data assistants (PDAs)) by its Signal Maintainers to enter testing and other data. Approximately 50% of the Signal Maintainers began using the PDAs in February 2006. However, the Claimant and other Signal Maintainers did not begin such use until approximately July 2006.

In late August or early September, FRA Inspector Tom Feiners informed Kurt De La Motte, Manager of Signal Maintenance, Council Bluffs, Iowa, that he

would be coming in late October or early November to check the Carrier's records. In response, De La Motte notified all 14 Signal Maintainers, including the Claimant, that their records had to be up to date. Specifically, he told them "you get your records up to date, we'll get them signed. I want to be compliant."

Because data for part of 2006 was entered using the PDAs, De La Motte printed off the necessary records for each Signal Maintainer for their review and signature. De La Motte testified that after printing out the forms, he left "them at Mo. Valley with word that I needed them signed." De La Motte testified that all Maintainers signed them within a day or two of his delivery of the forms. The Claimant submitted his completed and signed forms on September 5, 2006.

Thereafter, De La Motte reviewed all submitted forms and discovered that the Claimant had certified that he had performed a significant number of the mandated tests on dates that the Claimant had not reported to work. Specifically, the records reflected that the Claimant certified that he performed required tests on January 9, June 8, June 9, July 10, and July 18 even though payroll and hours of service records reflected that the Claimant was off sick each of those days. In addition, the Claimant certified that he performed a number of required tests on July 3 even though other records reflected that he was off-duty as part of a safety day. In addition, the Claimant certified that he performed tests on July 4 including a crossing test at Mile Pole 350.31 and 350.34. Other records, however, reflected that the Claimant had eight hours of holiday time and six hours of overtime split between Mile Poles 335 and 332, but no time at any other mile pole such as 350.²

In response to the above evidence, the Claimant testified that he did not knowingly falsify any reports. Rather, given the period of time that had passed

² The evidence also demonstrated that Claimant certified that he had performed (1) monthly and quarterly switch tests at B-CP B330 on July 19; and (2) six-month signal mechanism tests on August 21. De La Motte testified that the above dates also were falsified because the Carrier's computer aided dispatching (CAD) logs showed that no such tests were performed. However, C.T. Windschitl, a 10-year Union Pacific employee with four years experience in the Signal Operations Center working with CAD logs testified that you would not be able to look at a CAD log for a control point on the territory at issue and determine whether the control point was in the Maintainer's control. He stated that "we cannot run a CAD log that reflects any movement out there, it would be invalid." He also testified that the indications that come in and out of CAD are considered "non-vital" and the FRA does not generally concern itself with those because "they are not dependable." The Board finds based on the above that the Carrier has not met its burden of establishing a violation with respect to the above two dates.

between the days at issue and when the discrepancies were brought to his attention, it was impossible to know what happened. He opined, however, that evidence showing tests performed on dates when he was off duty were the results of “clerical errors.”

Based on the above evidence, the Board finds that the Carrier met its burden of proving a violation of Rule 1.6, Part 4 which encompasses not only willfulness, but also negligence as part of the prohibition against dishonesty.

The above Rule violation clearly warranted discipline and under ordinary circumstances the Board would not disturb the Carrier’s imposition of dismissal. However, the Board is troubled by several aspects of this case, which taken together, support a finding that the discipline imposed was unjust.

The Board finds troubling the circumstances under which (1) the reports were generated; and (2) the Claimant was asked to sign the forms that lead to the instant charge. First, as noted above, for the majority of the dates at issue, the information was entered using a new system – the electronic PDAs. De La Motte testified that errors in entering data on the PDA could be corrected either on the device itself or later by computer. He also testified that Signal Maintainers could print out the reports to check for accuracy, but later noted that not all Signal Maintainers have access to printers. The Claimant testified that he did not know how to correct improper PDA entries. The Claimant also testified that the only time that he had an opportunity to review the print-outs was the single instance in September when De La Motte provided them to the Signal Maintainers for their signature.

Second, De La Motte testified that when he dropped the reports off, his sole instructions were for the Signal Maintainers to sign them. He did not instruct the Claimant or the other Signal Maintainers to make sure that the days were correct; rather, he assumed that the Signal Maintainers would know this when he asked for their signature. The reasonableness of this assumption, however, is tempered by the fact that the Signal Maintainers did not have custody of the electronic PDA reports; only management did. Even more significant, De La Motte testified on cross examination that the Claimant had an opportunity to amend the printed reports, but conceded that the Claimant was not provided any other documents such as payroll or hours of service records that would have allowed him to check the accuracy of the listed dates which were anywhere from 21 days to eight months old.

In light of the above, the Board finds that the record evidence does not warrant the discipline issued. However, the Claimant was responsible for keeping accurate records and negligently failed to do so. Given the critical nature of the tests at issue and the Claimant's negligent recordkeeping, the Board finds that the Claimant should be reinstated with full benefits, but without backpay.

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 March 2010.