

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43808
Docket No. SG-44959
19-3-NRAB-00003-180408**

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(The Belt Railway Company of Chicago)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Belt Railway of Chicago

Claim on behalf of K.D. Hall, for reinstatement to service with compensation for all time lost, including overtime, all rights and benefits unimpaired, including Railroad Retirement credits, and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 52, when it issued the harsh and excessive discipline of dismissal 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 December 20, 2016. Carrier’s File No. Hall Investigation #3. General Chairman’s File No. 16-09-BRC. BRS File Case No. 15842-Belt. NMB Code No. 173.”

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.

Claimant Ken Hall entered the service of the Carrier on August 8, 2001 as a Signalman. At the time the subject incident occurred that resulted in his dismissal from service, charged with having violated GCOR Rule 1.6, the Claimant was assigned to the position of Signal Maintainer in Carrier's Signal Department with the title of Road Maintainer. Prior to his dismissal, Carrier cited the Claimant for formal investigation for infracting GCOR Rule 1.6 on two (2) prior occasions, the first occurred on November 17, 2016 and the second occurred the very next day, November 18, 2016. Relative to the November 17th occurrence, Carrier imposed discipline of a five (5) day actual suspension which was appealed unsuccessfully by the Organization and then progressed to arbitration before the Board wherein, we sustained the suspension (see Docket No. 44957 / NRAB 3-180406). Relative to the November 18th occurrence, Carrier imposed progressive discipline of a ten (10) day actual suspension which also was appealed unsuccessfully by the Organization and then progressed to arbitration before the Board wherein, we sustained that suspension as well (see Docket No. 44958 / NRAB 3-180407).

On December 6, 2016 at approximately 1:32 P.M., Acting Dispatcher, Kelly Petika working the first or day shift received a trouble call from a BNSF crew traveling Eastward across the NERSKA interlocking at Lemoyne reporting that the signal was cycling from a proceed indication to dark and then to red. Petika explained that upon receiving a trouble call the procedure to follow requires inputting the information into the Operational Issues computer program but she was unable to do so because the computer at the time was down for maintenance. In the alternative, Petika recorded the trouble call by handwriting it down on a legal pad. Petika then contacted the Claimant over the radio to notify him of the trouble call as the Claimant's tour of duty had not yet ended. Petika related that the Claimant answered her call telling her he was heading to go to the bathroom. Jokingly, Petika responded, "there are no bathroom breaks here". Petika related that since the Claimant took her call she did not contact another Road Maintainer to notify of the reported signal problem at Lemoyne notwithstanding there were other Road Maintainers on duty in the Territory and notwithstanding that the Claimant's tour of duty was to end thirty (30) minutes later at 2:00 P.M. When Petika's shift which also ended at 2:00 P.M., she held a mandatory job briefing with the second shift dispatcher who, on that date was Anthony Marchi. Petika related that in the briefing she informed Marchi that the Operational Issues computer system was down and then handed him the legal pad upon which she had recorded in handwritten notes the issues that required his being informed about noting that first on the prioritized list was the trouble call pertaining to the signal at Lemoyne. Petika

further explained that once a trouble call is reported to the Signal Department the call is in their hands as to how to handle the call; for example, whether the problem will be attended to immediately or whether there are issues that will be taken care of first in a prioritized fashion. According to Petika once a trouble call is reported to the Signal Department, dispatch is not privy to the details of how the Department will handle the call. In any event, because the Claimant took her call and was informed of the signal problem at Lemoyne, this constituted having notified the Signal Department of the reported trouble call. That being the case, dispatch does not follow-up on the reported trouble issue to check on and make sure the problem is being corrected.

Marchi related that when he assumed his second shift duties by relieving Petika at turnover time, Petika informed him of the reported trouble call and that she had responded by notifying the Claimant, the Daylight Maintainer. Marchi's next knowledge of the signal problem at Lemoyne was a call he received at 7:14 P.M. from a crew that reported the signal was cycling from dark to red to dark to red. At first, he did not know what the crew was reporting as he related the screen he was looking at was showing a good signal. At this time Marchi related he had no traffic at the Lemoyne location acknowledging therefore that the signal problem was not delaying traffic or causing any harm. However, in accord with Carrier procedure, he entered the trouble call into the Operational Issues computer program as maintenance had been completed and it was then up and running. Next, Marchi contacted Paul Granholm the second shift or afternoon Road Maintainer with hours of 2:00 P.M. to 10:00 P.M. and informed him of the signal problem at Lemoyne.

