

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44209
Docket No. SG-45072
20-3-NRAB-00003-180444**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern:

Claim on behalf of R. Owen, 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 47, when it issued the harsh and excessive discipline of a 5-day actual suspension, and a 25-day record suspension 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 March 3, 2017. Carrier’s File No. K0617-7209. General Chairman’s File No. 17-019-KCS-185. BRS File Case No. 15767-KCS. NMB Code No. 119.”

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.

On September 21, 2015 the Claimant entered on duty with the Carrier and was assigned to a signal construction gang. As a new hire he received training on a variety of rules and, in January 2016, received further training. In August 2016 the Claimant was awarded a Signal Maintainer position and received training for that position.

On February 21, 2017, the Claimant's assignment was to remove highway grade crossings from service because a Maintenance of Way (MOW) contractor crew was performing rail work on the Alliance Subdivision near Murphy, TX. The Manager - Safety, Engineering Department (MSE), conducted safety audits of the contractor crew's work for approximately three (3) hours. Thereafter the MSE observed the Claimant exiting a Carrier truck parked in a private lot away from the track and proceeding to foul the track with bond wires. Since the MSE had not observed the Claimant working with the crew, he asked the Claimant for his track warrant. The MSE's audit showed that the Claimant had not (i) conducted a job briefing with the two (2) MOW units under the Joint Track Authority, (ii) listed the work limits and dispatcher's instructions on the warrant, (iii) filled out a job-briefing form, (iv) displayed the Joint Track Authority yellow tag on his Carrier-assigned truck and (v) completed the Crossing Out of Service form (COS-1). The MSE shared this information with the Claimant's supervisor.

On February 27, 2017, the Carrier issued a notice of formal hearing to the Claimant stating, in part, as follows:

"While serving as a Signal Maintainer, it is alleged you failed to properly perform your duties in a safe and proper manner by failing to properly establish on-track safety protection. It is also alleged that you failed to have the proper crossing out of service form filled out. This occurred in Murphy, TX on the Alliance Subdivision."

On March 3, 2017, an investigative hearing convened. After considering the transcript of that proceeding, the Carrier assessed the Claimant a five (5) day actual suspension and a twenty-five (25) day record suspension for violating the following rules:

“● M/W General Order No. 2 - Joint Track Authority

1. Be governed by the new procedure for use of Joint Authority Cards:

Joint Track Authority
New Procedure:

When track authority is Joint with other EIC's . . . after briefing with those in the work group, write the number identifying the other work group . . . on the “Joint Authority” Card . . . and post it in a conspicuous location easily seen by all in the group. This can be on a handle, inside the cab of the equipment, on the side of the door of the truck, to bring attention to and increase awareness of the limits being joint[.]

● General Code of Operating Rules 6.11.1 - Issuing or Voiding Mandatory Directives

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B. Transmitting Track Authority

An employee will enter all of the information and instructions issued by the train dispatcher on the track authority form.

C. Joint Authority

When a joint authority is issued listing other train(s), track car(s) or employee(s), the employee receiving the authority must notify the listed train(s), track car(s) or employee(s) of the addition to the joint authority. The notification to the other train(s), track car(s) or employee(s) must be made before entering the joint limits of the authority. In the event the other train(s), track car or employee is unable to notify the other train(s), track car(s) or employee(s) about the addition, the information may be related through the train dispatcher or other employee.

Trains and on track equipment must not enter joint authority limits without first determining from the employee in charge if working limits have been established. Established working limits must not be entered

without permission from employee in charge of the working limits. Trains, track cars or employees must understand the conditions and movements that will be made within the joint limits and where established working limits, if any, exist.

- **Maintenance of Way and Signal Department On-Track Safety Roadway Worker Rules 21.1 - All Employees Must Ensure That They Receive a Job Briefing Before They Foul Any Track.**

The Job Briefing Must Include the Following:

1. **Plan the job briefing and develop your own work plan to include the following: [five (5) items]**
 2. **Consider existing and potential hazards that might be involved as a result of: [eight (8) items]**
 3. **Consider how work assignments will be made: [four (4) items]**
 4. **Conduct the Job Briefing and explain work or task to employees: [seven (7) items]**
 5. **Discuss existing or potential hazards and ways to eliminate or protect against them [five (5) items]**
 6. **Job Briefing for Special Conditions [three (3) items]**
 7. **Follow up by Supervisor [three (3) items]**
 8. **Individual Responsibility [one (1) item]**
- **Rules, Standards and Instructions; Signal Department; Highway Grade Crossing Warning Systems**
- * * * *
9. **When it is necessary to temporarily disable a Highway Grade Crossing Warning System . . . the following procedure must be followed:**

* * *

- d. After the Dispatcher/Control Operator has confirmed that all approaching trains have been notified . . . the person responsible for disabling the crossing must inform the Critical Incident Desk, or their designee, how they will disable the crossing . . . The signal person must enter the crossing name and mile post on the COS-1 form and may then proceed with the disabling process to ensure all flashing lights are extinguished and gates, if equipped, are in the upright position.
- e. After the crossing has been repaired and all methods of disabling have been removed, the signal person must check levels, verify that the AC power is on and test crossing to ensure that warning devices . . . are functioning as intended and document testing on the COS-1 form.”

