

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40949
Docket No. SG-39785
11-3-NRAB-00003-060593**

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

PARTIES TO DISPUTE: (**(Brotherhood of Railroad Signalmen
(Kansas City Southern Railway Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern:

Claim on behalf of B. Stewart, for compensation for all lost wages, including skill pay, with all rights and benefits unimpaired and his personal record cleared of any reference to this matter, account Carrier violated the current Signalmen’s Agreement, particularly Rule 47, when it issued the excessive discipline of a 45-day suspension 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 July 18, 2005. Carrier’s File No. K06056037. General Chairman’s File No. 05-087-KCS-185. BRS File Case No. 13635-KCS.”

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.

The Claimant was disciplined for violating the Hours of Service Law (HOS) on June 22, 2005. At the time of the incident, the Claimant had some six years of service.

The instant dispute involves questions about the proper application of the HOS¹ to the facts at hand. Specifically, the dispute raises two issues. The first is the proper categorization of non-safety sensitive service occurring after safety sensitive service. Secondly, the dispute raises the issue of how such non-safety sensitive service is counted against the 12-hour limit of the HOS in a 24-hour period.

Absent emergency circumstances, which are not present here, it is undisputed that the HOS limits an employee to performing no more than 12 hours of covered service in a 24-hour period. The HOS seeks to prevent fatigue due to long hours of work from adversely impacting safety-sensitive work. Safety-sensitive work, such as installing, repairing, or maintaining signal systems is covered service (CS). Other non-safety sensitive duty, such as driving to or from a work site, is non-covered service (NCS). However, such NCS is sometimes “co-mingled” with CS and is counted as CS against the 12-hour limit. The precise requirements of the HOS were not established during the Investigation. It appears that NCS performed before CS begins is treated as though it was CS; thus, the CS must cease at the end of 12 hours of NCS and CS. On the other hand, if NCS is performed after CS is completed, then the NCS does not appear to count against the 12-hour CS limit.

Compounding the instant dispute is the fact that the Claimant’s record of his service, both CS and NCS, on June 22, 2005, is clearly not accurate. It was prepared on July 6, 2005, from the Claimant’s memory while he was away from his home and did not have access to his actual notes and records of his work on June 22, 2005. It was submitted from memory because he was required to do so immediately in response to a telephone request from his supervisor.

The work log that the Claimant submitted from memory was off by one-half hour. It showed him performing 12.5 hours of CS, which would have constituted a violation of the HOS. The record he submitted showed him completing CS at 6:30

¹49 CFR § 228.

P.M. on June 22, 2005. However, another Carrier record he generated showed that he actually completed CS at 6:00 P.M. that day. This other record was generated contemporaneously at 6:00 P.M. on June 22. However, the Claimant did not have access to this record when he submitted his log on July 6 based on his memory of what had occurred two weeks previously.

If the contemporaneous record is accepted as being accurate, then the Claimant did not violate the HOS on June 22. It is clear he completed his CS by 6:00 P.M. that day. If the later record he prepared from memory for June 22 on July 6 is the governing document, then the Claimant did violate the HOS. This document showed him completing his CS at 6:30 P.M., which would have exceeded the HOS limitation by 30 minutes.

It is undisputed on the Investigation record that the Claimant was engaged in putting away and cleaning up his tools between 6:00 P.M. and 6:30 P.M. on June 22. It was not safety-sensitive service. It is undisputed that the Claimant had completed his repair service on a crossing flasher by 6:00 P.M. according to the contemporaneous record he generated. The repair service was CS, but it had been finished by 6:00 P.M. Thus, we have the question of whether cleaning and putting away his tools must be co-mingled with the CS and counted as CS. The Carrier contends it must be. The Claimant asserts it never has been.

As previously noted, the precise requirements of the HOS were not established in the record of the Investigation. Specifically, when and to what extent NCS is to be counted against the 12-hour limit was not clearly established. The text of the HOS as it pertains to the counting of NCS was not made a part of the record.

Given the state of the Investigation record, we must conclude that the Carrier did not sustain its burden to prove that the Claimant violated the HOS. Accordingly, the claim must be sustained.

AWARD

Claim sustained.

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 24th day of March 2011.