Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40425
Docket No. SG-40743
10-3-NRAB-00003-080628

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
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(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 A. H. Swinhoe, Jr. for reinstatement to his former position with compensation for all time lost, including overtime, with his seniority and benefits 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 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 September 11, 2007. Carrier's File No. 1483218. General Chairman's File No. S-Investigation-882. BRS File Case No. 14058-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 before the Board, Claimant A. H. Swinhoe, Jr., then a 26-year UP employee, was terminated from his position as Signal Maintainer on September 24, 2007 following an Investigation conducted on September 11 into allegations that he failed to perform a number of monthly required inspections and tests on equipment on his territory between April 1 and August 24, 2007. The Organization challenged that action, and after its claim was declined at the highest appeal level in claim handling and duly conferenced, it advanced the matter to the Board for final and binding determination.

The evidence adduced at the Claimant's formal Investigation indicates that Carrier's Level-5 dismissal was based upon its finding that the Claimant had been negligent in failing to perform proper testing and inspection of island circuits during the relevant time frame as required by "Union Pacific Railroad Signal Maintenance, Inspection, Test and Standard Instructions" at several locations, creating an unsafe condition for the traveling public and other trains at those sites. Additionally, it determined that the Claimant had failed to perform proper testing and inspection of flashing light units as dictated by the Carrier's published procedures for crossing warnings, train detection apparatus, at two further locations. The net result of that negligence, the Carrier argues, was that by failing to shunt the tracks to simulate an approaching train, causing the gates to drop, defects were not detected at certain gates, exposing the public to grave risk. Further, the Claimant's failure to test LED lights at certain rail crossings to make certain they operated on both AC and DC power as required similarly posed potentially serious dangers to vehicular traffic in the event of a failure of commercial power.

The Organization puts forth a number of arguments, including that the Claimant was new to this badly maintained territory; that he had bid onto it only approximately four months earlier, and even by the Carrier's own admission, some of these defects had existed "for several months and possibly years;" that the disrepair was evidenced by the Claimant's having had to change six banks of batteries in a very short period of time and the FRA's issuance of more than 1200 violations in the Houston Terminal in 2007; that the Claimant had requested assistance on the territory when he assumed responsibility, but had not been given it; that his short stint on the job had been interrupted when he had to suspend his maintenance duties for three weeks to assist Maintenance of Way forces; and that,

accordingly, it was unrealistic thinking for the Carrier to insist that the Claimant complete the work of bringing the territory up to standards in such a short period of time.

Contributing to the problem, the Organization argues, was the fact that the Claimant's immediate Supervisor had never been on his territory and did not know specifically what equipment the Claimant was responsible for inspecting and testing, as evidenced by its citation of several incorrect crossings in its charge letter. Additionally, hard evidence of the Claimant's negligence was lacking here - the LED lights could have worked on AC and DC during a monthly test, but failed before the next monthly test, working then on AC, but not DC. Or other Signal Maintainers could have made changes to circuits after the Claimant had performed his monthly tests, because both second and third shifts work the area, as well as a swing shift on weekends, leaving numerous other employees with access to the equipment. With respect to the island circuits not shunting out with an .06-ohm shunt, the Carrier's Yellow Book instructions do not specifically identify where the island circuit is to be tested. If the Carrier had wanted these circuits to be shunted on both sides of the crossing, it should have issued clear rules so stating. Finally, it asserts that in light of the Carrier's actions in imposing disqualification or lesser discipline on other Signal Maintainers for similar infractions, dismissal in this instance was excessive and arbitrary.

Upon careful review of the record, the Board concludes that the Carrier has demonstrated by substantial credible evidence that the Claimant failed in his responsibility to follow appropriate required testing. Indeed, with respect to testing LED lights, the Claimant himself admits that he did no testing because he believed none was necessary. We further find that the possibility of other employees contributing to these problems rests on unproven speculation. The Organization's evidence pertaining to both other Signal Maintainers having had difficulty with this equipment on their territories and to disparate levels of discipline assessed for similar infractions by others was not presented during claim handling on the property and is thus beyond the purview of the Board.

However, while substantial evidence was adduced to support a finding of negligence, we find several of the Organization's contentions forceful. The record raises concerns about whether the Carrier took sufficient account of the apparently longstanding poor condition of the equipment that the Claimant had only recently inherited. Approximately three months plus of active work when the Maintenance

of Way induced interruption is considered, with no assistance, may not have been sufficient to rehabilitate equipment that had been allowed by management to be inadequately maintained for a prolonged period of time. When those mitigating circumstances are considered together with the absence of any FRA penalties in this instance, the Claimant's long, 26-years of apparently satisfactory service and his seeming unfamiliarity with the proper required LED test and inspection protocol, the Board inclines to the view that dismissal was arbitrary and that disqualification would have been a response more appropriate to the circumstances. Nothing in this record suggests that with further training and guidance the Claimant cannot resume a productive career in the Carrier's employ.

In view of the foregoing, the Claimant's dismissal shall be converted to a disqualification from the position of Signal Maintainer, Gang 2960 with appropriate further instruction and supervision afforded as required. In view of the multiple failures documented in this record, we find backpay to be unwarranted.

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 14th day of May 2010.