

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43497
Docket No. SG-44594
19-3-NRAB-00003-180019**

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 D.E. Malone and M.B. Varnold, for compensation for all time lost, including overtime, with all rights and benefits unimpaired, including being credited for all qualifying days lost, and any mention of this matter removed from their personal records; account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of a Level S, 31-Day Actual Suspension with a 1-year review period to the Claimants, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on April 15, 2016. Carrier’s File No. 35-16-0038. General Chairman’s File No. 16-108-BNSF-20-C. BRS File Case No. 15733-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 dispute, the Claimants in this matter, Signal Inspector D.E. Malone and Signal Electronic Technician M.B. Varnold, were headquartered in Galesburg, Illinois. The Claimants were given notice of an investigation with 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 properly disable the grade crossing at Edwards Street DOT 072902C in Macomb Illinois per Signal instruction 7.2A and your alleged failure to properly test the grade crossing for proper operation per TP-234 after making wiring changes which resulted in an activation failure.

After a formal Investigation on April 15, 2016, both the Claimants were found to have violated SI 7.2A Highway Grade Crossing Warning Systems- Disabling and STP-TP-234 Highway Grade Xing Warning Test Procedures and were assessed a 31 days Actual Suspension and a One Year Review Period.

On April 6, 2016, Claimant Varnold disabled various crossing gates in the Macomb, Illinois area, including the Edwards Street Crossing so that Maintenance of Way gangs working in the area could perform maintenance work. Thereafter, he re-enabled the crossing. Claimant Malone was called to test the crossing circuit due to some problems. Claimant Varnold again disabled the crossing so that Claimant Malone could repair it. When Claimant Malone finished, he restored the crossing, but did not test to ensure it was functioning correctly. The crossing was experiencing a partial activation failure, so a Signal Maintainer was sent out to investigate. He determined that the wiring was still set on a disabled status. Recorder logs showed that three trains passed through the crossing unprotected before the error was found.

The Carrier contends that neither of the Claimants re-tested the crossing to verify that the Edwards Street Crossing was operating as intended. The Carrier contends that if the Claimants had followed the proper testing procedures, they would have corrected the problem before three trains passed through the crossing unprotected.

The Organization contends that the Claimants did not receive their Investigation Notices until April 11, 2016, which was four days before the Investigation on April 15, 2016, and that the Carrier's procedural flaw is fatal to its case. The Organization contends that Rule 54 provides that the Claimants are entitled to five days' notice in order to prepare a proper defense.

With respect to the merits, the Organization contends that Claimant Varnold was placed into a position in which he was responsible for disabling, testing, and re-enabling nine crossings on his own, without support from the Carrier. The Organization further contends that Claimant Malone did not disable the crossing and was not involved with the events that led to the partial activation failure. As a result, Claimant Malone should not have been disciplined.

Rule 54.C of the Agreement states, "At least five (5) calendar days advance written notice of the investigation outlining specific offense for which the hearing is to be held shall be given the employee and appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire."

At the Investigation, Claimants testified that they received their investigation notices on Monday, April 11, 2016, for the investigation held on Friday, April 15, 2016, four days later. There is no question that the wording of Rule 54.C is clear and is binding on the parties here. The parties negotiated a provision that allows the accused employee a minimum of five days' notice of an investigation, in order to allow the employee sufficient time to prepare for the investigation. The Board has an obligation to enforce this term, just as any other term in the agreement.

The question of whether the Carrier's obligation under Rule 54.C is satisfied by mailing a Notice of Investigation at least five days prior to the Investigation has been addressed by previous awards such as Public Law Board 4161, Award No. 32 and Third Division Award 42706. In accordance with these awards, the Board is persuaded that Rule 54.C demands that the affected employee receive written notice of the investigation at least five calendar days in advance of the Investigation and that the Carrier failed to timely notify the Claimants herein.

Given the Board's ruling on the procedural issue raised by the Organization, the question of the merits need not be addressed.

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 1st day of March 2019.