

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40825
Docket No. SG-41278
11-3-NRAB-00003-0100128**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Kansas City Southern Railway Company (former
(Texas Mexican Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern (formerly Tex-Mex):

Claim on behalf of M. F. O’Sullivan, for reinstatement to his former position with payment for all time lost and with his rights and benefits restored, account Carrier violated the current Signalmen’s Agreement, particularly Rule 31, when it issued the harsh and excessive discipline of a five day suspension and a 25 day record suspension in addition to his driving privileges suspended until further notice, which is equivalent to a dismissal from service against the Claimant without providing a fair and impartial investigation in connection with an investigation held on October 7, 2008. Carrier’s File No. K0609-6695. General Chairman’s File No. 08-046-TM-185. BRS File Case No. 14313-TextMex.”

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.

At the time of the incident leading to his suspension, Claimant M. F. O'Sullivan was assigned to the Signal Department. According to the Carrier, on April 25, 2008, the Claimant, while driving a Carrier vehicle, failed to yield to oncoming traffic while approaching Highway 77 at about 7:30 A.M., resulting in a collision in which the Claimant suffered injuries to his back, left shoulder, and a laceration above his left eye.

By letter dated May 5, 2008, the Carrier directed the Claimant to report for a formal Investigation “. . . to ascertain the facts and determine your responsibility, if any, in connection with:

- 1) Your alleged failure to yield to oncoming traffic while approaching Highway 77 from eastbound on 4th Street in Bishop, TX, at about 0730 hours on April 25, 2008, resulting in an automobile collision with a southbound vehicle on Highway 77, in which you allegedly injured your back, left shoulder and a laceration above your left eye.**
- 2) Your alleged failure to report for service at the required time for the beginning of your tour of duty on April 25, 2008.”**

The Hearing was postponed and took place on October 7, 2008, pursuant to which, in a letter dated October 20, the Claimant was notified of his 30-day suspension, to be served as a five-day suspension and 25-day record suspension. In addition, the Claimant's driving privileges were suspended until further notice.

By letter dated November 28, 2008, the Organization appealed the decision contending that the Carrier did not meet its burden of proof and that the discipline assessed was unwarranted and excessive. On January 28, 2009, Signal Engineer V. A. Jones denied the appeal. On February 17, 2009, the matter was appealed by the Organization to Director of Labor Relations J. Y. Robinson. On April 16, 2009, the appeal was denied. On July 20, 2009, a conference was held, but the parties were unable to resolve the matter, and it was then appealed to the Third Division.

According to the Organization, the discipline imposed upon the Claimant was unwarranted, harsh and excessive. The Organization contends that the Carrier failed to meet its burden of proof. The Organization asserts that the Carrier (1) has been arbitrary and capricious in its treatment of the Claimant (2) has abused its discretion and (3) its determination to discipline the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. In addition, the Organization submits that the Claimant was denied a fair and impartial Investigation. The Organization contends that the Claimant acted properly and responsibly on the day in question. The Organization asserts that the Carrier should now be required to overturn the discipline and make the Claimant whole for all losses.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing makes it clear that the Claimant was guilty as charged. The Claimant received a citation for failure to yield the right-of-way and thus was responsible for the accident on April 25, 2008. Based on the instant offense, the discipline imposed was appropriate.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325 and Third Division Award 16166.)

The Board found substantial evidence in the record to uphold the Carrier's position with regard to the accident of April 25, 2008. We note that the Carrier proved that the Claimant failed to yield to oncoming traffic, which resulted in an accident. We concur that the Claimant violated the Rules alleged, and we concur that the Carrier had the right to impose appropriate discipline. In this case, the Carrier imposed proper discipline; however, we have determined that the driving suspension imposed upon the Claimant has served its purpose and shall now be lifted.

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 11th day of January 2011.