

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39873
Docket No. SG-39836
09-3-NRAB-00003-070008
(07-3-8)**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(BNSF Railway Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe (BNSF):

Claim on behalf of B. J. Ferguson, for the Claimant’s personal record to be cleared of any reference to the discipline issued or to this event, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued a 10-day record suspension against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on September 20, 2005. Carrier’s File No. 35-06-0005. General Chairman’s File No. 05-100-BNSF-121-T. BRS File Case No. 13663-BNSF.”

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 in this case was assigned to the position of Signal Maintainer, headquartered at Krum, Texas, at the time of the events giving rise to this dispute.

The record shows that on August 29, 2005, there was an FRA inspection at certain locations on the Fort Worth Subdivision. Included in that inspection was a railroad crossing on FM Road 2449 at Ponder, Texas, which was on the Claimant's assigned maintenance territory. During his inspection at that location, the FRA Inspector noticed that the signal lights were not functioning at the left-side gate of the signal. It was determined that the malfunction was caused by loose nuts securing the terminal test-strip, and the FRA Inspector noted that in his inspection report.

The District Signal Supervisor determined that the only way the loose test-strip could have occurred under the circumstances was that its nuts were manually loosened and then not properly re-tightened. As the designated Signal Maintainer for that territory, the Claimant was responsible for proper maintenance of that signal. The Supervisor asked the Claimant about the signal. He admitted that he had worked on the signal apparatus on August 17, 2005 and that he had loosened the nuts on it during the course of his maintenance work there.

Based on the foregoing, the Claimant was directed to report for a formal Investigation in connection with the "alleged violation of TP-101, Paragraph 3 and TP-234, Paragraph 3 at the Highway Grade Crossing, Ponder, TX., FM 2449 MP 377.05, Ft. Worth subdivision while a scheduled FRA inspection was being performed at approximately 1230 hours on August 29, 2005 the 'L' side flasher lamps did not operate." The Investigation was held on September 20, 2005. Thereafter, the Claimant was issued a ten-day record suspension. The Organization filed a timely appeal on behalf of the Claimant, protesting the discipline on procedural and substantive grounds.

The Organization first argued that the Investigation notice charged the Claimant with misconduct on August 29, 2005. In reality, the incident which is the basis for the charges occurred on August 17, 2005. As a result, the Organization contends, the discipline should be overturned because the Claimant was not properly informed of the charges and was denied a fair and impartial investigation.

The Board is not convinced that the Organization's position is well-taken. It is true that the notice states that the alleged violation occurred on August 29, 2005 – the date that the violation was discovered – rather than on August 17, 2005 – the date the violation was alleged to have occurred. Nevertheless, this does not amount to fatal procedural error. There is no evidence that the Claimant or the Organization were prejudiced or harmed by the mistake. They were prepared to, and did, vigorously defend against the charges. We find no proper basis to void the discipline based on the technical error.

Turning to the merits, the Organization contends that there is no evidentiary basis to assign responsibility to the Claimant for the faulty crossing. The Organization asserts that the Claimant was not the only person who made repairs to the crossing. Moreover, the Organization points to the Claimant's testimony that he complied with the Rules while making repairs at the crossing in question on August 17, 2005 and indeed, he made a final check verifying that the crossing was functioning properly. The Organization argues that the Carrier provided no witnesses or evidence to prove that the Claimant violated any of the Rules with which he was charged. For these reasons, the Organization submits that the Carrier did not meet its burden of proof.

The Board carefully reviewed the record in its entirety. As the Organization correctly points out, there were no witnesses who saw the Claimant at the crossing on August 17, 2005 to attest to his noncompliance with the Rules. However, the circumstantial evidence and the reasonable inferences to be drawn there from provide substantial evidence that the Claimant was the responsible party. The Claimant admittedly performed work on the gate in question and the work he performed required the loosening and re-tightening of the nuts that were identified as the cause of the equipment failure during the FRA inspection. Between August 17 and August 29, 2005, no one else performed any other work on that gate. The

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evidence at the Investigation established that crucial point. Notwithstanding the Organization's arguments and the Claimant's denial of wrongdoing, there is no convincing alternative to the evidence which shows that this particular malfunction would not have occurred but for the Claimant's negligence.

Concluding as we do that the Carrier established that the Claimant committed the misconduct with which he was charged, the only remaining question is the propriety of the penalty. We find that a ten-day record suspension is certainly within the range of reasonableness. The claim must be denied.

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 31st day of July 2009.