

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40526
Docket No. SG-39615
10-3-NRAB-00003-060400
(06-3-400)

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 M. L. Peace, for the Claimant’s return to his former position with compensation for all lost straight time and overtime and any differential between the Signal Maintainer and Signalman’s rates of pay, with seniority and benefits unimpaired and with any reference to this matter and the previous improper references removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rules 52 and 68, when it improperly disqualified the Claimant from his Signal Maintainer’s position in a letter dated April 6, 2005 and then failed to return the Claimant to his former position after an unjust treatment hearing held on May 17, 2005. Carrier’s File No. 1428047. General Chairman’s File No. N 68 563. BRS File Case No. 13626-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.

On March 11, 2005, the Claimant was allegedly involved in a failure of a grade crossing device in Greeley, Colorado. As Signal Maintainer, there is no dispute that he had performed tests at that location due to an activation failure. The Carrier initiated a disciplinary Investigation into the Claimant's alleged involvement in the activation failure of the crossing warning device. The record reflects that the Carrier failed to timely proceed, negating discipline. However, on April 6, 2005 the Claimant was notified that he was disqualified due to his crossing device failure, along with two prior occurrences in 1993 and 1994.

The Organization argues that the Carrier's disqualification violates Rule 68 (Investigations, Discipline and Appeals) and Rule 52 (Assigning Positions). It argues that the Claimant cannot be disciplined without a fair and impartial Investigation. The Organization further argues that the Claimant was assigned to the Signal Maintainer position and has properly qualified. In fact, the Claimant has 27 years of service with more than one dozen years as a Signal Maintainer on this same assignment.

Pursuant to the Organization's request, an Unjust Treatment Hearing under Rule 70 was held on May 17, 2005. It further argued, thereafter, that there was no proof of the Claimant's involvement in the failure of the crossing device. It was not proven in the disciplinary Hearing and was not thereafter established by any evidence or testimony. The Organization argues that there are a lot of serious issues with this disqualification.

Among these issues are problems with proof. The Organization argues that the Carrier was unable to prove the Claimant's involvement during the disciplinary

Investigation. Further, the Organization maintains that there is no proof that the Claimant was involved in a malfunction as the Carrier alleged. There is no proof that the Claimant violated any Rule. In fact, the Organization alleges that this is a failure of a 25-year old crossing warning device, which it thereafter maintains lacks properly configured batteries. The Organization denies that the Claimant was required to “jumper the crossing up” in running the limited tests he performed. The Organization strongly argues that the Carrier failed to prove the Claimant’s involvement and then coupled its suppositions with two events occurring more than a decade earlier to arrive at this unfair action; a use of disciplinary actions which were well beyond the cumulative disciplinary policy.

The Board studied the full record. Much of it centers upon disciplinary actions and we, therefore, comment on that part of the dispute first. This case involves a disqualification. Because Rule 68 applies to discipline, it is not applicable. The Carrier has the right to disqualify employees when it determines that they no longer engage in work performance that demonstrates appropriate fitness and ability. In this regard, Third Division Award 36957 clearly stated:

“The Carrier determines whether its [employees] have the fitness and ability to perform their duties, subject to review by the Board only as to whether the Carrier’s decision was arbitrary.”

The Board carefully studied the Carrier’s decision. The facts presented are that the Claimant was the only Signal Maintainer who had worked on that crossing device. Manager of Signal Projects Abrams submitted evidence that he interviewed employees and tested the equipment, but found no defects or reason for the occurrence except employee involvement. Manager Abrams and Federal Railroad Administration representative Le both concluded that the activation failure was caused by an employee failure.

The Board notes that the Claimant (1) worked on that crossing device to permit a BMW Surfacing Gang and hy-rail to move past (2) was the last employee at that crossing less than one hour before the failure and (3) was the first to return after the report that immediately after the Claimant finished working on the device, a train had passed with an activation failure occurring. The Board cannot find the

Carrier's conclusion that the Claimant was involved in this serious incident improper. A train approached and passed through the crossing without the warning device indicating to pedestrians and cars of the train's approach and movement. The warning device failed immediately after the Claimant worked on the device. The Board concludes that there is substantial probative evidence of the Claimant's failure.

The Board considered the Organization's positions carefully. We fail to find any proof to support the numerous arguments that the equipment failed, or that the cause of the failure was due to outdated equipment that the Carrier has since "abandoned" for better crossing warning devices.

Additionally, the Board considered the two prior incidents wherein the Claimant waived a Hearing in 1993 concerning crossing protection not activating properly and in 1994 for crossing protection failing to activate when a train moved across. In addition to three crossing device failures, there is more in the record. Manager Abrams determined that the Claimant's jumper cables violated the Rules in that they were not permanently tagged. The Claimant had recently attended training and his answer that he only needed to tag the cables when he was jumpering a crossing does not conform to training or Rules.

The disqualification of the Claimant was supported by the Carrier with testimony and evidence. The Carrier stated on the property:

"It is duly noted that neither Claimant nor your Organization has submitted even a shred of probative evidence to support your theory that Claimant, who demonstrated an inability to perform the safety-sensitive duties of Signal Maintainer and failed to comply with carrier directives concerning the proper tagging and identification of jumper cables, remained somehow fit and able to continue in the complained-of capacity of Signal Maintainer."

The Board has concluded that the Organization failed to provide the evidence necessary to document the Carrier's error in disqualification of the Claimant. There is nothing in the record to support equipment failure or causes other than the

Claimant's improper actions. There is nothing in the record to conclude that the two prior failures are dissimilar or unrelated, or that the Claimant's compliance with tagging and identification of cables was a qualified action. The fact that the Claimant has been on the job for many years does not limit the Carrier's actions (Third Division Award 29307).

In fitness and ability disputes, including disqualification, the Organization must demonstrate that the Carrier's actions were arbitrary (Third Division Awards 5417, 6829, 11231 and 14040). In the instant case, the Board is unable to find that the Carrier acted arbitrarily when it determined that the Claimant was no longer qualified to hold the position of Signal Maintainer. Accordingly, the claim must be denied.

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 15th day of June 2010.