According to Granholm he reported for his second shift ten (10) minutes before 2:00 P.M. at which time he and Supervisor Lill having arrived at the shop location at the same time engaged in talking with one another while remaining in their respective vehicles. In their verbal interchange however, Lill never informed him of an earlier reported call to dispatch by a BN crew of a malfunctioning signal problem at Lemoyne. Additionally, the Claimant also had arrived at the shop location at the same time behind Lill but, according to Granholm the Claimant never reported the trouble call he received from dispatcher Petika thus failing to turn over the call to him. Granholm related it was not until sometime around 7:00/7:10 P.M. that Dispatcher Marchi called him asking if he had received notification the signals at Lemoyne on the BN were malfunctioning cycling from green to yellow to red and asked him to take a look. When Granholm arrived at Lemoyne and determined the problem that existed was serious, he called Ron Wanda, Manager Signal and Communications who directed him to run the gamut of ground tests which he did. As the tests proved unsuccessful in detecting the problem Wanda informed Granholm he would send out inspectors the next day in the

morning. According to Granholm, inspectors were able to detect the problem with the malfunctioning signal and the signal was fixed.

Wanda related in corroboration with Granholm's account that at approximately 7:30 P.M. Granholm notified him that North Dispatcher Marchi called and notified him that signals at the Lemoyne Interlocking were cycling. In this same call, Wanda related that Granholm also informed him that Marchi apprised that the Claimant had accepted the trouble call of the cycling signal(s) at Lemoyne Interlocking from Dispatcher Petika at approximately 1:30 P.M. Wanda related he spoke with Supervisors Lill and Ramirez who both told him that the Claimant never reported to them there was any outstanding signal issues at Lemoyne Interlocking. Wanda explained he then collected written statements from Granholm, Dispatcher Petika and Dispatcher Marchi. In his written account, Granholm stated the Claimant never notified him of any outstanding trouble calls on the date in question, December 6, 2016. In her written account, Petika stated that after receiving the trouble call about the signal problem at Lemoyne, she immediately contacted the Claimant by radio communication and apprised him of the problem. Wanda verified Petika's written account that the Claimant had accepted the trouble call by a review of radio tapes. In his written statement, Marchi recounted that at the time he came on duty and relieved Petika, she apprised him of the signal problem at Lemoyne and that she had called the Claimant who accepted the call.

Supervisor Lill recalled that in addition to talking with Granholm when he, Granholm and the Claimant all arrived at the shop location just prior to 2:00 P.M., he also had a conversation with the Claimant that pertained to Bulls radio among other subjects as well. However, contrary to the Claimant's account of this conversation, it did not include anything about the Claimant having received a trouble call about a malfunctioning signal at Lemoyne and neither did it include, Lill related, a commitment made by him to the Claimant he would pass this trouble call on to Granholm. Lill acknowledged that both Granholm and Wanda in their respective questioning related that the Claimant was very reliable in reporting turnovers and he too agreed this was the case. Lill further acknowledged that in this instant case, it was odd that the Claimant failed to make a turnover of the trouble call he took from Petika when his shift ended and Granholm's shift commenced. According to Lill, once a Maintainer is notified of a trouble call it indicates that by so doing, the Maintainer has accepted the call and it is the responsibility of that Maintainer to fix the reported problem or, in the alternative to turn over the trouble call to another Maintainer prior to the ending of the first Maintainer's shift. Lill recalled that at the time the Claimant was called by dispatch and notified of the problem at Lemoyne, Jim O'Brien another Maintainer was also on

duty at the time and he could have been called by dispatch and notified of the problem at Lemoyne instead of the Claimant.

The Claimant acknowledged that Dispatcher Petika did call him and notify him of the reported malfunctioning of the signal at Lemoyne. the Claimant related that Lemoyne Interlocking is not located in his territory, that it is Jim O'Brien's territory and that O'Brien could have been called instead of him to take care of the signal problem as O'Brien was still on duty at the time. the Claimant asserted that when he arrived at the shop to use the bathroom, after doing so, he encountered Rich Long another Maintainer and told him about the trouble call. the Claimant also maintained that at this same location he also informed Lill of his receipt of the trouble call because Granholm was not yet present for him to make the turnover and that Lill responded by telling him not to worry as he would either call or see Granholm and inform him of the signal problem at Lemoyne thus making the turnover for him. According to the Claimant he then departed the shop location and as he did Lill drove past him stopping when he saw Granholm and he observed Lill and Granholm talking with each other and thought that Lill was telling Granholm of the trouble call at Lemoyne.

