

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38959
Docket No. SG-38326
08-3-NRAB-00003-040174
(04-3-174)

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

(Brotherhood of Railroad Signalmen
(PARTIES TO DISPUTE): (
(Providence and Worcester Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Providence & Worcester Co.:

Claim on behalf of R. C. Baumuller, for removal of discipline from his record, account Carrier violated the current Signalmen's Agreement, particularly Article 13, when Carrier failed to provide a fair and impartial hearing evident when it issued the excessive and disparate discipline of a three day suspension on the Claimant as a result of a hearing held on February 12, 2002. Carrier's File No. None. General Chairman's File No. WHK-62-91-0202. BRS File Case No. 13012-P&W.”

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 employed by the Carrier in its Track Department. On February 8, 2002, he was assigned to cover for the Brush Cutter. This required him to travel to designated crossings ahead of the Brush Cutter along its route, unlock the control box at each crossing, and then throw the test switch in the box to put the crossing gates down. The Brush Cutter was then able to move through the crossing safely.

Each control box contained two switches. One switch was labeled "test in normal," and the other, "override in normal." Moving the test switch from its normal position would make the crossing gates go down. Moving it back to its original position would cause the gates to go back up. Moving the override switch from its normal position would cause the gates to go up and stay up, even if a train were to approach and travel over the crossing. The Carrier has very stringent Rules concerning the method and circumstances under which an override switch may be thrown.

When the test switch is moved from normal to test position, that activates a warning device which causes the crossing gates to go down. This permits track equipment to travel safely over the crossing. Returning the test switch to normal deactivates the warning device and causes the gates to go back up. The override switch shuts off the warning device at the crossing so that the gates will remain up even if a train comes through the crossing.

The correct performance of his duties by the Claimant on February 8, 2002, was for him to throw the test switch at the crossing to put the gates down as the Brush Cutter was approaching the crossing and then move it back to normal position after the Brush Cutter had passed through the crossing. He would then proceed to the next crossing, arriving there before the Brush Cutter, and do the same thing with the test switch at that crossing. The Claimant testified that his normal practice once he put the test switch back to normal was to look at the switches to make sure that they were both in the normal position before he secured the control box.

One of the crossings which the Claimant covered on February 8, 2002, was at the Attawagan Road crossing in Killingly, Connecticut. At approximately 12:00 or 12:30 P.M. he threw the test switch to lower the gates. After the Brush Cutter went through the crossing, however, instead of returning the test switch to its original position, the Claimant mistakenly threw the override switch. This caused the gates to go back up, the same as if the Claimant had moved the test switch back to its normal position. However, unlike when the test switch is at normal, throwing the override switch caused the warning device controlling the crossing gates to be deactivated.

At approximately 1:00 P.M. on February 8, 2002, someone called 911 to report that a train had gone over the railroad crossing at Atawagan Road and that there were no signals or gates. The Dispatcher sent an employee to the crossing to investigate, and the employee found the override switch in the override position, and the test switch in the test position. All locks were on the control box and locked.

Atawagan is a busy crossing. The Carrier determined that the reason that the train was able to pass over the crossing safely without colliding with highway traffic was that the traffic signals are preempted by railroad signals that cause the traffic lights to go red when a train approaches the crossing. Track speed at the Atawagan Road crossing was 40 MPH. The crossing was a relatively new crossing that had been put in approximately a year earlier with upgraded equipment.

The Organization takes the position that the three-day suspension assessed against the Claimant was excessive and unequal compared to the reprimand received by a supervisor who did the same thing at Dexter Road crossing on December 15, 2000. The Organization also contends that the system of overrides is not safe and that the Carrier was therefore as much to blame as the Claimant, who should not have received any time off. The Organization notes that some six weeks after the incident the Carrier removed all override switches, and it argues that this shows that the Carrier agreed with the Organization that the system was unsafe.

The fact that after the occurrence here in the dispute the Carrier decided to remove all override switches at crossings does not excuse failure to take proper care on the part of the Claimant when override switches were in use. It is not unusual to

find better ways to do things. But until a change is made, employees are required to use due care in carrying out their tasks under the method or procedure currently in effect. There was nothing complicated or abstruse in what the Claimant had to do at the crossings he covered for the Brush Cutter on February 8, 2002. He had to move a switch in a control box from normal position to test position when the track machine approached the crossing, and, while remaining at the control box, return that same switch back to normal position after the track machine passed over the crossing. The time involved at each crossing was approximately two minutes. Good practice then required the Claimant to make sure that both switches in the control box were in the normal position before he locked the box and went on to the next crossing. The Claimant, an experienced employee fully familiar with the procedure to be followed, failed at this task, creating a clear danger to life and property. Had it not been for the fact that the Carrier had recently upgraded the crossing with circuitry that automatically turned the highway traffic lights red when a train approached, the consequences of the Claimant's negligence could have been tragic. The lack of proper care on the part of the Claimant properly subjected him to a degree of discipline beyond a mere reprimand.

The Organization argues, however, that the three-day suspension given to the grievant was excessive and constituted disparate treatment because on December 15, 2000, a Supervisor activated an override switch at the Dexter Road crossing to allow traffic to pass through when he noticed that the gates were down and traffic was backed up. The Supervisor then left the crossing without putting the switch back to normal. The discipline administered to him was a written reprimand together with a warning "that conduct of this nature will not be tolerated and any further misconduct and/or violation of company policy will result in disciplinary action and possible dismissal."

Differences in penalties do not necessarily amount to disparate or discriminatory treatment. Mitigating or aggravating circumstances may justify different penalties for similar violations. In the present case there were aggravating elements not present in the earlier occurrence. Here a citizen noticed a train passing over the crossing without the gates being down or any signals visible to warn motorists. The citizen called 911, thereby also involving the police in the incident. Public awareness of a failure of the Carrier's gates to be activated when

its train passed through a busy crossing can tarnish the Carrier's reputation. In addition, the fact that here a train actually went through the crossing while the switch was in override made the "near-miss" aspect of the case much more prominent than in the earlier case where there was no evidence of such an occurrence prior to the override being corrected. These aggravating circumstances in the present case justify the different penalties in the two cases.

In this connection the Board notes that the difference in penalties between this case and the earlier case (a three day suspension versus a written reprimand plus a warning of possible discharge for the next violation) was much less than in Third Division Award 21240 relied on by the Organization where for similar offenses one employee (the claimant) was dismissed and not reinstated after a grievance was filed and two other employees were reinstated after their dismissal. The same elements of aggravation which may justify a suspension versus a written reprimand for similar offenses would not necessarily justify dismissal versus a reprimand for such similar offenses. The Board finds that the penalty assessed in this case was proper for the offense committed and that, for the reasons stated, the Claimant was not subjected to disparate treatment.

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 29th day of February 2008.