Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38367
Docket No. SG-38809
08-3-NRAB-00003-050219
(05-3-219)

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(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 (formerly Midsouth Rail Corp.):

Claim on behalf of N. D. Nash, for reimbursement for time lost, including all straight time hours, all overtime hours, Holiday pay and Skill differential pay, and any reference to this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 36, when it failed to provide the Claimant with a fair and impartial hearing and then issued the harsh and excessive discipline of a 60-day suspension (30 days actual and 30-days record) as a result of an investigation held on August 4, 2004, without meeting its burden of proving the charges. Carrier's File No. M0604-5911. General Chairman's File No. 04-090-MSR-185. BRS File Case No. 13153-Midsouth."

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, a Signal Maintainer, was instructed by letter dated July 20 to attend a formal Investigation to be held on August 5, 2004, at the Company's offices in Shreveport, Louisiana, ". . . to ascertain the facts and determine your responsibility, if any, in connection with your alleged purchase of safety boots on July 7, 2004 at J&H Boots and Jeans, West Monroe, Louisiana by using a Safety Boot Authorization Form containing a signature other than the person indicated in the supervisor's approval signature portion of the form. . . ." As of the time of the Investigation the Claimant had approximately 11 years of service with the Carrier.

The Carrier maintains a safety boot program in which it reimburses its employees for part of the cost of approved steel-toed safety boots to replace the employee's current pair of boots because of wear or damage. The employee must show his existing pair of boots to his supervisor who is supposed to examine the employee's current pair of boots to determine if they need replacement. If they do, the supervisor provides the employee with a signed Safety Boot Authorization form. The employee must complete the form by filling in his name, address, occupation, social security number, and home and work telephone numbers. There is also a space on the form for the employee's supervisor to sign indicating approval of the purchase. The instructions for obtaining boots under the program are on the bottom of the form. They provide that after filling out the signed form obtained from the Supervisor, the employee is to fax the completed form to a 1-800 number. The boots are mailed to the employee at the address on the form.

The Claimant's boots were approximately three years old as of July 2004 and he wanted to replace them. He was not aware that the program had changed since his last purchase of boots and was now a mail order program. Previously employees could go into a store which was part of the program and receive a pair of boots. On July 7, 2004, the Claimant went into the J & H Boots & Jeans store in West Monroe, Louisiana, and selected a pair of safety boots. He submitted the Safety Boot Authorization Form, and the store accepted the form as payment for the boots.

On July 12, 2004, the Carrier's safety office called the Claimant's Supervisor and asked him if he knew the Claimant. The office also faxed him a copy of the form that the Claimant had used to purchase his new pair of boots. The Supervisor, whose name is Donald Brinlee, saw that someone else had written a signature purporting to be his on the form in the space for "Supervisor's Approval Signature (Required)." The signature was spelled incorrectly and looked like "Don Brinkle," although the letters were not distinct.

The Supervisor testified that sometime within six months prior to July 7, 2004, the Claimant had discussed with him getting another pair of boots. The Supervisor stated that although he did not examine the Claimant's boots, he knew that the Claimant would be needing a pair of boots, because he told the Supervisor that he had not ordered any boots in three years. Working on the railroad, the Supervisor observed, most boots do not last three years. The Supervisor testified that he did not provide the authorization form to the Claimant or give the Claimant permission to sign his (the Supervisor's) name.

When the Claimant was notified that there was going to be an Investigation regarding the purchase of the boots, he had his wife go to J & H Boots & Jeans and pay cash for the boots.

On cross-examination the Supervisor acknowledged that he did not get an authorization form for the Claimant and did not discuss with him the new procedure for ordering boots. Asked whether, since it was three years from the Claimant's last pair of boots, it was reasonable to believe that he "went to the boot store, the same way we've done it for years, thinking he was doing like he was supposed to and just did not realize we had a new boot policy," the Supervisor answered, "That's possible." Questioned if he thought that the Claimant was trying to steal anything from the Carrier, the Supervisor answered, "No."

