

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42854
Docket No. SG-43168
18-3-NRAB-00003-150256**

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

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(BNSF Railway Company (Former Burlington Northern
(Railroad 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 P.L. Abernathy and J.D. Gilman, for any mention of this matter to be removed from their personal records, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the Claimants the harsh and excessive discipline of a Standard Formal Reprimand with a 1-year review period without providing them a fair and impartial Investigation or meeting its burden of proving the charges in connection with an Investigation held on October 3, 2013. Carrier also violated Rule 56 when it failed to provide the Claimants with proper instruction regarding the locating of underground cables. Carrier’s File No. 35-14-0016. General Chairman’s File No. 13-046-BNSF-154-TC. BRS File Case No. 15113-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.

On July 21, 2013 a contractor severed two signal cables. The Carrier determined that this was because the Claimants had improperly located the cables. An Amtrak delay resulted. Each Claimant was issued a Standard Formal Reprimand with a one year review period. The Organization protested the discipline as barred by procedural error and unjust due to the Carrier's failure to provide necessary instruction. The parties to said dispute were given due notice of hearing. This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The Carrier denies any prejudicial procedural violation in this case. It contends that if the Organization wanted certain witnesses to testify, it should have arranged for this. If the Organization needed to cross-examine witnesses who were not present at the Investigation, they could have requested an adjournment for that purpose. In the Carrier's view, because the Organization elected against an adjournment, it has voluntarily waived any right to object.

System Signal General Construction Supervisor and Witness Lee Huizenga took several photographs clearly showing where Claimants made their markings and where the cable was actually located and severed. The markings made by Claimants were approximately four feet from where the first cable was severed and approximately six or seven feet from where the second cable was severed. In the Carrier's assessment, this constituted violation of Signal Instruction 1.2, justifying discipline.

The Carrier notes Claimant Gilman had located "hundreds" of cables in the past. The Claimant Abernathy also stated he was familiar with the BNSF Cable Locate Policy and also had previously located "around a hundred" cables. The Carrier concludes from this that neither Claimant can reasonably argue that he was inadequately trained or experienced.

Carrier notes that Claimant Gilman's testimony -- that another crew came along and changed the markings -- was not found credible by the hearing officer. It maintains such credibility determinations are entitled to deference by the Board.

There is no corroborative evidence that would justify diminishment of this deference. Since this was Claimants' first offense and there was no injury, the Carrier argues the appropriate discipline was a Formal Reprimand with one-year review period.

The Organization states it anticipated the attendance of Signal Supervisor Mimi Savage as a witness, but she did not attend. It denies waiving its objection and explained that because the Carrier does not pay a principal for attending his own investigation, rescheduling would entail added time and expense for Claimants. In the Organization's assessment, it is particularly important here, the Organization argues, because Savage had the Claimants dig to make sure the cable was there, and they did this in front of her. According to the Organization, she blessed their work, and as a result, the Claimants cannot and should not be faulted for any wrongdoing.

The Organization asserts the record supports the conclusion that false locates can result without any fault of the employee. Unbeknownst to the employee, certain models of the automatic gain locator are particularly prone to giving false readings or should only be used on low frequency and never with the null function. Instruction to this effect was not offered until shortly after the severance here concerned. In addition, underground metal can skew the readings. The Organization is appalled the Carrier would accuse and ultimately charge Claimants when the location done twice by different people, with the same results.

The Board is concerned that the testimony of Mimi Savage was not made part of the record when it was clearly crucial to the case. The Carrier's argument that the Organization waived its objection by failing to request postponement is generally cogent. However, in this instance, the relevance and importance of Savage's testimony is obvious and substantial. As a result, the Board accepts the Organization's proffer that Savage would have confirmed that the employees potholed and accurately located the cable, and that they followed instructions and performed their duties properly. Given this context, the Carrier cannot be said to have met its burden of proof.

The claim is sustained in full. The Carrier shall immediately remove the discipline from Claimants' records, with seniority, vacation and all other rights unimpaired and make them whole for all time lost as a result of this incident.

AWARD

Claim sustained.

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 10th day of January 2018.