On May 6, 2017, the Organization appealed the discipline stating the Carrier denied the Claimant a fair and impartial hearing in violation of Rule 47 - Discipline/Investigations. The Carrier did not advise the Claimant of the precise charges at least forty-eight (48) hours prior to the investigation; this impaired the BRS’ ability to prepare a defense and “results in the Investigation being void ab initio, and the resulting discipline in violation of Rule 47.”

Aside from the due process violation, the BRS states the MSE was not concerned about safety because he waited until the Claimant completed his duties prior to conducting the audit. This situation represents a misunderstanding as the Claimant has not received training in over a year thereby rendering the discipline harsh and excessive.

In denying the claim, the Carrier states the Claimant received a fair and impartial hearing. Prior to auditing the Claimant’s Joint Track Authority (JTA) form and determining it was improperly filled out, the MSE observed the Claimant fouling track without contacting the MW units working under the JTA and conducting a job briefing. The Claimant did not properly complete the COS-1 form; he did not test the crossings prior to recording them on the form as returned to service. The Claimant received training annually on the signal rules and training every other year on the

General Code Operating Rules (GCOR). His major infractions of rules shows that the discipline was not arbitrary or harsh nor an abuse of managerial discretion.

This claim was advanced on-property in the usual manner, up to and including the Carrier's highest official designated to handle this matter. A conference convened but the parties' positions remained unchanged. Thereafter, the Organization referred the claim to the Board for adjudication.

As for the alleged violation of Rule 47 - Discipline/Investigations, the Board finds that the formal notice of investigative hearing was issued February 27 - - more than forty-eight (48) hours prior to the hearing on March 3 - - setting forth the date, incident location and subject matter under investigation. The notice contained sufficient information to alert the BRS to the investigation's focus and enable it to prepare a defense. When the presiding official inquired at the outset of the hearing whether the BRS had any standing objections to the proceeding, it answered in the negative and the Organization's closing summation at the hearing identified no concerns about a vague notice impairing its ability to represent the Claimant.

Third Division Award 42832 offered by the BRS is unpersuasive; the negotiated agreement required inclusion of the rules in the notice of hearing; there is no such requirement with the negotiated agreement in this claim where rules were identified through testimony at the hearing. Also submitted by the BRS was Third Division Award 30492 stating charges must be specific and precise to time, date, and nature of infractions. The notice in this claim identifies the incident date, location, and nature of the infractions. Finally, the BRS alleges the presiding official demonstrated bias by attempting to sway the Claimant's testimony. The Board reviewed the transcript and finds the BRS was accorded an opportunity to clarify the Claimant's testimony notwithstanding its concerns about the presiding official's bias. In sum the Board finds there is no violation of Rule 47 - Discipline/Investigations as the Claimant received a fair and impartial hearing.

The Carrier recognizes the burden of proof resides with it and asserts there is substantial evidence that the Claimant did not display the JTA yellow tag thereby violating M/W General Order No. 2 - Joint Track Authority. The Claimant violated Rule 21.1 -All Employees Must Ensure That They Receive a Job Briefing Before They Foul Any Track as he did not conduct a job briefing with the two (2) M/W units and failed to establish work limits with them and list those limits on the JTA form. The Claimant violated Rule 6.11.1 - Issuing or Voiding Mandatory Directives because he

did not enter the dispatcher's instructions on the warrant when the dispatcher issued track authority to the Claimant.

The Carrier notes that the Claimant testified to working under a JTA which required him to establish on-track safety protection for removing crossings out of service but he failed to do so. On the COS-1 form he marked the boxes and wrote "Order Removed" on the form thereby indicating the crossings had been returned to service; however, the Claimant did not test the crossings before returning them to service as required by Highway Grade Crossing Warning Systems-Rule 9, items d. and e. and only after the MSE inquired did the Claimant list the crossings he repaired.