The Claimant asserted unwaveringly that Lill lied in his account about not informing him of the trouble call he received of the signal problem at Lemoyne Interlocking and that Lill never told him he would pass on the information to Granholm thus effecting the turnover for him. the Claimant further asserted that Wanda also lied in his rendition of addressing an event that occurred in 2006, ten (10) years earlier when he was still a bargaining unit employee before he was later promoted to a management position when he was caught giving false testimony in an investigation in violation of GCOR Rule 1.6 Conduct / dishonesty and received a 60 day suspension for doing so. The Claimant asserted that having lied about his past in this proceeding there was no reason not to suspect Wanda rendered other false testimony as well. The Claimant based his belief on his past relationship with Wanda which was less than desirable and accounts for Wanda's harassment of him. The Claimant further asserted that Management was out to get him and that he felt he had a target on his back. In support of his assertion that both Lill and Wanda lied in their respective testimony regarding the subject events and that Carrier Management beyond just Lill and Wanda were out to get him, the Claimant played a voicemail he received May 31, 2015 from a former Carrier Policeman by the name of Leavitt, to wit:

Kenny, this is Leavitt. I heard the Fergie [a reference to Chief Engineer Mark Ferguson] got the big spot. Better watch out. Got a target on your back. So, when you got time give me a call and leave a message or a text.

If you need any - - you know, watch your back. Keep your paperwork clean, try and do everything they say, you know, and I think they are laying for you. Okay? All right. Talk to you brother. Bye.

As in the Claimant's two (2) suspension cases, the Organization raised a litany of procedural and substantive challenges during both on-property handling of the claims and at the formal investigation. The Board has reviewed in-depth each challenge raised and finds each to be lacking validity. As addressed in the prior two cases, there is no provision in the controlling Collective Bargaining Agreement that entitles the Organization to pre-investigation discovery of evidence such as a list of witnesses Carrier intends to call, as well as documents, exhibits and any other items Carrier intends to introduce at the formal investigation. Additionally, there has been no past practice in the railroad industry that has been established to permit organizations to engage in pre-discovery of evidence. There is absolutely no due process rights that inure to railroad workers under the United States constitution as asserted by the Organization. However, railroad workers are entitled to a panoply of due process rights as provided for contractually under the Collective Bargaining Agreement such as the right to a fair and impartial hearing, the right to representation at both the on-property handling of claims and at the formal investigation, the right to have witnesses testify on their behalf at the formal investigation and the right to cross-examination of witnesses called by the carrier along with the right to appeal adverse decisions at all levels of claim handling as well as post the formal investigation among others. In the case at bar there is no evidence to support the Organization's position that the Formal Investigation Conducting Officer denied the Claimant a fair and impartial hearing by his conduct of the hearing or that he showed any bias against the Claimant. The Board takes judicial notice that notwithstanding the challenges raised by the Organization, both the Claimant and the Organization stated at the opening of the investigation they were prepared to go forward and put on a defense. Likewise, at the end of the hearing in its closing statement, the Organization did not indicate that the hearing held was not fair and impartial.

Having reviewed all three (3) investigations held on the same date, December 20, 2016, relative to the Claimant's five (5) day suspension (Docket No. 44957), his ten (10) day suspension (Docket No. 44958) and this final case of his dismissal from service, the Board is uniquely positioned to discern a common thread running through the defense of the Claimant in all three (3) cases and that is, that Carrier management, particularly Ron Wanda along with Supervisor Lill are all out to "get" him and to achieve this outcome, they have done nothing but lie in their respective testimony. Analysis of the evidence in all three (3) cases but particularly this instant case proves otherwise. While

in the prior two (2) suspension cases the Claimant's defense that Manager Wanda and Supervisor Lill lied in their respective testimony might have been plausible given their central role in both these cases and the argument asserted that it was their word against the Claimant's word, this was not the surrounding circumstances that existed in this instant case. In fact, as the evidence makes crystal clear, the employees central to the occurrence of events here, specifically Dispatchers Petika and Marchi and Maintainer Granholm, are not part of Carrier's management and therefore the defense asserted that beside Lill and Wanda these other three (3) named witnesses also rendered false testimony and that the only witness that gave truthful testimony was the Claimant is simply and wholly not credible.

