

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41704
Docket No. SG-41633
13-3-NRAB-00003-110306

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corp.:

Claim on behalf of R. E. Perkins, for payment of any lost time and any reference to this matter removed from his personal record. Account Carrier violated the current Signalmen’s Agreement, particularly Rule 57, when it imposed harsh and excessive discipline against the Claimant as a result of an investigation held on October 30, 2009, without meeting its burden of proving the charges. Carrier’s File No. 09.396. General Chairman’s File No. BRS-SD-1136D. BRS File Case No. 14472-NRPC(S).”

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, a Signal Maintainer, was issued a Notice of Investigation (NOI) on October 13, 2009, on charges that he was negligent and failed to properly perform

his duties related to properly aligning the frog point of the 24 switch at Meadow Interlocking on September 22, resulting in the derailment of track equipment on September 23, 2009. The NOI set the formal Hearing for October 20 at 11:30 A.M. The Organization and the Claimant appeared at that time, because they had not received prior notice that the Carrier had unilaterally postponed the Investigation until October 30, 2009. The Claimant and his Organization representative appeared at the October 30 rescheduled joint Investigation, objected to the manner and fact of the postponement under Rule 57, but participated fully in the Investigation. As a result of the November 10, 2009 Decision Letter wherein the Hearing Officer found the Claimant guilty of the charges and in violation of the Carrier's Standards of Excellence, the Claimant was issued Notices of Discipline on November 12 and 16, 2009 assessing him a 30-day suspension for such violation. This claim protests the discipline.

The pertinent portions of Rule 57, relied upon by the Organization, appear below.

“RULE 57 - DISCIPLINE AND APPEALS

(a) Employees shall not be reprimanded, suspended nor dismissed from service without a fair and impartial trial

(d) An employee who is accused of an offense and who is directed to report for a trial therefor, shall be given reasonable advance notice in writing of the exact offense for which he is to be tried and the time and place of the trial. The trial shall be scheduled to begin within thirty (30) calendar days of his supervisor's first knowledge of the employee's involvement and may be postponed for a valid reason for a reasonable period of time at the request of the Company, for the employee or the employee's union representative. A copy of this notice shall be furnished to the Local Chairman.”

The Organization initially argues that the Carrier violated Rule 57 by unilaterally postponing the scheduled Investigation to a later date and failing to notify the Organization that it intended to do so, as well as failing to hold the Hearing within the required 30 days of the Carrier's knowledge of the employee's involvement, which nullifies the proceeding and the resulting discipline, citing Third Division Awards 16262, 18352, 22258 and 30998. The Organization asserts that the Carrier failed to meet its burden of establishing, by substantial evidence, that the Claimant did not properly align the frog point of switch 24, noting that the switch was accessible for

manipulation at any point during the more than nine-hour time lapse between completion of the job and the derailment, and could have been manipulated to shift the blame for the derailment from the Operator who was traveling in excess of the permitted speed preventing him from stopping in advance as required. It also points out that (1) this was trackage that was out of service, so Rule AMT 23 cited by the Hearing Officer does not apply, (2) the Claimant was not part of the regular crew working in the area and only performed the switch adjustment requested by the Foreman due to his proximity to the area, (3) there were so many other people whose actions (or inaction) contributed significantly to the derailment that the Carrier chose not to investigate in order to place the blame on the shoulders of the Claimant, whose testimony establishes that he properly aligned the switch as instructed and whose partner, the only other eye witness when the switch was aligned, confirmed. Finally, the Organization maintains that the penalty assessed was excessive and arbitrary, especially in light of the Claimant's clean record and the absence of any prior safety violations, and the fact that others were proven to be more responsible than he was for the derailment.

