

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40300
Docket No. SG-40349
10-3-NRAB-00003-080163**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(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. C. Haas, for reinstatement to his former position with payment for all time lost and all rights and benefits restored with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it issued 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 December 20, 2006. Carrier compounded this violation by failing to comply with the time limit provisions of Rule 68-C. Carrier’s File No. 1463206 D. General Chairman’s File No. S-Investigation-817. BRS File Case No. 13923-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.

According to the record of formal Investigation conducted on December 20, 2008, this dispute arose over whether Claimant J. C. Haas, a 35-year employee of the Carrier, falsified legal documents by reporting completion of Federal Railroad Administration ("FRA") mandated tests as outlined in the Signal Maintenance, Inspection, Test, and Standard Instructions on Power Switches assigned to his care at East Shumla, West Langtry and East Malvado, Sanderson Subdivision, in possible violation of, inter alia, Union Pacific General Code of Operating Rule 1.6.¹

The record established that during March 2006, the Claimant was assigned as a Signal Maintainer on Gang 2732 headquartered at Langtry, Texas. J. Marrs, Manager of Signal Maintenance, testified that as part of their responsibilities, Signal Maintainers are required to complete Carrier Form 24094 titled Union Pacific Railroad Signal Department DOT-RS and I Test Form which shows the monthly, quarterly, six-month, and yearly tests performed on equipment by Signal Maintainers. The tests are required both by the Carrier's Rules and FRA mandate.

During the investigative Hearing, Marrs introduced three consecutively dated 24094 Forms indicating that the Claimant had performed certain required power switch tests on March 22, March 23, and March 24, 2006 in West Langtry, East Shumla, and East Malvado, respectively. Marrs explained that in order to perform the types of tests included on the Claimant's completed paperwork for the above dates, the Signal Maintainer must first call the Dispatcher and either (1) obtain permission to put the location in monitor; or (2) the Dispatcher can block the track

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."

and give foul time whereby one takes the switch off of power after which it will show that the switch is in hand throw or out of correspondence. Marrs also noted that the tests could be performed with tracking time. Regardless of which method is used, Marrs testified that Company CAD and track and time records would reflect such actions if taken.

After receiving the Claimant's paperwork, Marrs decided to review Company CAD records to confirm that the recorded tests, in fact, had been performed. He testified that he found that the CAD records showed no evidence that the switches in question on the above three dates in March had ever been put in either monitor or hand throw in order to perform the tests. He also testified that there was no evidence that the Claimant got track time on any of the above three dates at issue. Thus, he concluded that the Claimant had engaged in three separate acts of deliberate falsification of records, warranting dismissal.

The Organization argued that the charges should be dismissed on several grounds. First, the Carrier failed to notify the Claimant and the Organization of its decision to assess discipline within 15 calendar days after completion of the Investigation in violation of Rule 68-C of the parties' February 1, 2000 Agreement.² Second, the Claimant was denied a fair and impartial Investigation due to the Carrier's failure to provide vital reports (CAD, as well as Track and Time) requested by the Organization prior to and during the Investigation. The Organization asserted that had the requested documents been provided they would have shown that the Claimant did the tests in question, but inadvertently recorded incorrect dates on the reports; thus, the Carrier based its decision on less than a full record.

As a general rule, the Board will not substitute its judgment for that of the Carrier in disciplinary matters where the evidence establishes the misconduct charged. In this instance, however, the evidence suggests an exception to that principle is warranted. Specifically, we gain a sense from the overall record that in actuality the recordation at issue was less an act of willful dishonesty on three

² After careful consideration, the Board rejects the Organization's first argument as non-persuasive. The Investigation was conducted on December 20, 2006 and the Carrier notified the Organization and the Claimant on January 4, 2007 of its decision satisfying Rule 68-C's 15-day limitation.

separate occasions than a single non-willful recording error during a period in which the Claimant was suffering from significant medical issues.

Specifically, the record reflected that starting in November 2005, the Claimant began experiencing serious health problems. As he testified,

“I’ve had heart problems ever since around November of 2005. And I ended up having a stint put in [in September 2006] because I had a 70 percent blockage. But I kept going to the doctor and going to the doctors, and the doctors at Del Rio never found it – never found out what was wrong with me. They changed my medicine. I found one medicine that didn’t work so I – I kept having problems with dizziness and headaches.”

The Claimant also testified that during March 2006 he was sometimes forgetful and dizzy, but was attempting to do his job and get all the required medical tests done. He testified that his personal log book reflects that he went to the cardiologist three times in March including March 3, 27 and 30. He also testified that he was off work from June 2, 2006 to his release date of October 24, 2006.

After Marrs returned the Claimant to work on November 6, 2006, he asked him to turn in his test reports from March through May 2006. The Claimant testified that he thought he had already turned in the March reports, but Marrs said that he did not have them and asked the Claimant to supply them by November 10.

In the process of completing the reports eight months after the fact, the Claimant testified that he referred to his log book from March 2006. He noted that he does not always fill out his log book on the date the tests are performed. Rather, he may record the time the following day or as much as a week later. He noted that “On my district everything is hard to get to. These locations like Langtry – West Langtry and Malvado, they’re really hard to get to . . . cause you gotta get so much track [and] time to go into that place.” So sometimes he has gone as long as a week before recording the dates in his log book. He also testified that even though he honestly believed that he had performed the tests on the dates listed, given all the health issues and tests, it was possible that he erroneously put the wrong dates in his book.

In sum, the Claimant testified that to the best of his knowledge sometime during the month of March he went out and inspected and tested the switches in accordance with the yellow book, but could have inadvertently put down the wrong dates. In terms of his record with the Carrier, he also noted that:

“I have 35 years with the company, 27 years at Langtry and never had problems such as these with a test. I was fighting sickness and still trying to do my job. I have been a benefit to the company by living in Langtry. I am the man between Sanderson and Del Rio which is 120 miles. I have stopped bridge fires and grass fires before they really got started. I have helped railroad employees who have been injured on gangs. I have even helped with the death of a railroad employee. I am well known and would like to get back to my job and be a benefit to the company once more by living in Langtry. Also, I have never had an injury or caused a false clear or caused a derailment in my 35 years.”

The Board is persuaded from the record that it is less likely that an exemplary 35-year employee would, for no apparent reason, willfully decide not to perform required tests, falsify his own personal log book by pretending to have performed the test on three consecutive fictitious dates, and eight months later rely on such allegedly fictitious dates in completion of the required forms. It seems more plausible that he performed the test, but that he negligently, not willfully, erred in recording the proper dates due to a compromised medical condition during the period in question.

Additionally, the Claimant's actions should fairly be viewed not as three separate dishonest acts, but as one event in light of the single act of filling out the reports at the same time in November for three consecutive dates in March. Accordingly, the Board inclines to the view that asserting three acts of dishonesty is an overcharge. The most plausible conclusion to be drawn from the incomplete record is that the Claimant engaged in one negligent act – i.e., mis-recording all three dates at once in his log by relying on information that threw all dates off and compounding the problem in November when he relied on the erroneous entries.

Although the evidence does not warrant the discipline issued, 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.