

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42406
Docket No. SG-42653
16-3-NRAB-00003-140167**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of W. E. Jensen, for reinstatement to service with compensation for all lost wages, including skill pay, with all rights and benefits unimpaired, and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal to the Claimant without providing him a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on August 29, 2012. Carrier’s File No. 35-13-0008. General Chairman’s File No. 12-046-BNSF-188-SP. BRS File Case No. 14944-BNSF.”

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.

Claimant Jensen was a Signal Maintainer, meaning he largely worked unsupervised. Following installation, modification or repair of equipment it was his job to test that equipment to ensure that it was functioning properly.

On July 16, 2012, the Track Department replaced a switch point and stock rail near Woodland, Washington. On July 18, 2012, an Amtrak train derailed at milepost 118.21 in Woodland. Analysis by the Quality Assurance Team and the FRA Inspector determined that the switch point was not properly adjusted following its replacement in that a gap of .75 of an inch between the rail and the switch point was created when the old switch point measuring 2.5 inches was replaced with a new one measuring only 1.75 inches.

The Carrier held a formal investigation for the purpose of gathering evidence. After investigation, Director Signal Engineering Jerry W. Specht determined that the Claimant had violated Code of Federal Regulations (CFR) 236.11 – Adjustment, repair, or replacement of component; CFR 236.303 – Control circuits for signals, selection through circuit controller operated by switch points or by switch locking mechanism; CFR 236.334 – Point detector; CFR 236.4 – Interference with normal functioning of device; Maintenance of Way Operating Rule (MWOR) 1.6 – Conduct - Negligence and Dishonesty; MWOR 9.5.2 – Protection If Signal Appliance or Track is Damaged; Signal Instruction (SI) Test Procedure (TP)-101 – All Systems - Purpose for Tests and General Instructions; and SI TP-103A – Point Detector Integrity Test, and SI TP-382 – Switch Obstruction Test. These lapses were found to be the cause of the derailment. The Claimant was terminated for failing to perform required inspections and tests, and for falsely recording that he had.

The Organization protested the discipline, which the Carrier rejected on appeal. The claim was duly processed without resolution. As a result, the Organization presented the dispute to the Board for hearing and decision.

The Carrier asserts that highly qualified professionals made the determination that the derailment was caused by the .75” gap that the Claimant failed to identify and repair. In its view, every train that ran over the switch prior to the derailment damaged it further. The Carrier points out that the Claimant admitted he performed no tests and his inspection was visual; this did not meet any of the requirements in the Rules, Regulations or Instructions. The Carrier alleges

the Claimant also admitted he entered a test into Rail Docs that he did not actually perform.

The Carrier argues that SI-TP 101, by its terms, applies not only to circuits, but to equipment and devices as well: “After completing any installation, modification, repair of circuits or equipment . . . a complete operational checkout shall be made to ensure that all circuits and devices operate as intended.” It contends arbitral precedent establishes that ignorance of the rules is not a valid defense to their violation.

The Carrier relied on witness statements in lieu of live testimony but asserts these statements substantiated what the Claimant said. The Track Foreman and the Welder were not called to testify because the Carrier deemed neither to be crucial to establishing whether the Claimant performed the required tests and inspections. Though the Organization requested these persons to attend, they chose not to, most likely because the Organization did not offer them compensation for their time. BNSF contends it was not required to provide witnesses since their testimony did not conflict with the Claimant’s. It insists it is not obliged under Rule 54 to compensate the Organization’s witnesses for their time. It reasons that there was no need for them to attend because the Claimant admitted he did not perform the required tests and inspections.

The Organization finds fatal procedural error in this case, and contends the Board should not reach the merits. It notes that before receiving any discipline, the Claimant must have a fair and impartial investigation. In its assessment, the Carrier’s failure to provide witnesses with first-hand knowledge constituted a blatant denial of a fair hearing. The Organization requested their presence to no avail, resulting in what it deems a serious due process violation. It cites precedent for its position that denial of the right to confront a hostile witness is prejudicial procedural error.

The Organization claimed the multiple trains which ran over this switch prior to the derailment prove its integrity. It reasons that had the gap been there, they would have derailed too because it is not credible for those trains to have run over the switch without derailling if there was a .75” gap.

The Claimant was not the employee in charge, the Organization notes, and he did not release the authority after the work was done. He was called away from the location by a trouble call. The Claimant was not the employee who returned the

switch to service. It was the Department Welding Foreman who held the track authority and returned it to service. It was incumbent on that employee to test and check it. The Organization also argues that a period of 48 hours with the passage of no less than four trains breaks any causative link.

In this Board's assessment, the Claimant was not prejudiced by the failure of the Organization's requested witnesses to appear. Their statements indicated that they did not see the Claimant perform testing. Such evidence does not alter or enlighten the facts of the case. It follows that there has been no prejudicial procedural error in this case.

The Inspection Report filed by the Department of Transportation on August 8, 2012 stated:

**"INTERFERENCE WITH NORMAL FUNCTIONING OF
DEVICE WITHOUT TAKING MEASURES TO PROVIDE
SAFETY OF TRAIN OPERATION.**

**On July 16, 2012, switch rail and stock rail replaced and placed in
service without proper tests and adjustments of power operated
machine switch 2B."**

This report alone provided the Carrier with substantial evidence of rules violation. The Claimant had submitted a report on July 16, 2012 showing that he had tested the switch, meaning the Carrier had reasonable grounds for finding him responsible for the problematic DOT Inspection Report. In addition, the Claimant's testimony suffered from incongruity; first he said the switch was installed improperly, then he stated he looked at it and there was no gap. He cannot have it both ways. Significantly, he admitted he did not perform the tests:

**"JERRY SPECHT: And, Mr. Jensen, back to the question of the test
procedures. You stated that you did not do TP 103 or TP 382. Is
that correct?**

WALTER E JENSEN: That is correct.

**JERRY SPECHT: Mr. Jensen, did you put any type of gauge or any
type of measurement to test the point?**

WALTER E JENSEN: I did not.”

The Claimant also admitted he reported testing which he did not do:

“JERRY SPECHT: Mr. Jensen, you stated previously that you did not do TP 382. Why was that test entered in?

WALTER E JENSEN: When I got the call, I was told it was a derail. 15 minutes later when Jay called me he told me it was an Amtrak. I went into shock. I'm still in shock, but I ran on auto pilot that night. I was out there all night long. No mention was made over the phone about test inspections, point and stock rail, none of that. That never happened. That conversation took place while Jay and I were walking away from the bungalow just he and I. And I took it as an implication that it would be in my best interest to put in a test. And so I did per instructions.”

The record evidence persuades the Board that the Claimant took it upon himself to record a test when he had not performed the test at all. His admissions provided the Carrier with substantial evidence of wrongdoing. The fact that other trains preceded the derailment is not found by the Board to establish a lack of causation. The consequences of the Claimant's failure to perform his testing duties could hardly have been more serious. His dishonesty in representing that safety requirements had been met destroyed the trust the Carrier had placed in him. It follows that the discipline was proper.

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 31st day of October 2016.