Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44212
Docket No. SG-45224
20-3-NRAB-00003-180725

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 (formerly Tex-Mex):

Claim on behalf of T.L. Webb, 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 31, when it issued the harsh and excessive discipline of a 5-day actual suspension, and a 25-day record suspension 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 July 27, 2017. Carrier's File No. 2017-0365. General Chairman's File No. 17-054-TXMX-185. BRS File Case No. 15885-TexMex. 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.

The claim in this proceeding and the claim in NRAB-00003-180726 involve different claimants but the claims arise from the same incident and were investigated under one (1) formal notice of hearing. Claimants' testimonies were considered by the Carrier for each claim albeit the KCS issued separate decisions.

The Claimant is a Signal Maintainer assigned to that portion of the KCS system known as the Texas Mexican Railway Company ("TexMex"). He is headquartered at Kendleton, TX. As of 2017 the Claimant has fourteen (14) years of service with the Carrier.

On April 18, 2017 the Claimant and co-claimant in NRAB-00003-180726 informed their Supervisor that they "weren't going to take calls after hours so I [Supervisor] said we need to go tell Steve [Director - Signal Operations], so we drove over to the [Kendleton yard] offices over here and we were outside and I called Steve." During the ensuing phone conversation, the Director referred to Rule 10 - Calls and stated "they [Claimant and co-claimant] were expected to be available for call." The Supervisor and Director did not know the Claimant recorded their conversation.

On June 14, 2017 the Organization filed a claim for seven (7) TexMex Signal Maintainers alleging they were "subject to call" twenty-four (24) hours each and every day without proper compensation. Included with that claim was the audio and transcript of the recorded phone conversation. The Director - Labor Relations informed the Director - Signal Operations (DSO) on June 28, 2017 about the "subject to call" claim and provided the DSO with the audio and transcript.

On July 5, 2017 the Carrier notified the Claimant of a formal hearing to "ascertain the facts and determine your responsibility, if any, in connection with" an allegation that the Claimant "recorded a conversation with [the DSO] without his permission" on April 18, 2017.

During the hearing on July 27, 2017 the Claimant acknowledged he did not inform the DSO that he recorded their conversation. On August 4, 2017 the Vice President and Chief Engineer assessed the Claimant a five (5) day actual suspension and a twenty-five (25) day record suspension for violating The Kansas City Southern Company's Video or Audio Recording Policy 15.00 ("Policy") effective October 25, 2013.

The Policy states, in relevant part, as follows:

> **"BACKGROUND AND POLICY STATEMENT 15.00**
>
> **Kansas City Southern and its U.S. Subsidiaries ("The Company") prohibits employees, contractors, vendors and visitors from using any recording device to capture any image, or sound ("recording") while on Company property, while conducting Company business and/or during working time, unless one of the following exceptions apply (see Acceptable Use 15.01). Examples of recording devices include cameras, video recorders, audio recorders, cellular telephones, PDAs or similar personal electronic devices, cameras, webcams, and/or any other device designed to capture any audio, video or still image.**
>
> **This policy is a good faith effort to, among other things, promote open and honest communication and protect confidential and proprietary information. This policy is not intended, and shall not be construed, to prohibit any conduct protected by the Railway Labor Act.**
>
> **ACCEPTABLE USE 15.01**
>
> **Notwithstanding the general prohibition above, use of recording devices is permitted under the following circumstances:**
>
> **A. Where specifically authorized by the Senior Vice President of Human Resources, Executive Vice President of Operations, General Counsel or Corporate Communications Department; or**
>
> **B. Where such recording is made in the ordinary course of legitimate business operations and in furtherance of legitimate Company business interests conducted by the claims, railroad police, human resources, and/or legal departments and is made by an employee of such departments in the ordinary course of his or her Company-authorized job responsibilities; or**
>
> **C. Where such recording is otherwise made in the ordinary course of legitimate business operations and in furtherance of legitimate Company business interest and where all parties to the recording**

are notified that their images and/or conversations are being recorded; or

D. Where a hearing officer makes such recording of the proceedings at a formal investigation pursuant to a collective bargaining agreement. A Union official representing his\her member(s) may also record the proceedings of a formal investigation provided that the Union's use of such recording device has been announced to all participants and is placed where all participants are aware of its presence.

Even where recording or photography is permitted by this section, such recordings or photographs are the sole property of the Company and dissemination of such recordings or photographs is prohibited absent a legitimate business need and in furtherance of legitimate Company business (*with the exception of Paragraph D above*).

*** * * ***

VIOLATIONS OF THIS POLICY 14.05

Violations of this policy may result in discipline up to and including termination of employment."

