

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 43318
Docket No. SG-44457
19-3-NRAB-00003-170603

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Kansas City Southern Railway Company (former
(MidSouth Rail Corporation)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern (formerly Midsouth Rail Corp.):

Claim on behalf of T.J. Asher, for compensation for all time lost, including overtime, 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 35, when it issued the harsh and excessive discipline of dismissal against the Claimant, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on November 3, 2016. Carrier’s File No. K1417-7063. General Chairman’s File No. 16-127-MSR-185. BRS File Case No. 15699-Midsouth.”

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.

The Claimant in this case is the same employee whose 30-day suspension was upheld by the Board in Third Division Award 43317.

After hearing held November 3, 2016 and by letter dated November 11, 2016, the Claimant – an employee in the Carrier’s service for approximately 17 years – was dismissed for failing to properly perform his duties by failing to observe that the commercial power was present after working on the Highway Grade Crossing Warning System at or near Milepost MG-010.30 at Lobouy Road Crossing on the Gulfport Subdivision on September 12, 2016.

An October 6, 2016 a report of an activation failure on Lobouy Road crossing on the Gulfport Subdivision at MP MG-010.30 was made to the Carrier. Specifically, the report indicated that the signal at the crossing did not activate when a train passed through.

A Signal Inspector determined that the AC power to the crossing was off; the standby batteries were dead; the commercial power switch was in the “off” position; the breaker had not been tripped; the signal case was locked; and there was no evidence of tampering.

The Carrier investigated and determined that the Claimant performed an inspection of the crossing on September 12, 2016; the inspection report showed that the Claimant tested the flashing lights and found no problems; and the Claimant had tested the standby batteries.

According to the Claimant, after completing testing he was required to restore commercial power. Tr. 44. The Claimant testified (Tr. 44-45):

“Q: ... So for you to restore the commercial power, the breaker, you would have had to have put it in the on position; is that correct?

A: It is.

Q: All right, sir. And once you done that, according to the Carrier Exhibit 7 out of the Signal Rulebook, are you required to observe that the commercial power is present?

A: Yes, sir.

Q: Did you do that?

A: I looked at the power off light when I closed the doors and evidently the sun was in the light that made me think that it was lit. I looked at the power off indication and thought that it was on.

*** * ***

Q: Okay. So you – you testified that you did observe it but you’re not sure if it was actually on because the sun was in your eyes?

A: The [power] appeared to be on. Evidently the sun was reflecting into the light, giving it the appearance of being on.”

Substantial evidence supports the Carrier’s position that the Claimant did not properly perform his duties when he failed to sufficiently observe that the commercial power was present after working on the crossing system. The Claimant’s testimony quoted above shows that his observation of the power light was compromised by the position of the sun causing a reflection. Under the circumstances, the Claimant should have done more to make certain that the crossing system would not fail due to lack of power.

With respect to the amount of discipline imposed, the Carrier points out that the Claimant was previously dismissed, but was reinstated by Third Division Award 41789 which reduced that dismissal to a long-term suspension and the Carrier placed the Claimant at Step 4 of its discipline matrix.

Third Division Award 41789 found that dismissal of the Claimant for the demonstrated misconduct in that case (again, failure to perform duties which the Board found to be a potential safety hazard) was “harsh and excessive.”

Nevertheless, in this case we find that the Claimant’s dismissal was arbitrary.

We note that the Claimant was on a 30-day suspension (see Third Division Award 43317) and that the Claimant had been previously dismissed and reinstated by Third Division Award 41789. Under ordinary circumstances, that record would cause the Board to uphold the Carrier's dismissal action for the demonstrated misconduct in this case. However, the Claimant is a long-term employee – some 17 years. Further, the purpose of discipline is to send a corrective message to employees that they must conform their conduct to the Carrier's rules and reasonable expectations of the work place. Under the unique circumstances of this case and without prejudice to any other arguments made by the parties, the Board is of the opinion that something less than dismissal is appropriate for this long-term employee and will serve to get the message through to the Claimant that he has to comply with the Carrier's rules – particularly given the safety-sensitive work that the Claimant performs. We shall therefore require that the Claimant be reinstated without loss of seniority as dismissal in this unique case is arbitrary. The Claimant's reinstatement shall be subject to his passing ordinary return-to-duty testing and qualifications requirements.

To further send the corrective message to the Claimant that discipline is meant to send, the Claimant shall not be entitled to backpay.

And to make certain that the Claimant understands that he is required to comply with the Carrier's rules, we shall add another condition to the Claimant's reinstatement. The Claimant's reinstatement shall be on a last-chance basis. The Claimant's discipline record will reflect that in the event after his reinstatement he engages in any misconduct, the Carrier may dismiss the Claimant from service. If after an Investigation the Carrier determines that the Claimant engaged in any charged misconduct and dismisses the Claimant and further if the Organization determines that it desires to appeal that action, the Board shall have jurisdiction to resolve that dispute. In the event such appeal is taken by the Organization, the only question before the Board will be whether substantial evidence supports the Carrier's determination that the Claimant engaged in the alleged misconduct. If the Board makes that finding, the Carrier's dismissal of the Claimant shall be upheld.

AWARD

Claim sustained in accordance with the Findings.

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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 14th day of December 2018.