

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41219
Docket No. SG-41359
12-3-NRAB-00003-100244**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Kansas City Southern Railway Company**

STATEMENT OF CLAIM:

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

Claim on behalf of D. J. Riggs, for reinstatement to his former position with payment for all time lost including skill pay and with his rights and benefits restored, 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 in connection with an investigation held on April 3, 2009. Carrier’s File No. K0609-6873. General Chairman’s File No. 09-019-KCS-185. BRS File Case No. 14317-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.

On May 27, 2009, the Organization presented a claim asserting that the Carrier violated Rule 47 when it wrongfully discharged the Claimant on April 9, 2009. The Organization states that the Carrier's Investigation did not prove a Rule violation. Conversely, the Carrier contends that the Claimant's conduct violated General Code of Operating Rules 1.1 (Safety) 1.1.1 (Maintain a Safe Course) 1.1.2 (Alert and Attentive) 8.20 (Derail Location and Position); On-Track Safety and Roadway Worker Rules, Rule 30.8.2 (Signal and Telecommunication Inspections, Item B); Signal Department Rules, General Instructions, Standards Instructions (Rule 4, Rule 10 and Testing Requirements, Rule 2).

The Organization alleges the Claimant did not receive a fair and impartial Hearing as required by Rule 47. In this regard, the Director of Signal Operations served as the instigating force for the charges levied against the Claimant.

On July 27, 2009, the Carrier denied the claim asserting that the Claimant violated the numerous General Code of Operating Rules and other authorities as reflected in the dismissal letter.

On August 13, 2009, this matter remained unresolved after a conference discussion as stated in the Organizations' letter to the Carrier dated August 14, 2009.

In its August 28, 2009, appeal the Organization argued that the Carrier did not establish any violations as serious infractions of the Rules because it failed to show that the Claimant endangered his safety or that of others. Rather, the Claimant followed the Rules yet there are no written Rules or Instructions on the proper way to adjust a derail switch and the Claimant had not been trained on this particular type of switch.

On October 28, 2009, the Carrier denied the appeal noting not only the serious nature of the Rules violated by the Claimant, but also his numerous performance deficiencies in the application of the Rules.

The Board finds that the case was handled in the usual and customary manner on the property, up to and including the highest officer of the Carrier designated to handle such matters. The Organization's letter of August 14, 2009, confirms the parties' conference discussion of the matter. Because it was not rebutted by the Carrier during the on-property handling, it is a record of fact in this proceeding. Consequently, the Carrier's belated argument in its Submission, i.e., that the Board lacks jurisdiction because no conference was held, must be rejected. Accordingly, the Board will address the merits of this claim.

The Claimant commenced service on November 11, 1991, as an Assistant Signalman. From 2006 until his discharge on April 9, 2009, the Claimant was a Signal Maintainer with responsibilities and duties in the Harriet Yard.

On March 26, 2009, the Claimant adjusted a switch circuit controller to close a derail. This adjustment rendered the main line unprotected from errant car movements and provided an improper signal to a train moving on the main line. The Assistant Vice President - Engineering was patrolling the area and observed the closed derail. He notified the Director of Signal Operations.

The Director, accompanied by another employee, met with the Claimant at the derail. While observing the Claimant adjust the switch, the Director informed him that it was contrary to proper operation of the derail and signal system. The Director informed the Claimant there would be an Investigation.

The Organization asserts that the Claimant did not receive a fair and impartial Investigation. The Director of Signal Operations investigated the incident and testified at the Hearing about his preliminary investigation. Others also testified and the transcript was reviewed by several Carrier officials. Based on the results of the Investigation, the Director, as a supervisory official of the Claimant, issued the discipline. This Investigation and issuance of discipline by the supervisory official is not unusual to this proceeding. The Claimant received a fair and impartial Investigation.

At the investigative Hearing the Claimant acknowledged that he did not properly adjust the switch circuit controller notwithstanding the Organization's assertion that there are no written instructions for this type of equipment and the Claimant had not been trained on this particular switch. The Carrier's instructions and the Claimant's training were sufficient for the Claimant to adequately perform his duties associated with the derail.

The Organization's argument that the Claimant had been adjusting the switch in this manner during his three years at Harriet Yard without injury or damage to equipment is not persuasive. The Carrier need not wait until a fatality, injury or loss of equipment arises in order to discipline an employee for Safety Rule violations. In this regard, the Claimant's employment record reflects a series of incidents where he failed to properly follow duties and responsibilities with reference to safety.

For example, in 2008 he was suspended for failing to obtain proper authority to activate a signal. In 2007 he was suspended for failing to properly test equipment and in 2006 he was suspended for making improper bonds on 26 joints on his territory. The three instances of discipline involved major infractions under the Carrier's discipline policy. The present offense is the third of three major infractions within a three-year look back period. This dismissal results from a progression of disciplinary incidents and the Claimant is at the final step of the progressive discipline program.

The Claimant's record reflects an inability to consistently perform at an adequate level with regard to safety that affects equipment and persons. The Claimant's violation of Safety Rules constitutes serious infractions and dismissal is the appropriate penalty under the Carrier's progressive disciplinary policy.

The Claimant subjected himself and others to injury and risked equipment loss or damage by violating General Code of Operating Rule 1.1.1 Maintaining a Safe Course ("In case of doubt or uncertainty, take the safe course.") On-Track Safety and Roadway Worker Rule 30.8.2, Signal and Telecommunications Inspections ("Employees must ensure signal and communication apparatus is . . . operating as intended.") and General Instructions, Standards and Instructions

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(“Employees are responsible for inspection, adjustment and proper maintenance of all Signal and Interlocker apparatus assigned to their care.”)

Based on these proven violations, 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 22nd day of February 2012.