

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43843
Docket No. SG-44785
19-3-NRAB-00003-170502**

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(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 W. Newby, for any mention of this matter removed from his personal record, and for compensation for any time lost, including overtime and skill pay; 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 Three (3) 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 October 27, 2015. Carrier’s File No. 35-16-0023. General Chairman’s File No. 15-059-BNSF-188-SP. BRS File Case No. 15690-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.

The Claimant held the position of Signalman in the Carrier's service. On September 25, 2015, The Claimant 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 provide protection for contractors who were working foul of other than- main track without locking the switch with an effective locking device, observed by System Operations Testing Team, on the Spokane Subdivision, LS 45, MP 69.9 at approximately 1158 hours PST, on September 23, 2015 while assigned to gang SSCX0121." (See Organization's Exhibit No. 1).

After a formal investigation on October 27, 2015, the Claimant was found in violation of MWOR 6.3.2 Protection on Other Than Main Track, and was assessed a Level S 30 Day Record Suspension with a Three Year Review Period, commencing on November 23, 2015.

On September 23, 2015, the Claimant was responsible for escorting and flagging for contractors who were boring underneath a yard track. The Claimant chose to provide live flagger protection per MWOR 6.19.1. He positioned himself near the switch so that he could observe the contractor's equipment and work and the point of entry into the industry track.

A Carrier Operating Practices audit team entered Claimant's worksite and the Claimant briefed them on his statement of on track protection. It was discovered that the switch that was connecting the industry track to the main track was lined incorrectly, so that it would move trains into the crew rather than away from it. The Claimant had checked the switch the day before but failed to do so on this day.

The Carrier contends that the Claimant was properly charged with violation of MWOR 6.3.2:

"Protection on Other Than Main Track The employee in charge must ensure that equipment and employees do not occupy or foul the track

until protection is established. An employee assigned the responsibility of yard movements must be notified of the work to be done.”

The Carrier points out that the track in question was an industry track, not main track.

The Carrier contends that the Claimant was a rules-qualified Signaller and trained to provide flagging protection for the crew. The Carrier contends that the Claimant thought that the contractors he was tasked with protecting were safe but failed to check the switch to see that it was lined the wrong way. The Carrier contends that the penalty imposed was not excessive given the Claimant’s unsafe actions.

The Organization raises several procedural issues. First, it contends that the Claimant was charged with the wrong rule and should have been charged with MWOR 6.19.1, which states, in part:

“Flag protection may be established within Restricted Limits or non-signaled Yard Limits by lining and locking all facing point switches to prevent direct access to the protected track segment, including all crossover switches. When conditions permit, notify the train dispatcher and/or yardmaster of your intention to employ Rule 6.19.1 before lining the switches. . . .”

The Organization also objected to the Carrier’s eyewitnesses testifying by telephone. Neither of the members of the Carrier Operating Practices Team that approached Claimant testified in person at the on-property investigation, depriving the Claimant of a fair and impartial hearing. The Organization contends that the Carrier’s eyewitnesses were unable to view documents that had been entered into the record and the Organization was unable to cross-examine them.

The Organization contends that the investigation revealed that the Claimant utilized proper protection under MWOR 6.19.1, which covers protection for non-signaled yard limits where he was working. The Organization contends that throughout the investigation, it was clear that the Carrier listed the wrong location on the Investigation Notice.

The Organization contends that the Claimant was inexperienced and was not properly briefed to be responsible for protecting the contractors within the yard limits.

The Organization contends that the Audit Team created a further unsafe environment when it pulled the Claimant from his flagging duties without ensuring protection for the contractors.

This 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. Among the factors to consider are the nature of the testimony and the circumstances that necessitated telephonic testimony. For instance, where the testimony is merely background information or to authenticate a document, such testimony may be permissible.

Here, the witnesses who were allowed to testify by telephone were the audit team members who observed the Claimant's protection on the day in question. Besides the Claimant, they were the only eyewitnesses to the events that gave rise to the discipline. The Organization attempted to show the witnesses documents in support of the Claimant's testimony, but they were unable to see it or comment on it because their testimony was taken by telephone.

This Board concludes that the Organization's ability to cross examine witnesses was severely hampered when both of the critical witnesses testified by telephone. The observation by these witnesses was the linchpin of this investigation, and the employee's right to cross-examine the witnesses was certainly compromised by the fact that the witnesses were not physically present at the hearing.

Furthermore, the testimony of the eyewitnesses was contradicted by testimony from the Claimant, so the Hearing Officer was obligated to make a credibility determination. This Board concludes that the Hearing Officer's ability to make such credibility determinations would be severely hampered when the critical witnesses testify by telephone.

No explanation for the absence of the key witnesses was given. They simply were not present at the investigation. While 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.

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 4th day of September 2019.