

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40686
Docket No. SG-40866
10-3-NRAB-00003-090148**

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 J. C. Timmons, for all lost wages, including skill pay, with all rights and benefits unimpaired and any reference to 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 a 5-day suspension from service and a 25-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 August 15, 2007. Carrier’s File No. K06076229. General Chairman’s File No. 07-024-KCS-185. BRS File Case No. 14077-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 suspension, Claimant J. C. Timmons was assigned to the position of Signal Foreman on Gang No. 890. According to the Carrier, on May 23, 2006, J. Rutledge suffered an on-duty injury, but did not report the injury as required. Because the Claimant was Rutledge's Foreman, he was obligated to report the injury when he first became aware of it.

By letter dated July 23, 2007, the Carrier directed the Claimant to report for a formal Investigation to ascertain the facts and determine his responsibility, if any, in connection with the following charges:

- "1) your alleged failure to properly report an alleged personal injury sustained May 23, 2006 and reported to you by a member of your gang May 24, 2006 and
- 2) your alleged failure to have the prescribed form completed and submitted to the Carrier concerning the above alleged injury."

The Hearing took place on August 15, 2007, pursuant to which, in a letter dated August 24, 2007, the Claimant was notified that he was assessed a 5-day suspension and a 25-day record suspension.

By letter dated October 9, 2007, the Organization appealed the decision based on the contention the Carrier failed to meet its burden of proof, and the discipline assessed was unwarranted and excessive. On December 5, 2007, Signal Engineer V. A. Jones denied the appeal. On January 9, 2008, the matter was appealed to Director of Labor Relations J. Albano. On March 7, 2008, the appeal was denied. On May 5, 2008, 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 the Carrier's burden of proof has not been met. The Organization asserts that the Carrier was arbitrary and capricious in its treatment of the Claimant, that the Carrier abused

its discretion and its 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 Organization contends that the Claimant fully cooperated with the Carrier and reported the information that he had received from Rutledge. The Organization concludes that the Carrier should now be required to overturn the discipline 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 made it clear that the Claimant was guilty as charged. The Claimant was aware that he was obligated to immediately report any workplace injury suffered by those assigned to his gang, and he did not comply with this requirement. Based on the instant offense, the discipline imposed was appropriate.

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 not found substantial evidence in the record to uphold the Carrier's position. We note that the Carrier has not proven that the Claimant failed to properly report the injury sustained by J. Rutledge. Because the Carrier failed to meet its burden of proof, the claim is sustained and the Claimant shall be made whole.

AWARD

Claim sustained.

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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.