Finally the Carrier asserts the Claimant was aware of the rules. Training is provided annually for on-track safety rules and GCOR training occurs every other year. In 2016 training was provided on Rules, Standards and Instructions, Signal Department. When the Claimant bid into the position Signal Maintainer, he was trained on completing the JTA and setting work limits. His major infractions of the rules shows that discipline was warranted and consistent with the Discipline Policy.

The BRS asserts the charged rules violations are unproven and discipline issued represents an abuse of discretion, is harsh and excessive and must be set aside. The Claimant, a Signal Maintainer, often works independently whereas the rules apply to a gang or group of employees. For example, the Claimant did not violate M/W General Order No. 2 which is intended for on-track equipment and work groups whereas the Claimant was working solo and not using on-track equipment. The Claimant established protection as shown on the JTA form.

The Claimant had a job briefing as required by Rule 21.1; the rule does not require a written briefing. The form contains no instructions for an individual to complete it; the instructions on the form address a gang or work group to retain the form for five (5) days for supervisor review. Rule 21.3 is for Roadway Worker Groups and not applicable because the Claimant was not in a gang or work group.

There is no violation of Rule 6.11.1(B) because the Carrier did not submit any form showing that the Claimant failed to enter the dispatcher's instructions on the JTA form. The Claimant did not violate Rule 6.11.1(C) which provides that an employee not operating or riding in on-track equipment only needs to contact the Employee-in-Charge (EIC) in the event movements or conditions change within the limits. the Claimant had his own track authority and was not in a train or on-track equipment. He understood the conditions and movement that would be made in the

area where he was assigned to work, thus, he did not need to contact the EIC prior to fouling the track.

As for the allegation that the Claimant did not have the COS-1 completed including the section on FRA Tests Performed, instructions on the form state that the FRA section can be completed once the crossing signals are disabled and the form can be submitted at the end of the month to the Signal Supervisor. Without exception, the Claimant submitted the form at the end of the month to his supervisor and he updated the COS-1 as requested by the MSE.

In determining whether the Carrier established the facts to support its position that the Claimant violated the charged rules, the Board will follow well-known precedent concisely stated in Award 62 of Public Law Board 4901:

“Our task is to review the record developed by the parties on the property to determine whether substantial evidence exists to support Carrier’s disciplinary action and to ensure that Carrier’s decision was not unreasonable under all of the relevant circumstances.”

Award 7 in Public Law Board 4703 describes “substantial evidence” as “such evidence as a reasonable mind might accept as adequate to support a conclusion” and is a lesser or lower standard or burden to establish than “beyond a reasonable doubt” and “preponderance of evidence”.

In carrying out the Board’s appellate function and considering the relevant circumstances raised by the Organization, the Board finds there is substantial evidence that the Claimant violated the rules as charged.

- **General Order No. 2 - Joint Track Authority**
- **GCOR 6.11.1.B and C - Issuing or Voiding Mandatory Directives**
- **Rules for Roadway Worker Rule 21.1 - All Employees Must Ensure That They Receive a Job Briefing Before They Foul Any Track**
- **Rules, Standards and Instructions - Rule 9, items d. and e.**

Substantial evidence in the testimony by the MSE, the Claimant’s supervisor and the Claimant leads the Board to find that the Claimant did not display the JTA yellow tag until after he had been audited by the MSE.

The Claimant acknowledged to his supervisor he did not have any job briefing forms in his possession when he was audited by the MSE; the Board finds that the Claimant did not conduct a job briefing with the M/W units prior to fouling the track. The Claimant failed to fill out the JTA form issued by the dispatcher; he did not list the units' track limits; he failed to notify the contractor under the JTA when he entered its track limits. The Claimant testified that his work required him to establish on-track protection before he fouled the track but he failed to do so. The Claimant filled out the COS-1 form as requested by the MSE; however, he never tested the crossings prior to indicating on the form they had been restored to service. All of the charged rules violated by the Claimant were applicable to his work situation; he was working under a JTA with others; safety is always paramount whether working independently in a solo capacity or in a gang.

The Claimant testified he was familiar with and trained on the job briefing and roadway worker rules. The Claimant received training on the rules for Signal Maintainers in 2016. When the Claimant was assigned to the position Signal Maintainer, he received training on copying track authority and setting working limits. Although BRS' submission to the Board states this was the Claimant's first time completing paperwork and setting limits, these assertions as mitigating circumstance were not presented during on-property processing and are not considered.

Since there is substantial evidence showing the Claimant violated the rules and such violations are major infractions under the Discipline Policy which was discussed on-property, the discipline assessed is not harsh or excessive but proportional to the infractions. Thus, the claim is denied.

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 30th day of September 2020.