

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41789
Docket No. SG-41822
13-3-NRAB-00003-120096

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(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 T. J. Asher, 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 Rules 2 and 47, when it issued the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation in connection with an investigation held on October 22, 2010. Carrier’s File No. K0610-8038. General Chairman’s File No. 10-057-KCS-185. BRS File Case No. 14561-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 is a Signal Inspector and long-term employee. On October 22, 2010, a formal investigative Hearing convened to determine the Claimant's "... responsibility, if any, in connection with an incident that occurred on July 12, 2010."

Specifically:

"While serving as a signal inspector, it is alleged that you failed to properly perform your duties in a safe and proper manner by failing to follow instructions concerning the removal of gated flasher warning devices at 5th Street in Sachse, TX. On August 19, 2010, it was discovered that the island wires for the crossing equipment were still connected to the rail, as were both shunt boxes. The wires that were left are within the approach limits of two adjacent crossings in dark territory.

Carrier's first knowledge of incident was August 19, 2010."

After reviewing the Investigation transcript, the Southeast Division General Manager determined that the Claimant was responsible for the incident on July 12, 2010, which constituted a violation of Rule 1.6 - Conduct due to the Claimant's failure to follow instructions and improper performance of his duties in an unsafe manner. Based on this incident and Rule violation, the General Manager dismissed the Claimant from service effective immediately November 1, 2010.

This claim, dated December 23, 2010, was handled on the property in the usual and customary manner, up to and including the highest designated officer of the Carrier. Following discussion of the claim in conference on February 18, 2011, the parties' positions remained unchanged and the claim is now properly before the Board for final adjudication.

On July 12, 2010, four employees (the Claimant, a Signal Foreman, an Assistant Signalman and an unidentified employee) were working on a grade crossing removal project. Track wires at this crossing were to be disconnected from the track upon completion of the project. On August 19, 2010, the Project Manager (Engineering) and a Signal Foreman (a different Signal Foreman from the one who had been working on the project) discovered that the track wires remained connected.

The Organization alleges violations of Rule 2 – Classification and Rule 47 – Discipline/Investigations. Rule 2 states that the Signal Foreman “is assigned to the duties of supervising the work of a gang of other employees[.]” Thus, the Signal Foreman supervises the gang and is responsible for ensuring that it properly and safely disconnected and removed track wires from the rail. By comparison, the Claimant is a Signal Inspector “whose principal duties are (but not limited to) inspecting, testing and repairs of signal apparatus[.]” In accordance with Rule 2, the Claimant does not supervise a gang. Although the Project Manager testified that he instructed the Claimant to oversee (supervise) the work because the Project Manager lacked confidence in the Signal Foreman’s abilities, the Assistant Signalman testified that the Signal Foreman issued work instructions on the incident date. The Project Manager placed culpability on the Claimant based on the improper assignment of supervisory responsibilities notwithstanding the presence of the Signal Foreman. Despite this violation of Rule 2, the Claimant complied with the Project Manager’s instructions and removed all equipment in a timely manner so as to enable the contractor to commence widening the road as scheduled.

Even though the Signal Foreman was present and responsible for supervising the gang, the Carrier did not call him to testify at the Hearing. This violates Rule 47 - Discipline/Investigations, because it denied the Claimant a fair and impartial Hearing. In this regard, the Carrier is obligated to have all employees with knowledge of the incident at the Hearing to testify. By not arranging for the Signal Foreman’s presence, the Hearing Officer did not fully investigate all relevant aspects pertaining to the incident, specifically, the responsibilities of the three other employees who were working on the grade crossing removal. Instead, the Carrier arbitrarily and capriciously leveled culpability for the incident on the Claimant.

Additionally, the Project Manager was not a credible witness given discrepancies in his testimony. For example, he acknowledged that he did not know whether the Claimant tested the two adjacent crossings. He further acknowledged that there are recorders at those crossings that would have verified whether the Claimant tested the wiring, but the Project Manager did not review the recorders prior to assessing culpability on the Claimant for the incident. The Project Manager also testified that another employee (who was not present on July 12, 2010) tested the rails on August 19, 2010, to determine whether there were shorts between the wires and reported the results of the tests to the Project Manager; however, this employee testified that he did not test the wires and did not report any results to the Project Manager. The absence of a critical witness with knowledge of the incident and the

Carrier's reliance on the Project Manager's discredited testimony in its decision to dismiss the Claimant served to deny the Claimant a fair and impartial Hearing under Rule 47.

Conversely, the Carrier contends that the Claimant violated Rule 1.6 - Conduct because he failed to perform his duties in a safe and proper manner by failing to follow the Project Manager's instructions to supervise the gang and ensure that the gated flasher device was removed. The Claimant acknowledged that he had performed this type of work in the past, e.g., disconnecting wires at road crossings, as well as issued work instructions to a gang in his capacity as a Signal Inspector. The Claimant's improper and unsafe performance of his duties resulted in wires remaining connected to the rail and shunt boxes. The Claimant minimized his unsafe and improper performance of duties by describing the incident as an "oversight" by all employees in the gang and attributed it to a limited window of time to complete the work and vacate the area prior to contractor forces arriving at the crossing to commence widening the road. This "oversight" exposed the public and others to a potential safety hazard - if not a train collision - because the signals would not have activated with sufficient advance notice for a train approaching the grade crossing.

As for the Signal Foreman not testifying, the Carrier advised the Organization to contact that individual and arrange for his presence at the Hearing. The Organization acknowledged at the Hearing that it never contacted the Signal Foreman. Each party is responsible for contacting its own witnesses.

The discipline assessed - dismissal - is the last step in a series of escalating disciplinary measures for the Claimant. This incident is the Claimant's third infraction in the past three years. Given his disciplinary record, dismissal is not excessive or harsh.

Having considered the on-property record established by the parties, the Board observes that the Claimant acknowledged the "oversight" with the wires remaining connected to the rails after the removal of the grade crossing. This acknowledged "oversight" is coupled with the Project Manager's instructions to the Claimant to assist with the grade crossing removal in a substantive manner, because the Project Manager lacked confidence in the Signal Foreman's ability. The Claimant's substantive role complemented the Signal Foreman's responsibilities; the descriptive wording in Rule 2 for a Signal Inspector - "duties are (but not limited to)" - is sufficiently flexible to accommodate the Project Manager's instructions to the

Claimant. Thus, the Board finds that there is substantial evidence in the record to warrant the Carrier's decision to assess discipline to the Claimant given his substantive assignment in the project and his acknowledged "oversight" concerning the wires.

Dismissal, however, is harsh and excessive. The Claimant was the only employee subjected to discipline, whereas the other employees (the Signal Foreman, the Assistant Signalman, as well as an unidentified employee) who were working alongside the Claimant incurred no discipline. Harsh and excessive discipline is inconsistent with a progressive disciplinary scheme. Given the unique facts and circumstances of this case, the Claimant's dismissal is hereby reduced to a long-term suspension. The Claimant shall be reinstated with seniority unimpaired, 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 17th day of December 2013.