The Carrier contends that there was no procedural violation in this case, because Rule 57(d) does not require mutual assent to a postponement, and, even if earlier notice of the postponement should have occurred, it does not negate the fact that a fair and impartial Investigation was held on October 30; the Claimant was notified of the charges and was present with his representative who participated fully. It notes that the Rule only requires that the Investigation be scheduled within 30 days, not actually held within that time period. The Carrier contends that proof of the charges by substantial evidence is apparent in the Investigation transcript, because all who were present during the post-derailment investigation testified that the switch was aligned to normal, but the frog point was aligned to reverse, causing the derailment, and the record makes clear that the Claimant was the one who performed the manual alignment on the frog point of switch 24. It points out that there was no evidence presented by the Organization of the presence of unauthorized personnel or tampering with the switch, and because the Claimant was admittedly the last person working on the frog point, and he failed to check inside the C&S hut to ensure that the switch was properly aligned, his negligence was a direct contributing factor to the derailment, regardless of whether others bear some responsibility as well. The Carrier argues that the discipline was commensurate with the seriousness of the offense, and was neither excessive nor arbitrary, relying on Public Law Board Nos. 36 and 42, noting that leniency was granted by the Carrier with respect to the Claimant actually serving his suspension.

A careful review of the record convinces the Board that there was no procedural violation requiring the overturning of the discipline imposed. The language of Rule 57(d) herein is very different from the mandatory language contained in the Rules involved in the cases relied upon by the Organization, which required the holding of an investigation (as opposed to its scheduling) within the designated time period. See, e.g. Third Division Awards 18352, 22258 and 30998. The scheduling language in Rule 57(d) also notes an understanding that a postponement (which may be at the request of any party) may cause a reasonable delay from the initial scheduling of the Hearing, as occurred in this case. The Board concludes that, while the communication slip up causing a lack of advance notice of the postponement to the Organization was inappropriate, the Claimant received a fair and impartial Hearing on October 30, 2009.

With respect to the merits, there is no dispute that (1) the Claimant was assigned to, and did work on the alignment of the frog point of switch 24 at Meadow Interlocking at around 3:00 P.M. on September 22, 2009; (2) the Claimant and Electronic Technician (ET) Congo were the last people to be assigned to work on that switch; (3) the Claimant and ET Congo were not normally assigned to that area, and were sent by the Foreman to make the switch adjustment because of their proximity to the location; (4) neither the Claimant nor Congo (or anyone else) went into the C&S hut to check to see if the switch was properly aligned; (5) there was a derailment of track equipment over the 24 switch frog point at around 12:30 A.M. on September 23, 2009; (6) the investigation after the derailment revealed that the switch point was aligned normal for line 2 and the frog point was reversed for line 4; and (7) Meadow Interlocking was not in service at that time, all track circuits were down, and Interlocking Rules did not apply. The transcript of the Investigation makes clear that Meadow Interlocking was a restricted speed area (15 mph within interlocking), the Brandt Truck that derailed was hauling five units, and the Operator was traveling at a speed that did not permit him to stop within half the distance of this obstruction in the track, which he was to look out for, as required by the applicable Rules. He testified that there was no lighting and his vision was impaired. Both the Claimant and Congo testified that they aligned their portion of the switch normal for line 2, and Congo confirmed that he saw the frog point aligned normal before they left the area. Neither was called out to the accident scene after the derailment.

The entirety of the Carrier's evidence of the Claimant's guilt of the charge of negligence in misaligning the frog point is the fact that he was the last one assigned to this job and the post-accident investigation showed that the frog point was reversed. As pointed out by the Organization, more than nine hours elapsed between the time the Claimant performed his job and when the frog point was found reversed after the

derailment; it was in an area that Supervisor Shelton described as “all messed up,” and there was no evidence that access to the switch was controlled during the interim time period. While it is possible that the Claimant may have misaligned the frog point on this switch, it is equally clear that others should have discovered this lack of correspondence in the interim nine-hour period during the performance of their routine functions, including the Brandt Truck Operator, and none of them did. Thus, we cannot say that the Carrier met its burden of proving the Claimant’s guilt, or that the derailment was caused by the Claimant’s negligence in the performance of his job responsibilities, by substantial evidence. While it is true that the actions or inaction of others do not excuse the Claimant from performing his job in accordance with the Carrier’s Standard of Excellence, and that his conduct may have been a part of the overall picture, there is insufficient evidence of the Claimant’s guilt of the charges to support the assessment of a 30-day suspension in this case. Accordingly, the suspension imposed shall be removed from his personal file and he shall be made whole for any losses incurred as a result of the suspension, if any.

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 16th day of September 2013.