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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37361
Docket No. SG-37745
05-3-03-3-89

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
(
(Wheeling & Lake Erie Railroad

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Wheeling And Lake Erie (W&LE):

Claim on behalf of J. T. Worrell and S. R. Konczal, for reinstatement to their former positions with their seniority unimpaired, payment of all lost wages including overtime lost, payment and restoration of all benefits lost, and any reference to this matter removed from their personal records, account Carrier violated the current Signalmen’s Agreement, particularly Rule 37, when it imposed the harsh and excessive discipline of dismissal against the Claimant without meeting its burden of proving its charges in connection with an investigation held on November 9, 2001, making Carrier’s action in this case arbitrary and capricious. Carrier’s File No. NA. General Chairman’s File No. 231-02-20-02. BRS File Case No. 12522-W&LE(MofW).”

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.

S. R. Konczal and J. T. Worrell were assigned to work together on the same machine as Brush Cutter Operators on October 23, 24 and 25, 2001. Their assigned tour of duty was from 7:00 A.M. to 5:30 P.M. on each date. They were working in the vicinity of New Washington, Ohio. The Carrier questioned the amount of time it was taking for the brush cutter to make its way across the railroad, as it appeared to be excessive. The Carrier employed a Private Investigator, Charles E. Penrod, a Certified Claims Professional, to observe the brush cutter crew.

Investigator Penrod noted the crew's activity for October 23, 24 and 25, 2001. The observations made by the Investigator were recorded on videotape as follows:

DATE	CLAIMANT WORRELL'S ACTIVITIES	CLAIMANT KONCZAL'S ACTIVITIES
10/23/01	Arrived 6:57 a.m. No activity until 8:20 a.m. 2:30 p.m. Vehicle is no longer at New Washington Did not wear hard hat	No activity until 8:20 p.m. Did not wear hard hat
10/24/01	7:14 a.m. Arrived, sat in vehicle 7:52 a.m. Exited vehicle 8:07 a.m. Started to prepare the brush cutter for operation 10:07 a.m. Train passed but was not inspected as required 4:28 p.m. Left work site Did not wear hard hat	7:09 a.m. Arrived, sat in vehicle 7:59 a.m. Exited vehicle 8:07 a.m. Started to prepare the brush cutter for operation 10:07 a.m. Train passed but was not inspected as required 4:38 p.m. Left work site Did not wear hard hat
10/25/01	6:59 a.m. Arrived, sat in vehicle 7:33 a.m. Still in vehicle 7:36 a.m. Out of vehicle, getting dressed 3:59 p.m. Left work site Did not wear hard hat	7:04 a.m. Arrived, sat in vehicle 7:33 a.m. Still in vehicle 7:36 a.m. Out of vehicle 4:09 p.m. Left work site Did not wear hard hat

The Claimants claimed ten hours' service for each date on their time sheets. Additionally, Claimant Konczal claimed one hour of service at his overtime rate of pay for October 25, 2001. It was alleged by the Carrier that the Claimants failed to report for duty at the required time and place, absented themselves from duty without permission of a designated officer, entered time on their time slips that did not reflect work actually performed, and committed theft. It is also alleged that the Claimants failed to properly inspect a passing train and failed to wear the required safety equipment.

By letter dated November 1, 2001, the Claimants were directed to attend an Investigation to be held on November 9, 2001 "... to ascertain the facts and determine your responsibility, if any, in connection with the alleged failures listed below while you were on duty as brush cutter operators working in the vicinity of New Washington, Ohio, on October 23, 24 and 25, 2001, when during your assigned tour of duty from 0700 hours to 1530 hours you allegedly failed to protect your job responsibilities and you allegedly failed to observe your assigned work schedule and provided false information on your time sheet. The Carrier's first knowledge was October 30, 2001.

- * Alleged failure to report for duty at the required time and place.
- * Alleged failure to not absent yourself from duty without permission of a designated officer.
- * Alleged failure to not enter time or wages on time slips that do not reflect work actually performed or agreed upon allowances
- * Alleged theft.
- * Alleged dishonesty.
- * Alleged failure to wear required safety equipment.
- * Alleged failure to inspect passing train.
- * Alleged willful disregard of the Company's interest.
- * Alleged failure to be familiar with and obey all rules and instructions."

The Investigation was held on November 9 and 12, 2001. In separate notices dated November 27, 2001, the Carrier notified the Claimants that as a result of the Investigation, they were being dismissed because they "... violated Wheeling and Lake Erie Operating Rules T, D, B, 109, Wheeling & Lake Erie System Timetable General Special Instructions T, Wheeling & Lake Erie Policy Manual - General Statement of Policy - Dismissible Offenses, and Norfolk & Southern Safety and General Conduct Rule 1040 as adopted by the Wheeling & Lake Erie, Wheeling & Lake Erie Policy Manual General Statement of Policy - Protective Equipment."

By letter dated February 20, 2002, the Organization appealed the Carrier's decision to dismiss the Claimants, contending that the Carrier failed to meet its burden of proof and that the discipline assessed was unwarranted and excessive. Specifically, the Claimants contended that the Carrier violated Rule 37 when it failed to provide the Claimants with a fair and impartial Investigation and then imposed excessive discipline against the Claimants.

The Organization claims that the discipline was unwarranted. It asserts that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. The Organization contends that the Carrier imposed harsh and excessive discipline against the Claimants. According to the Organization, the Carrier's decision to discipline the Claimants constitutes an abuse of its discretion and the Carrier should now be required to compensate the Claimants for all lost time and benefits, with all reference to the discipline and Investigation to be removed from their personal records.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimants were afforded a fair and impartial Investigation in accordance with the requirements of the Signalmen's Agreement. The Carrier considers the Claimants guilty as charged. According to the Carrier, the record in this matter provides substantial evidence to support the Claimants' culpability. The Carrier contends that it met its burden of proof and that the discipline was appropriate based on the nature of the offenses.

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 the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass 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 its discretion. See Second Division Award 7325 and Third Division Award 16166.

The Board finds that the Organization's complaints regarding the fairness of the Investigation are without merit. There is substantial evidence in the record to uphold the Carrier's position. The Carrier proved that the Claimants violated the relevant Rules. The evidence shows that the Claimants did not perform their required work on October 23-25, 2001. In addition, there is substantial evidence to prove that the Claimants were not wearing the required safety equipment and also failed to inspect passing trains.

Based on the record, the Board concludes that dismissal is the appropriate penalty for both Claimants. We note that Claimant Worrell had previously received a written

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reprimand, a five-day deferred suspension and a dismissal that had been reversed by the Carrier. Claimant Konczal had previously received a written reprimand, a written warning and a five-day deferred suspension. Based on the instant offense, as well as the Claimants' prior record, the discipline imposed upon the Claimants is reasonable and we will not overturn it. Therefore, the claims are without merit. See Third Division Awards 30258 and 28227.

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 24th day of February 2005.