The Claimant testified that he obtained the Safety Boot Authorization Form from the Trainmaster at Monroe the morning that he purchased the boots. In the Investigation it was pointed out to the Claimant by the Hearing Officer that the instructions on the form state that the employee is to receive a signed copy of the authorization form. He was asked, "Why didn't you follow those instructions?" He answered, "I didn't read the form." Questioned who signed in the space on the form for the Supervisor's signature, the Claimant stated, "Apparently somebody at

the store did, because I didn't." He filled out all of the employee information on the form, the Claimant testified, and the store clerk filled out the information regarding brand name, stock number, size, and width. The Supervisor's signature portion of the form, the Claimant testified, was not filled out by him or in his presence.

The Hearing Officer asked the Claimant how anyone in the store would know what name to put down. He answered, "When I left the store, she followed me outside and asked me my supervisor's name and I told her his name." The following colloquy then took place between the Hearing Officer and the Claimant:

"Q. You did not fill out the signal supervisor's signature area?
A. No, sir, I didn't.
Q. And you did not have one filled out when you went to the store?
A. No, sir.
Q. Did you follow the instructions on the form?
A. No, sir. She never said nothing. I've always used that store and she never said nothing and I never read the form and apparently she didn't either.
Q. You didn't fill out the supervisor's approval signature?
A. No, sir, I didn't."

The Claimant was asked by the Local Chairman representing the Claimant why he supposes that the sales lady followed him to the parking lot to ask his supervisor's name. He stated, "Apparently she needed to know his name so she could put it on the form." He stated that he asked his Supervisor for a boot authorization form and that the Supervisor did not provide him with the form.

The cost for the pair of boots was $130.75. On the form the Claimant signed his name authorizing the deduction of the full cost of the boots from his paycheck in two pay periods. He explained that he did this because neither the store nor he knew how much of the cost of the boots the Carrier paid, so he and the clerk agreed that he would put down the full amount. Their understanding, according to the Claimant, was that the Carrier would pay its share and deduct the rest; but, if not, that he would pay the whole amount.

The Supervisor was recalled to testify by the Hearing Officer. He testified that he called J & H Boots and spoke to three different people there in an effort to

obtain the original copy of the boot form, but was unable to secure it. The Supervisor stated that he spoke to the cashier who sold the boots to the Claimant and asked her if she received the safety boot form from the Claimant and whether the form was completely filled out. The cashier told him, he testified, that it was and that the only thing that was added to the form was the stock number. Over the objection of the Organization, the Hearing Officer admitted into evidence a letter from the cashier that stated that she helped the Claimant select a pair of safety toe work boots and that when it was time for him to pay, he presented her "with a completed & signed authorization form for K.C. S." The letter further stated that after she realized that her store did not have that particular account, she called the Carrier and was told what procedures to take. The Hearing Officer stated, "The statement will be held only at face value and as nothing else."

Following the close of the Hearing, by letter dated August 13, 2004, the Claimant was notified that he was found to be in violation of General Code of Operating Rules 1.9, 1.13, and 1.25. Rule 1.9 states, "Employees must behave in such a way that the railroad will not be criticized for their actions." Rule 1.13 requires employees to comply with the instructions from supervisors and with instructions issued by managers. Rule 1.25 states, "Unless specifically authorized, employees must not use the Railroad's credit and must not receive or pay out money on the Railroad account."

The Carrier contends that the Claimant sought compensation from the Carrier for part of the cost of his boots by acquiring a boot form from someone other than his supervisor and signing his supervisor's name to the form. He never owned up to these actions at the Investigation, the Carrier argues, "choosing instead to concoct a story about the sales clerk signing [the Supervisor's] name to the form." The Carrier characterized this conduct as "dishonest, and deserving of severe discipline."

The Carrier contends that the Hearing Officer did not commit error in admitting into evidence the statement of the store cashier. The statement, the Carrier asserts, was merely corroborative of the Supervisor's testimony of a conversation he had with the cashier and was accorded its "face value" on that basis. The Carrier notes that the Organization did not object to the Supervisor's testimony regarding the content of his conversation with the cashier. The Carrier argues that "it is well established that the Hearing Officer may admit and give

weight to written statements submitted by non-employee witnesses and direct testimony from those who interview them." The Carrier asserts that the governing Agreement does not prohibit the admission of such statements and that there "is ample precedent for the limited acceptance of such statements at an investigative hearing, where the maker of the statement is not under the control of the Carrier."

