

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40484
Docket No. SG-40193
10-3-NRAB-00003-070432
(07-3-432)**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of W. L. Walker, for reinstatement to his former position with payment for all time lost, including overtime, and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it imposed the harsh and excessive discipline of dismissal 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 August 8, 2006. Carrier’s File No. 1453519-D. General Chairman’s File No. S-Investigation-776. BRS File Case No. 13763-UP.”

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 assessed permanent dismissal following an Investigation held on August 8, 2006. The Hearing considered charges that following the mid-June replacement of rail at Mile Post 62.34, the Claimant had failed to re-connect the shunt wires to the rail. This failure to reconnect safety wires on that section of track remained undetected and also left unprotected train movement which could have produced a proceed signal into occupied track. Based upon the Carrier's conclusion that this critical work would have been far too important to overlook, the Carrier concluded in its August 18, 2006 decision that the Claimant had, in fact, been dishonest and violated Union Pacific Rule 1.6 (Dishonest).

This is the central issue of this case at bar. The Organization argues that there is testimony and proof that the Claimant forgot to perform the shunt wire re-connects, but strongly argues that he was not dishonest. The Organization contends that the Carrier failed in its burden of proof, for there was evidence in the record to find a mistake, but no evidence to prove dishonesty, defined by Carrier Policy as: "When an employee's actions or statement constitute lying, cheating or deceiving the Company."

The Organization points out that there is no dispute in the testimony that the Claimant traveled to the location and tested the switch. As such, there is no reason for the Carrier to draw the conclusion that the Claimant went all the way to that point, did some of the work that needed to be done, but purposely decided not to test the fouling circuit; failing to re-connect the shunt wires to the rail. The Organization argues that the Claimant did not arrive, do some of the work, and then intentionally leave without performing this one test. What happened, in the Organization's view, is that the Claimant was in a hurry to finish all of his tests and forgot to inspect and test this one circuit. Given his unblemished six years of work, dismissal for the error of forgetting one test is harsh and excessive (Second Division Award 1756).

A detailed study of all elements of this dispute has been made. The Board finds that the basic facts are not in dispute until the conclusion must be drawn. The record is clear that the Claimant was the Signal Maintainer responsible for the job of re-connecting the shunt wires to the new rail section at Mile Post 62.34. Manager of Signal Maintenance Kleckley testified that it was "obvious," "in plain view and

you can't miss it" by visual inspection that the work was not performed. Kleckley also asked the Claimant if he did the test and the Claimant "had no reply." The Claimant admits that (1) he knew that they had to be connected (2) he first put off the connection due to rain and (3) he ultimately completed a Form 24094 indicating that he had performed four tests on June 30, 2006. The accuracy and completion of this Form is a federal law (Federal Railroad Administration) and a Carrier requirement. Of those four tests, three were "grounds" tests and the fourth, which was not performed, was a very different test, i.e., the shunt test in dispute.

The Carrier has the burden of proof that this failure constituted dishonesty. Certainly, the test was not performed and not detected until July 11, 2006. It was most certainly a critical and potentially catastrophic error. The Claimant completed Form 24094, with only this one inaccuracy. It is an inaccuracy not left blank, but indicated as performed. The Claimant documented that he accomplished the shunt test, but he did not. Further, the Carrier argues from the evidence that when the Claimant said that he completed the task and knew that he did not, he was dishonest. The Carrier argues that this shunt test was a critical test that the Claimant knew he had previously not performed due to rain. The Carrier also argues that the shunt test would have stood out of the four tests to be performed on June 30, due to its importance and difference from the other "grounds" tests. The Carrier contends that its actions were proper.

After careful review, the Board finds sufficient evidence to support the Carrier's finding of dishonesty. There is no reason to believe that the facts at bar suggest memory failure. Having determined guilt, the solitary issue left unresolved by the Board is the quantum of discipline. The Organization argued that under these facts, the discipline is harsh and excessive. The Board notes the seriousness of the Claimant's actions - his failure to properly test the shunt while indicating to the Carrier that he had completed the test and connected the wires. The Board also notes that the Claimant has a very good record as a Signal Maintainer. Under the full facts and background, the Board believes that the length of time that the Claimant has been dismissed has served its disciplinary purpose. The Claimant should be offered an opportunity for reinstatement with seniority unimpaired and benefits, but without backpay for time lost.

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 14th day of May 2010.