

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43495  
Docket No. SG-44539  
19-3-NRAB-00003-170719**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.**

**(Brotherhood of Railroad Signalmen  
PARTIES TO DISPUTE: (  
(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 T.J. Travis, for 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 a Level S, 30-day Record Suspension with a 1-year Review Period to 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 June 24, 2016. Carrier’s File No. 35-16-0035. General Chairman’s File No. 16-119-BNSF-33-K. BRS File Case No. 15693-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.**

**At the time of this discipline, the Claimant was assigned to the position of Signalman headquartered in Emporia, Kansas. On June 16, 2016, he was given notice of an Investigation in connection with the following charge:**

**“An investigation has been scheduled .... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to display red flags or complete the working limits form after receiving authority that was joint with overlapping limits with another employee and a train when establishing working limits, MP 59.6, Strong City Subdivision, at approximately 1225 hours on June 15, 2016, while working as signal maintainer.”**

**After a formal Investigation on June 24, 2016, Claimant was found in violation of MWOR 6.3.1 Main Track Authorization and was assessed a Level S 30 Day Record Suspension with a One Year Review Period.**

**On June 15, 2016, the Claimant had track and time to protect the crossing at Milepost 59.6 on the Strong City Subdivision. An Operations Test team noticed that two gangs had joint authority. They arrived at the signal house where Claimant was working and approached the Claimant to question him. Claimant said that he was asked if he had a track warrant and he answered yes. He was asked to show the warrant, so he began pulling it up on the computer. The Manager asked the Claimant if he was joint with anyone and the Claimant answered, “Yes, with Hainard.” Then the Manager asked the Claimant if he had briefed with Hainard and the Claimant answered that he was at the briefing and they had briefed, and he understood the work plan for the day.**

**Next, the Claimant was asked if he filled out a briefing form or put out red flags and the Claimant responded “no.” Then the Claimant told the Manager that he was working under Hainard’s authority. The Manager said that he challenged this, asking how he could be working under Hainard’s authority when he was holding his own authority? The Manager asked the Claimant if he had a Statement of On-track Safety, and the Claimant replied, “No.” Then the manager spoke with Hainard, who told him that he was not joint with anyone but the work train and that the Claimant had not had a job briefing with him. The Manager said that when he spoke to the Claimant’s supervisor, he said that the Claimant had admitted that he hadn’t had a job briefing with Hainard.**

The Claimant testified that he never fouled the track. When the Manager arrived, he was in the house, and neither he nor his assistant were working on the track. He said that the Manager asked to see his track warrant but did not ask about a Working Limits Form. He did not recall the Manager asking for a Statement of On-Track Safety. The Claimant also said that he thought the Manager was asking about the work groups' briefing. The Organization put into evidence a Statement of On-Track Safety stating that the Claimant was working as a Lone Worker.

The Carrier contends that the Claimant's admission proves that he did not produce red flags to identify his working limits while working in overlapping track authority with the Maintenance of Way Surfacing Gang and Tie Gang. The Carrier contends that the Claimant's conduct violated MWOR 6.3.1, which provides, in part:

“When “joint” authorities overlap, and working limits will be established within the overlapping portion of the authorities, red flags must be displayed to identify the working limits. The EIC of each overlapping authority must record the following on the Working Limits form when working limits are established in the overlapping portion of “joint” authorities:

- a. Working limits
- b. Name of the EIC of the working limits
- c. At time
- d. Clear time”

The Organization raises several procedural issues. The Organization contends that the Carrier denied the Claimant a fair and impartial Hearing when it insisted that its only two witnesses could testify by telephone over the Organization's objection. It contends that permitting this telephonic testimony precluded the Hearing Officer from ensuring that the witnesses were properly sequestered. The Organization also contends that the commencement of the hearing was delayed for three hours, even though the Organization and the Claimant were present and ready to proceed, resulting in a unilateral postponement of the hearing.

As to the merits, the Organization argues that the Carrier has failed to prove the charge against the Claimant with substantial evidence. It contends that the Claimant had joint track and time with two other workgroups and acquired his authority strictly to protect the crossing and no work that involved fouling the track was being performed. Additionally, the Claimant had filled out a “Statement of On-

Track Safety” as a Lone Worker if Maintenance of Way equipment caused any issues with signal track wires or another issue arose that would require work that involved fouling the track. The Organization presented evidence that the Claimant was permitted to use a lookout or be a lone worker in the performance of minor work or routine inspection.

The Board finds that the issues raised by the Organization’s procedural objections are dispositive of the case. While telephone testimony does not per se deny an employee a fair hearing, the individual facts and circumstances of the case will determine whether a fair and impartial hearing took place.

The Board concludes that the Hearing Officer’s ability to make such credibility determinations would be severely hampered when one of the critical witnesses testifies by telephone. The conversation between the Claimant and the Manager was the linchpin of this investigation, and the employee’s right to cross-examine the witness was certainly compromised by the fact that the witness was not physically present at the hearing.

Furthermore, when the Organization objected to absence of the key witnesses, the Hearing Officer said that they were absent “due to their positions.” It later became clear that each of them testified from their homes. No other explanation for their absence was given. Telephone testimony may be permitted when the witnesses are understandably unavailable, here, their absence was not satisfactorily explained. The Board finds that when key witnesses are not produced to testify in person and their absence is unexplained, the employee’s right to a fair and impartial hearing is compromised. The discipline cannot stand, and the Claim must be sustained.

### **AWARD**

**Claim sustained.**

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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 1st day of March 2019.**