Almost all testimony rendered by Petika, Marchi, Granholm, Lill and Wanda contradicts the Claimant's testimony with only one exception and that is, the Claimant acknowledged receiving notification by Petika of the trouble call pertaining to the reported malfunctioning of the signal at Lemoyne Interlocking. The remaining testimony rendered by the Claimant fails to comport with the account of events as testified to by all five (5) other witnesses. The overwhelming record evidence adduced at the formal investigation proves beyond doubt the central charge against the Claimant that having taken the call from Dispatcher Petika he failed to perform his duties as Road Maintainer to proceed to Lemoyne Interlocking to make the necessary repairs required to fix the signal from cycling, notwithstanding the fact his shift was to end thirty (30) minutes after receiving the call. Electing not to perform the work after taking the trouble call from Petika, the Claimant had the option to invoke a turnover, that is, to apprise the next shift Maintainer of the problem who was Granholm; but the Claimant also failed to do this as well according to Granholm who testified the Claimant never informed him of the cycling signal problem at Lemoyne Intersection on the date in question, December 6, 2016 even though Granholm recalled this lapse by the Claimant was "odd" in that, this was the first instance he was aware of that the Claimant failed to brief him of a problem at the turnover in shifts.

The most compelling evidence that proves beyond any doubt that the Claimant failed to inform Granholm of the trouble call he received from Petika at 1:30 P.M. is the Claimant's own account of events. the Claimant maintained that just prior to leaving work at the end of his tour of duty, he had a chance encounter with Rich Long, a fellow Maintainer and that he told Long about the trouble call he received and that he would hand it over to his relief or supervisor. Since Granholm and Lill both asserted in their respective testimony that the Claimant did not inform them of the trouble call, the Claimant could have countered their account by having Carrier make Long available to testify otherwise and corroborate his account of informing Long of his intention to

effect the turnover with either Granholm or Lill. Neither the Claimant nor the Organization requested Long's presence at the formal investigation.

The record evidence is devoid of any explanation as to the reason why the Claimant failed to perform his duty either to attend to the problem of the cycling signal at Leymone after he accepted the call from Petika or, in the alternative, to effect the turnover with either Granholm his relief Maintainer or Lill, his immediate supervisor. Regardless of an explanation as to the reason why the Claimant failed to do either of these two things is open only to speculation but, the record evidence compiled in this case before us presents substantial proof that, in fact, a fact left unrefuted, the Claimant acted contrary to all past performance relative to taking and performing trouble calls or after accepting a trouble call turning the call over to a relief Maintainer when he determined he was unable to act on the call himself, thus revealing he infringed GCOR Rule 1.6 as so charged here by the Carrier resulting in his dismissal from service.

The Board does not concur in the Organization's position that the discipline of dismissal was unwarranted, harsh or excessive. As to the argument the discipline administered was harsh and excessive, we note two (2) factors, to wit: 1) the Claimant's past work record dating back to April, 2005 up through December 20, 2016 when he incurred the two (2) suspensions and this dismissal. Most notable among the listed five (5) disciplinary actions imposed on the Claimant from April, 2005 to September 16, 2016 is a prior dismissal from service the effective date of which was April 11, 2012, imposed for commission of work place violence which subsequently resulted in reinstatement four (4) months after the dismissal pursuant to a leniency reinstatement agreement dated August 3, 2012. One stipulation of this leniency reinstatement agreement was the Claimant's pledge that in the future he would adhere to all Carrier and Engineering Department rules and policies. The circumstances surrounding his two (2) actual suspensions and this subject discipline of dismissal is that the Claimant failed in this commitment to abide and adhere to these referenced rules and policies; and 2) Carrier follows the principles of progressive discipline so that even a one-time infraction of GCOR Rule 1.6 can result in one being dismissed from service no matter what one's length of service is. That being the case, Carrier could have dismissed the Claimant for having infringed GCOR Rule 1.6 relative to the November 17th incident but elected to administer progressive discipline imposing a five (5) day actual suspension instead. Carrier acted the same with respect to the Claimant's infracting of GCOR Rule 1.6 that occurred on November 18th again following the scheme of progressive discipline by imposing the more severe discipline of a ten (10) day actual suspension as opposed to invoking dismissal. Now comes this third infraction by the Claimant of GCOR Rule 1.6 and in following the principles embodied in administering progressive discipline as a

means of correcting workplace conduct as opposed to inflicting punishment, Carrier assessed the Claimant the next step in the chain of progressive action that of dismissal as obviously the Claimant refused to correct his wrongful conduct. As to the Organization's position the dismissal action was unwarranted, a review of the Claimant's past work record as cited above does not support such a position. Notwithstanding his nearly sixteen (16) years of service, his past work performance reflects a certain unwillingness by him to abide by Carrier's rules, regulations and policies.

Given the above discourse, we find given the Claimant's successive violations of GCOR Rule 1.6 in addition to his resistance in following instructions, that based on substantial evidence and Carrier successfully meeting its required burden of proof, that the discipline imposed on the Claimant of dismissal from service was both proper and appropriate under all the surrounding circumstances.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of July 2019.