

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42342
Docket No. SG-42979
16-3-NRAB-00003-150177**

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(Providence and Worcester Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Providence and Worcester Co.:

Claim on behalf of R. C. Baumuller, for reinstatement to service with compensation for all time lost, with all seniority rights and benefits unimpaired, and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement when it issued the Claimant the harsh and excessive discipline of dismissal without providing him a fair and impartial Investigation and without meeting its burden of proving the charges against him in connection with an Investigation held on September 10, 2013. Carrier’s File No. Robert C. Baumuller termination. General Chairman’s File No. JW-62-7-15-13. BRS File Case No. 15074-P&W.”

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 all times relevant to this dispute, the Claimant was employed by the Carrier as a Track Technician. On July 15, 2013, he was assigned to operate a ballast regulator on main line trackage between Plainfield and Willimantic, Connecticut. At approximately 6:33 A.M., he obtained a Form D from the Train Dispatcher, which authorized him to work between Gluck and Milepost 10 and prohibited any other operation of trains or equipment within the limits of the Form D. Sometime after the Claimant had completed his work, the Train Dispatcher realized that the Claimant had not relinquished his Form D authority. Because he needed to place Train NRW on that trackage to service a customer, the Train Dispatcher contacted the Claimant by phone at approximately 4:50 P.M. The Claimant then asked the Train Dispatcher to cancel the Form D.

At approximately 9:19 P.M. that day, the crew on Train NRW notified the Train Dispatcher that they had discovered that the House Track Switch was still lined for the House Track, where the ballast regulator had been stored by the Claimant.

At approximately 6:00 A.M. the following day, the Claimant called Track Supervisor Leo Gendreau and asked him to meet him at Putnam and give him access to the property. The Claimant explained that he had misplaced his railroad key and could not find it at his home. When the Claimant later called the Train Dispatcher to obtain another Form D for his day's work, the Train Dispatcher told him that his keys had been found by a train crew in Versailles Yard. In reality, according to the Carrier, the keys had been found in the House Track Switch lock, which was on the ground.

When the Carrier compiled the information about these events, Chief Engineer - Track Thomas W. Lewis issued the Claimant a letter dated July 18, 2013, informing him that his employment was terminated as of that date. The letter stated:

"Since the inception of your employment with Providence and Worcester Railroad Company ('P&W' or the 'Company'), you have been repeatedly disciplined for, among other things, inattention to your job requirements and for failing to discharge your duties in a safe manner. For example, on February 15, 2002, you were removed from service for three (3) days after placing the highway warning devices at Attawaugan Road in the override position, which prevented the signals from operating for the following train movement; on June 29, 2007, you were removed from service for three (3) days (reduced to two (2) days) for insubordination and disrespect to a Supervisor; on November 16, 2011, you were removed from service for three (3) days after you struck the Washington Street

under-grade bridge while operating the TC-203; on June 20, 2012, you were removed from service for five (5) days for derailing the railroad weed control hi-rail vehicle; and on January 15, 2013, you were cited for inattention to job duties while operating the ballast regulator on the Willimantic Branch. You have been advised repeatedly that any additional incidents could result in additional discipline up to and including termination.

Most recently, on July 15, 2013, while you were assigned to operate the ballast regulator on the Willimantic Branch, you canceled your Form-D and neglected to line, secure, and lock the main track switch at the Versailles House track to the normal position. This is a very serious violation of applicable federal regulations and NORAC rules. The gravity of this violation cannot be underscored. At 21:24 hours NRWO, a special train to pick up hazardous materials, discovered the reversed switch, fortunately prior to passing through this location. Had the crew of NRWO failed to see the reversed switch, they would have struck the ballast regulator. This incident could have resulted in a catastrophic train accident potentially causing the loss of life and property. In addition to leaving the switch misaligned contrary to NORAC rules and to what you reported to the Dispatcher, you left your switch keys in the lock on the ground at the switch location. P&W's goal is to prevent accidents and injuries by encouraging safe work practices at all times. As a part of this goal, it is critical that employees securely maintain switch keys to prevent any unauthorized persons from gaining possession and use of the switch keys. Your failure to secure your keys was a serious security breach, which could have resulted in harm to other train crews and/or damage or destruction of Company property.

Your continued inattention to the requirements of your duties along with your failure to discharge your duties in a safe manner created an unreasonable danger to life and property and exposed other employees and this Company to significant risk of harm. Therefore, as a result of your record and this most recent incident, consider this letter as notification of your termination from employment by P&W, effective today, July 18, 2013."

By letter dated July 25, 2013, the Organization appealed the Carrier's decision to dismiss the Claimant and requested that an Investigation be held. That Investigation

was held on September 10, and by letter dated October 4, 2013, the Carrier confirmed its decision to terminate the Claimant's employment.

The crux of the Organization's claim is that the Carrier denied the Claimant due process by imposing discipline without first conducting an Investigation. It acknowledges that the Parties' Agreement does not contain any language requiring an Investigation, but insists that it is a basic right of due process. The Board is cognizant of the fact that Third Division Award 8431 set forth what would become the "Seven Tests of Just Cause" first described by Arbitrator Carroll R. Daugherty in *Grief Bros. Cooperage Corp.*, 42 LA 555 (1964). Daugherty's third test in that decision was, "Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a Rule or order of management?" The basis for this test was Daugherty's experience in the railroad industry where pre-disciplinary Investigations were the norm. Today, the prevailing trend in the arbitral community is to disregard the "Seven Tests."

Pre-disciplinary Investigations in the railroad industry were the norm because the requirement for such was contained in nearly all collective bargaining agreements. Drafters of those agreements were presumed to know how to grant that right to employees, and the Parties herein are also presumed to know how to do so. Nevertheless, they elected not to incorporate such a provision into their Agreement. It would be beyond the authority of the Board to add such language to the Parties' Agreement. In any case, Third Division Award 40576, involving these Parties, put that issue to rest when it held:

"Prior to a consideration of the merits of the claim, it is necessary to note that the Agreement between the parties contains only one provision with respect to discipline matters. The sole reference to 'discipline' in the Agreement is found in Article 13:4, which provides that 'for minor offenses discipline will not be implemented until after final conference with the Carrier.' There are no provisions for charging employees with alleged violations of Carrier Rules, or for holding Investigations."

We, accordingly, find that the Carrier's failure to afford the Claimant an Investigation prior to dismissing him was not a violation of the Agreement. The Organization's contention that the Claimant was prejudged when the Investigation was held on September 13, 2013, is a moot issue because the Claimant was already dismissed by the time the Investigation was held. The purpose of that Investigation was

to set forth the Carrier's basis for its decision to dismiss the Claimant and afford him an opportunity to present facts in his own behalf.

In reviewing the record of the Investigation, the Board concludes that the Carrier had substantial evidence that the Claimant left the property on July 15, 2013, without first releasing his Form D and without securing the track on which he had parked the ballast regulator. There is no question that the Claimant's switch key was found in the lock on the ground. We simply do not find it credible that the Claimant relined the switch to the main line and then locked it, but subsequently lost his keys, which were then found by someone who happened to go to that same switch, unlock it and reverse the position.

The Board does not agree with the Organization's contention that the discipline imposed was harsh and excessive. The Claimant's negligence on this date was a serious matter that could have justified dismissal on its own. However, the Claimant's prior disciplinary record shows that he does not take seriously the need to perform his duties in a safe manner. That is a critical component of his position as a Track Technician. The Board finds that his dismissal was warranted, and not in violation of the Agreement. The claim, therefore, 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 28th day of July 2016.