Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40654
Docket No. SG-40184
10-3-NRAB-00003-070087
(07-3-87)

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
(
(Kansas City Southern Railroad

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern:

Claim on behalf of M. L. Kelley, for reinstatement to his former position with payment for all lost wages, including skill differential, with all rights and benefits unimpaired and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when it issued 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 December 2, 2005. Carrier's File No. K06066058. General Chairman's File No. 05-118-KCS-185. BRS File Case No. 13668-KCS."

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.

Claimant M. L. Kelley was employed as a Signalman, and had slightly less than five years of service at the time of the instant dispute. As of October 23, 2005, he was assigned to fill the vacancy of an absent Signal Maintainer on Job No. 877, headquartered at Beaumont, Texas.

On November 17, 2005, the Claimant arranged with Signal Maintainer Kalczynski on an adjacent territory to take his trouble calls from 6:00 P.M. that day until 6:00 A.M. on November 18, 2005. During the night of November 17, Kalczynski was called out for an extensive problem, requiring Kalczynski to work until 1:00 A.M., when he reached the maximum hours permissible under the Hours of Service Act. He was, therefore, not legally rested to perform further service until 1:00 P.M. on November 18.

On November 18 at 5:24 A.M., the Claimant received a call to attend to a switch out of correspondence at Starks, Louisiana. The Claimant believed that Kalczynski was responsible for repairing the switch. However, Kalczynski was not yet able to resume work and could not accept the assignment. The preliminary investigation revealed that a number of phone calls took place between the Claimant and the Carrier beginning at 5:24 A.M. It appears that the Carrier believed that the Claimant agreed at 5:38 A.M. to repair the switch at 6:00 A.M. when he returned to duty. However, it is uncontested that the Claimant did not repair the switch and another Maintainer was called to repair the switch, leading to the instant discipline.

By letter dated November 22, 2005, the Carrier notified the Claimant that he report for a formal Investigation on December 2, 2005, to ". . . determine your responsibility, if any, in connection with you allegedly:

"1. Failing to respond to a trouble call given to you the morning of November18, 2005 to a switch out of correspondence at North Starks, Louisiana, and

2. Failing to be on duty at the prescribed time on November 18, 2005."

The Hearing took place on December 2, 2005, pursuant to which, in a letter dated December 9, 2005, the Claimant was notified that he was terminated effective immediately.

By letter dated January 12, 2006, the Organization appealed the decision specifying that the Carrier did not meet its burden of proof and that the discipline assessed was unwarranted and excessive. On February 8, 2006, Signal Engineer V. A. Jones denied the appeal. On March 9, 2006, the matter was appealed by the Organization to Director of Labor Relations J. Albano. On May 5, 2006, the appeal was denied. On May 31, 2006, the Organization requested the Carrier to reconsider its position. On June 8, 2006, a conference was held and the parties were unable to resolve the matter.

According to the Organization, the discipline imposed upon the Claimant was unwarranted, harsh and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. It claims that the Carrier has been arbitrary and capricious in its treatment of the Claimant, that the Carrier abused its discretion and that the Carrier's determination to discipline the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. The Organization asserts that the Claimant was denied a fair and impartial Investigation. It contends that the Claimant was off of work and had properly selected another individual to take calls for him. The Claimant acted properly at all times. The Organization asserts that the Carrier should now be required to overturn the dismissal and make the Claimant whole for all losses.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing makes it clear that the Claimant was guilty as charged. The evidence shows that the Claimant was instructed to repair the switch and ultimately refused to do so. Kalczynski could no longer relieve the Claimant based on the Hours of Service Act and, therefore, the Claimant was obligated to fulfill the directive issued by the Carrier. The axiom in such situations is "obey now, grieve

later." The Claimant should have complied, but he did not do so. Based on the instant offense, dismissal is the appropriate penalty.

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

The Board has found substantial evidence in the record to uphold the Carrier's position in whole. We note that the Carrier proved that the Claimant violated the Agreement when he did not respond to the Carrier's instruction on November 18, 2005. The evidence is clear that Claimant was obligated to comply with the Carrier's directive, but did not do so. Based on the instant offense, we have determined that dismissal is an appropriate penalty. In addition, we cannot find that the Organization has been successful in proving that Claimant did not receive a fair and impartial Investigation.

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 1st day of November 2010.