The Carrier contends that there was substantial evidence in the record to support the decision that the Claimant was guilty of the charges. The Board, the Carrier urges, should not substitute its judgment as to the guilt of the Claimant or the discipline assessed.

The Organization takes the position that the Investigation was not fair and impartial for the following reasons: (1) The Carrier issued excessive and harsh discipline not warranted by the facts established during the Investigation. (2) Rules 1.9, 1.13, and 1.25 are vague and ambiguous and do not apply to the present situation. (3) Despite objection by the Organization, the Carrier allowed the admission of a statement into the record that deprived the Claimant of his fundamental right to confront opposition witnesses and cross-examine them. (4) The Carrier failed to prove that the Claimant signed his Supervisor's name on the Safety Boot Authorization Form or that he had any reason to do so.

The Board carefully reviewed the record in this case. The crucial fact on which this case turns is whether the Claimant signed his Supervisor's name to the Safety Boot Authorization Form. The name of the Supervisor was misspelled in the signature, and the Supervisor testified that the signature was not his. The Claimant denied that he signed the Supervisor's name to the form. No handwriting expert was consulted or called as a witness to render an opinion as to whether the signature on the document matched the Claimant's handwriting. When the Supervisor asked the store involved for the original authorization form, which had been retained by the store, he was told by the store that they no longer had the form. The form had never been turned into the Carrier. Had the form been available, perhaps it would have been possible to see if the ink used to fill in the Claimant's personal information matched the ink used for the Supervisor's signature. Not having the original document makes it very difficult to make any judgment about who signed the Supervisor's signature on the form.

The Board, on its own, is unable to render an informed opinion as to whether the Supervisor's signature on the form matches the Claimant's handwriting. It would be expected, however, that the Claimant would know the correct spelling of his Supervisor's name. One would also expect, if the Claimant intended to forge his Supervisor's name, that he would make sure that he had the correct spelling. In addition, the Claimant's explanation of how the store cashier learned the name of the Supervisor is plausible. The Board makes no findings on the question of the maker of the signature, but mentions these facts to show that this is not a case where the facts "speak for themselves."

The Carrier presented testimony, without objection, that the store cashier told the Supervisor that the Claimant gave her a completely filled out authorization form, including the space for the Supervisor's signature. In addition, the Carrier, over the objection of the Organization, was permitted to introduce into evidence a letter to the Supervisor from the cashier stating that the Claimant presented her with a completed and signed authorization form. Both the testimony of what the cashier said and the cashier's letter are hearsay. The general rule is that hearsay admitted without objection is entitled to be considered and given its natural probative effect. The letter was objected to, but not the oral testimony of what the cashier told the Supervisor.

The Board finds that the hearsay testimony and letter are entitled to little weight in this case because the declarant (the store cashier) had no less motive than the Claimant to prevaricate regarding the maker of the false signature. Had the cashier accepted a form from the Claimant without a proper signature on it, she would have had a motive to fill in the signature in order not to lose the sale for the store. It is not preposterous and completely unworthy of belief that she, at first, accepted the authorization form as payment and, in reviewing the form after the Claimant left the store, noticed the missing signature. It is not incredible that this could have happened and that she would have followed the Claimant into the parking lot to get the Supervisor's name and then signed that name in the space for the Supervisor's signature. Her motive for doing so could have been to protect her own job because she would have permitted someone to leave the store with expensive merchandise without valid payment. Once she did this she could not reveal the truth, when the Carrier later investigated the sale, without admitting her forgery. The Board is not accusing the cashier of such conduct, but is merely

pointing out that there is a reasonable basis for suspecting the trustworthiness of the hearsay evidence in question.

For the Carrier to prevail in this case, it must rely on hearsay. For the reasons stated, that hearsay is entitled to little weight. The Board concludes that there is not substantial evidence to support the charge that the Claimant forged the Supervisor's signature or that he presented the form for payment for a pair boots knowing that it contained the signature of someone other than his Supervisor in the space for the Supervisor's signature. The Board therefore finds that the 60 day suspension (30 days actual and 30 days record) shall be reduced to a one day suspension for failure to follow the instructions on the authorization form. The Claimant shall be made whole for all losses of wages or benefits as a result of being suspended for more than one day.

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 20th day of November 2007.