

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40655
Docket No. SG-40495
10-3-NRAB-00003-080341**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(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 T. A. Hogan, for reinstatement to his former position with payment for all time lost, including skill pay, and with all rights and benefits restored and his personal record cleared of any reference to this matter, account Carrier violated the current Signalmen’s Agreement, particularly Rule 47, when it imposed the harsh and excessive discipline 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 5, 2006. Carrier’s File No. K06076126. General Chairman’s File No. 07-001-KCS-185. BRS File Case No. 13892-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.

At the time of the incident leading to his discharge, Claimant T. A. Hogan was assigned to the position of Signal Maintainer (Job No. 802) with assigned territory from Kansas City to North Drexel, Missouri, Milepost 1 to Milepost 51. The regularly assigned hours of this job were 8:00 A.M. to 5:00 P.M., with one hour off for lunch, Monday through Friday. As a Signal Maintainer, the Claimant was assigned the use of company truck MW3607, a 2003 Ford F-350. At approximately 4:30 P.M. on Thursday, November 9, 2006, the Claimant was driving said vehicle west on the southernmost leg of Interstate 435. According to the Carrier, at that time, the Claimant was involved in a traffic accident, pursuant to which the Claimant failed to prepare the proper forms and to report the accident to a supervisor in a timely manner.

By letter dated November 17, 2006, the Carrier notified the Claimant that he report for a formal Investigation on December 5, 2006, to “. . . determine your responsibility, if any, in connection with you allegedly:

- “1. involved in a traffic accident that occurred at about 1630 hours November 9, 2006 on Interstate 435 in Kansas City, Missouri and
2. failing to timely fill out the proper forms regarding the alleged incident and
3. failing to timely report the incident to a supervisor.”

The Hearing took place on December 5, 2006, pursuant to which, in a letter dated December 13, 2006, the Claimant was notified that he was terminated effective immediately.

By letter dated January 26, 2007, 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 March 19, 2006, Signal Engineer V. A. Jones denied the appeal. On April 17, 2007, the matter was appealed by the Organization to Director of Labor Relations J. Albano. On June 18, 2007, the appeal was denied. On August 3, 2007, 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. The Organization contends 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. In addition, the Organization asserts that the Claimant was denied a fair and impartial Investigation. The Claimant contends that he was unaware that he was involved in an accident and, therefore, did not report same. The Organization contends that 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. He knew, or should have known that he was involved in an accident. Further, even if he did not believe that he was involved in an accident, the Claimant should have reported the incident to a supervisor. 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 with regard to the incident of November 9, 2005. We note that the Carrier proved that the Claimant failed to prepare the necessary forms and report the incident to a supervisor in a timely manner. While we agree that the Claimant violated the Rules with which he was charged, we cannot find that the

discharge was appropriate. Based on the unique circumstances of this case, particularly given the Claimant's long service and relatively good record, he shall be reinstated with seniority unimpaired, but without backpay.

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 1st day of November 2010.