

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43119
Docket No. SG-43661
18-3-NRAB-00003-160446**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Kansas City Southern Railway Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern Railway Company:

Claim on behalf of M. A. Fielding, for compensation for all lost wages and benefits, including skill-pay, with any reference to this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when it issued the harsh and excessive discipline of 30-day actual and a 30-day record suspension 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 April 3, 2015. Carrier's File No. K0615-6066. General Chairman's File No. 15-015-KCS-185. BRS File Case No. 15320-KCS.”

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.

After Investigation held April 3, 2015 and by letter dated April 13, 2015, the Claimant – a Signalman in the Carrier’s service for approximately nine years – was issued a 60-day suspension (30 days actual, 30 days record) on allegations that he failed to perform his duties in a safe and proper manner by failing to report that the highway grade crossing at FM 70 in Agua Dulce, Texas on the Laredo Subdivision was out of service and that he also failed to enable the crossing and failed to properly test the crossing after the work was completed on March 25, 2015.

After receiving notification on March 25, 2015, that the gates and lights did not activate until an eastbound train was in the crossing at the FM 70 crossing at MP 130.40 in Agua Dulce, Texas, Signal Supervisor D. Harwell went to the crossing and found a set of jumpers on the east unit which disabled the unit at that crossing. Harwell then enabled the crossing and placed it back in service.

Harwell determined that the Claimant had been working in the vicinity of FM 70. Harwell testified that he spoke with the Claimant who identified the jumpers taken from FM 70 as his. Tr. 7, 12. According to Harwell, there were no other Signalmen working at FM 70 other than the Claimant and the closest Signalmen working in that area were nine or ten miles away. Tr. 18-20. However, Harwell testified that the Claimant denied taking the FM 70 out of service. Tr. 7.

Maintenance of Way Operator J. Lasyone testified that on the date of the incident he was operating a roadway maintenance machine which required that he work in three crossings at Agua Dulce, including the crossing at FM 70 at MP 130.40. Tr. 45-46. Lasyone testified that he had a job briefing with the Claimant that morning about the scope of the machine operator work. Tr. 46-47. Lasyone further testified that he and the Claimant did not specifically discuss disabling the FM 70 flasher and he did not see the Claimant at the FM 70 crossing. Tr. 53-54. According to Lasyone, there was no mention of FM 70 in his discussion with the Claimant because “I didn’t realize that FM 70 was behind there” and he did not realize that FM 70 was involved until he got to that point of work. Tr. 49. According to Lasyone, he realized that FM 70 needed some work and that his task changed after the job briefing with the Claimant. Id. Although realizing that this task had changed, Lasyone did not have a further briefing or conversation with the Claimant. Tr. 49-50. Lasyone also testified that after he gave a statement about what happened, he was called by Harwell and asked if he could add to his statement mention of the specific crossing at FM 70, which Lasyone did. Tr. 55.

The Claimant denied that he disabled the FM 70 crossing. Tr. 60, 67. The Claimant further testified he was working in the area assisting Lasyone's gang; he was not aware of any other Signal employees working in the area; and that he spoke with Harwell and confirmed to Harwell that based on the way the jumpers were tied, the jumpers that Harwell showed him from the unit at FM 70, "looked like a pair of my jumpers." Tr. 61-62, 68-69. However, the Claimant testified that because other Signalmen needed jumpers and are not equipped with enough jumpers "I have loaned 10 sets of jumpers of those particularly tied jumpers to other signalmen." Tr. 62-63.

Although it is debatable, we find that the Carrier has not met its burden to show by substantial evidence that the Claimant disabled the crossing at FM 70 and then failed to enable the crossing after work was completed and perform other required duties on date of the incident. The Carrier's determination that the Claimant engaged in misconduct is based in great part upon the fact that the jumpers found at the crossing were the kind used by the Claimant, but the Claimant testified that he has given out his jumpers to other Signalmen, thereby showing that the Claimant was not the only Signalman who had those particular jumpers. The Carrier also relies upon the fact that the Claimant was in the vicinity of the crossing at FM 70. However, Lasyone's testimony shows that he did not see the Claimant there at the time the work was performed by Lasyone. Undercutting the Carrier's determination that the Claimant engaged in misconduct is Lasyone's testimony (as opposed to an addition requested to be made to his statement) that he did not specifically tell the Claimant that the Claimant needed to disable FM 70 crossing and the fact that Lasyone did not even know that he was going to work on that crossing until the work became necessary for Lasyone to perform, with no further conversation with the Claimant about disabling that crossing.

Weighted against the Claimant's denials that he disabled the crossing, the Carrier's case is based on weak circumstantial evidence that has been disputed. But the standard is that the Carrier is obligated to demonstrate through substantial evidence that the Claimant engaged in the charged misconduct. The weak circumstantial evidence in this case is not sufficient to meet that burden.

The Carrier's argument that this is a credibility case and that the Board must defer to the Carrier's credibility determinations is not sufficient in this case. The Carrier is correct that it is not the function of the Board to re-determine credibility findings as the Board does not have the opportunity to observe the witnesses and assess their credibility. We are confined to the record developed on the property.

However, we note that the Investigating Officer and Carrier Officer issuing the discipline were not the same individuals and, thus, the Carrier officer issuing the discipline also did not have the opportunity to personally observe the demeanor of the witnesses for credibility purposes. Further, the Carrier's April 13, 2015 letter issuing the discipline makes no mention of credibility resolutions. This case is determined solely upon the Carrier's reliance upon weak circumstantial evidence to find that the Claimant engaged in the charged misconduct, which evidence we have found does not meet the Carrier's burden of demonstrating substantial evidence in the record.

As a remedy, the discipline shall be rescinded; the disciplinary action shall be removed from the Claimant's record; and the Claimant shall be made whole in all respects.

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 30th day of May 2018.