

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41742
Docket No. MW-41795
13-3-NRAB-00003-120021

The Third Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(Soo Line Railroad Company (former Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) work days held in abeyance for one (1) year effective August 1, 2010] imposed upon Mr. K. Smith by letter dated July 29, 2010, for alleged failure to comply with GCOR 5.4.3 display of Yellow-Red flags and 5.4.7 display of Red flag or Red light and removal thereof on June 2, 2010 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D-17-10-511-05/8-00526 CMP).
- (2) As a consequence of the violation referred to in Part (1) above, all reference to the aforesaid discipline shall be removed from Mr. K. Smith’s record and he shall be compensated for any and all lost wages and have all rights and benefits restored that may have been lost as a result of this discipline.”

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 this dispute arose, Claimant K. Smith had established and accumulated 32 years of seniority within the Maintenance of Way Department. On June 2, 2010, the Claimant, who was assigned and working as a Foreman, was the Employee-In-Charge (EIC) and was responsible for providing Form B protection for several gangs spanning a 13-mile stretch of track.

The Organization submits that all of the crews and track were properly covered by Form B protection that day, which the Claimant appropriately secured in the morning and released in the evening, once all employees and equipment were in the clear. However, according to the Organization, at issue with regard to the events that transpired on June 2, 2010 is fellow Foreman J. Stoeckly's failure to remove the yellow-red and red flags on the east end of the 13-mile stretch of track in question once the Form B track protection had been appropriately removed. The record evidence reflects that the Claimant had delegated this specific responsibility to Foreman Stoeckly during their morning job briefing, just as the Claimant had done with Stoeckly in the past and many others similarly situated to Stoeckly over the course of 24 years as a Foreman, without once suffering any mishap.

Notwithstanding Stoeckly's error in failing to remove the above-referenced flags once the Form B track protection had been appropriately removed, the Carrier cited the Claimant for an Investigation for the ". . . purpose of ascertaining the facts and determining responsibility, if any, in connection with an alleged incident that took place on June 2, 2010 on the Paynesville Subdivision where track flags were not removed after the Form B was canceled." Following an Investigation held on July 9, the Carrier notified the Claimant by letter dated July 29, 2010 that based upon a thorough review of the Investigation transcript it had determined that substantial evidence established that arrangements had been made to place and remove track flags but, as the EIC, he failed to ensure that his instructions were complied with and, therefore, this failure on his part resulted in his violation of GCOR Rule 5.4.3, involving the display of red flag or red light and the removal thereof. Based on the Claimant's prior personal record, in conjunction with the proven offence committed (albeit with extenuating circumstances) the Carrier determined the appropriate

measure of discipline to be a ten-workday suspension to be held in abeyance for one year, effective August 1, 2010.

The Organization filed the instant claim predicated on two major grounds, to wit: 1) Unlike the Claimant, Foreman Stoeckly was not formally charged with any Rule violations, but instead received informal discipline in the form of a Positive Action Plan (PAP) performed by his supervisor, J. Rosenberg; and 2) the Claimant not only had 32 years of service at the time the claim was filed, he also had a clean work record and was a conscientious employee with a sincere desire and commitment to both safety and his years of service with the Carrier.

Prior to this claim coming before the Board nearly three years subsequent to the effective date of the disciplinary action, the Board was informed that the Claimant had not committed any Rule violations during the one year that his suspension was held in abeyance. Therefore, he ultimately did not serve a suspension and, as a result, he did not suffer any economic or other work related consequences. However, the Board is persuaded by the multitude of past Board decisions that, notwithstanding the fact that the Carrier did not impose formal discipline on Foreman Stoeckly pertaining to his failure to comply with the applicable GCOR Rules cited, the Carrier nevertheless, properly exercised its discretionary authority to both cite the Claimant for an Investigation (because he was the EIC on the incident date in question) and to subsequently discipline him for his failure to totally carry out the responsibilities incumbent upon him as the EIC.

Because the Claimant did not ultimately serve the ten-day suspension, we conclude that the majority of the remedy requested by the Organization is moot. However, given the fact that the Claimant has an unblemished work record for now almost 35 years, we rule to expunge from his personal work record any and all references to the deferred suspension associated with the proven offense committed by him in connection with the events as described above that transpired on June 2, 2010.

AWARD

Claim sustained in accordance with the Findings.

Form 1
Page 4

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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 30th day of September 2013.