

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26135

Docket Number MW-26089

Lamont E. Stallworth, Referee

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The thirty (30) working days of suspension imposed upon Flagperson L. J. Peterson, for alleged '*** failure to operate the crossing signals at Monroe and Adams Streets' was arbitrary, without just and sufficient cause and on the basis of unproven charges (System File 13-6(a) #1627/800-16-A-69).

2. The claimant's record shall be cleared of the charge leveled against her and she shall be compensated for all wage loss suffered."

OPINION OF BOARD: The basic facts are undisputed. Claimant is employed as a Flagperson whose regularly assigned duty hours were from 12:01 A.M. to 8:01 A.M. As a Winneconne Avenue Tower Operator, Claimant's duties included operating remote controlled manually activated crossing signal devices at Adams and Monroe Streets at Neenah, Wisconsin.

On August 23, 1983, the crossing signals did not operate for trains approaching at 2:50 A.M. and 3:55 A.M., respectively.

Subsequent to an Investigation by Carrier, Claimant was notified by letter on August 26, 1983, that she was being suspended for negligence.

There are basically two issues involved in the instant case. The Board will address the procedural argument first.

Although Carrier's August 26, 1983 letter failed to advise Claimant of her right to a Hearing under Rule 13-6(a) of the Agreement, Claimant timely requested a Hearing in a letter dated September 1, 1983, under the provisions of Rule 13-6(b).

Thereafter, Carrier responded by letter dated September 6, 1983, that a Hearing was scheduled for September 9, 1983. Following the Investigative Hearing, Claimant's suspension was upheld and assessed to run thirty (30) working days concurrent with her present suspension.

The Organization contends Carrier's failure to inform Claimant of entitlement to a Hearing when she was suspended is a violation of the Agreement. Further, the Organization objects to any discipline imposed as unsupportable and in violation of the Agreement.

The Rule states in pertinent part:

"Rule 13-Time Limit on Claims Grievances and Discipline.

6. (a) An Employee who has been in the service 60 days or more, and whose application has been approved, if disciplined or dismissed, will be advised of the cause for such action in writing, and also advised of his right to a hearing.

(b) An Employee disciplined or dismissed shall have a fair and impartial hearing, provided that a written request is presented to the Roadmaster or Regional Engineer within 10 days after date of advice of discipline. Hearing shall be granted within 10 days thereafter, and decision will be rendered within 10 days after date of hearing."

While Rule 13-6 (a) does contain a requirement to advise, the Board notes that Carrier complied with the provisions of Rule 13-6 (b) and properly scheduled a Hearing eight days after Claimant's request was made in writing.

The Organization also contends that it was not afforded sufficient time to prepare a proper defense, particularly in view of the technical nature of the testimony developed at the Hearing.

The record clearly shows that the Organization did not object to the Hearing date assigned. There is no suggestion whatsoever in the record that the Organization was not fully prepared to defend Claimant at the Hearing or that additional time was needed for such purpose.

Therefore, in the Board's view, no harm was done, Claimant was afforded a fair and impartial Hearing and her rights were not compromised.

Given that no infringement of Claimant's procedural rights are shown arising out of the Agreement, the Board cannot give any weight to the Organization's objection.

The Board turns now to the substantive issue of whether or not there is conclusive evidence to support the charges against Claimant.

Briefly, the highway crossing signals at Monroe and Adams Streets are activated manually from the control tower that was manned by Claimant.

She testified that she turned on the crossing signals for the approaching trains, that she did not have any problems with the signal system, that to her knowledge the lights were working and she was aware and alert at the time.

Carrier asserts the only reason the signals would not have worked would have been that Claimant did not turn them on.

The evidence presented by Carrier's witnesses is circumstantial.

Carrier's Relief Signal Maintainer stated he inspected the crossing signals just after the incident and found them to be in good working order.

Carrier's Assistant Regional Engineers conducted an Investigation over a period of two days and testified that watch persons on duty before and after Claimant, the same day and following day, experienced no equipment problems whatsoever.

Their testimony in uncontroverted that all signals inspected were in proper operating condition, there was no mechanical malfunction before or after the incident and no unusual or environmental factors could have caused the system to malfunction.

While the Organization disputes the testimony of the Carrier's witnesses as conjecture and speculation, it does not offer evidence to contradict the facts developed at the Investigation which clearly establish that the signals at both crossings were in working order.

The Organization's major defense is that Claimant did nothing improper and Carrier did not prove conclusively that failure to operate the crossing signals was due to operator negligence.

After a careful review of the Transcript of the record, the Board is satisfied that such assertions by the Organization are without merit. Carrier conducted a proper and thorough Investigation examining all possible explanations for the failure before charging Claimant.

Although the evidence is circumstantial, it is substantial nonetheless. The Board has often held that circumstantial evidence is appropriate where no other explanation of the occurrence is plausible. See Third Division Awards Nos.: 20781, 22635, 12491. In the later Award, the Board stated:

"The mere fact that the evidence is circumstantial, makes it no less convincing and the Board cannot say as a matter of law that the Carrier was not justified in reaching its conclusion following the trial."

In Award No. 21419, this Division said:

"The main difference between circumstantial evidence and direct evidence is that the former requires inferences to be drawn from the facts disclosed. The probative value of such proof depends upon the compelling nature of the inference required."

and:

"... (the) mass of the evidence against them is circumstantial. But the direction and weight of the evidence all point inescapably to the conclusion that Claimants are culpable. In our considered judgment there is no other reasonable conclusion than that substantial evidence of record supports the findings against them. Nor, in the circumstances can we say that the discipline assessed was arbitrary, unreasonable or capricious."

Although Claimant in the instant case denies it, the evidence in the record overwhelmingly establishes that the only opportunity for error was failure of the operator to activate the system.

Considering the seriousness of the unsafe condition which resulted from the signals being not activated by Claimant, the discipline assessed was reasonable based on the record. Accordingly, the Claim is denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

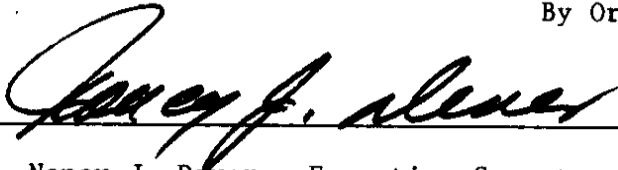
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

A handwritten signature in cursive script, appearing to read "Nancy J. Dever", is written over a horizontal line.

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of September 1986.