On September 12, 2017 the Organization appealed the assessed discipline alleging it was harsh and excessive in violation of Rule 47 - Discipline and Investigations. The appeal states:

"The investigation transcript revealed the Carrier failed to properly train the Claimant on its recording policy when it neglected to even inform Mr. Webb of the existence of such a policy prior to the investigation. It was additionally revealed Mr. Webb was acting in the capacity of a local chairman when he recorded the conversation in an attempt to resolve an ongoing dispute involving the Tex-Mex Agreement."

This matter was advanced through on-property procedures up to and including presentation to the highest official designated by the Carrier to address this claim. After conference wherein the parties' positions remained unchanged, the BRS referred the claim to the Board.

The initial consideration in this proceeding is the KCS' assertion that the Board lacks jurisdiction over the referred claim. In this regard, the on-property appeal cites a violation of "Rule 47 - Discipline and Investigations" in the "KCS BRS [Agreement]" whereas the claim referred to the Board cites a violation of "Rule 31 - Discipline and Investigations" in the "TexMex BRS Agreement". The referred claim must be dismissed, the KCS asserts, since it cites a different rule and different collective bargaining agreement than the on-property appeal and this serves to deprive the Board of jurisdiction.

The Carrier's written denial to the appeal states "the TexMex Agreement, Rule 31 - Discipline and Investigations governs" this claim. On-property discussions addressed the TexMex BRS Agreement's Rule 31. The cite to Rule 47 in the "KCS BRS [Agreement]" was a clerical miscue (BRS' position). The Board views the miscue as having no effect on its jurisdiction; the miscue does not result in a variance of substance between the on-property appeal and the referred claim. That is, the subject matter and process are materially the same under both rules. The Board finds the claim is subject to its jurisdiction.

As for the Organization's assertion that the Claimant was not provided a fair and impartial hearing because the notice was vague as it did not identify a rule, the notice disclosed adequate information to assist the BRS and the Claimant to prepare a defense. The Carrier is not required to identify a rule or policy in the notice or copy it to the Claimant prior to the investigative hearing. The policy at issue in this claim was presented and examined at the hearing where the presiding official did not exhibit a closed mind or bias. The Board finds the Claimant received a fair and impartial hearing.

Having addressed and dispatched the preliminaries - - lack of jurisdiction and fair and impartial hearing - - the claim is now foursquare before the Board. The Claimant engaged the DSO with an email dated October 22, 2015 followed by two (2) face-to face meetings and another email dated October 4, 2016 requesting clarification of "subject to call" availability but the Director refused or ignored the Claimant's requests. With no written response from the DSO, the Claimant recorded their phone conversation to capture the Director's position. The Claimant states the BRS advised him to record the conversation; the Claimant believed he acted pursuant to law as Texas is one-party consent; the Claimant provided the recording to the BRS.

The Claimant states he was unaware of the Policy enacted ten (10) years after his hire in 2003. He received no training about it at any time and his Supervisor provided

no direction where to find the Policy. The Claimant testified he does not know how or where to locate rules or policies or information about them. The Claimant's Supervisor confirmed that he [Supervisor] was unaware of the Policy prior to the incident; the Policy is not "advertised" on the KCS intranet site. For an employee to be aware of a policy, Award 37 of Public Law Board 7564 stated management must "ensure that . . . employees have reasonable access to . . . policies". The Organization's position is that the Carrier's failure to make the Policy available, so the Claimant would be aware of it, and failure to provide training are mitigating considerations. In other words, the Claimant violated the Policy but discipline should not be assessed because the Claimant was unaware of the Policy's contents and the consequences for violating it.

Aside from the Policy, the BRS asserts the notice of hearing and DSO comments (hostile and threatening) constitute harassment, intimidation, or retaliation. Exemplifying retaliation is the DSO's testimony that he did "a little legwork" to find the Policy which he knew "was out there". Prior to the notice, the DSO responded harshly to the Claimant's requests for clarification about "subject to call" requirements. The DSO's intimidating comments were captured in the recorded conversation - - "I'm telling you that right now, if you don't take your calls, then you're putting yourself in a bad position" and "you better not refuse" and "I've got way too much to do than mess with this kind of stuff".

When the Claimant recorded the conversation, he was acting in his capacity as the local chairman communicating with the KCS about a contract issue. He understood that recording the conversation was "protected activity" under the Railway Labor Act ("RLA") and the Policy which states it "is not intended, and shall not be construed, to prohibit any conduct protected by the Railway Labor Act."

The KCS asserts it can issue policies or rules after an employee's hire date such that the ten (10) years between the Claimant's hire date (October 28, 2003) and the Policy's effective date (October 25, 2013) is not determinative whether the Claimant knew about or was aware of the prohibition on recording. For support the KCS refers to provisions in "Terms of Employment" signed by the Claimant upon hire:

> **"(9) I further understand that the provisions of any employee handbooks, personnel manuals and any and all other written statements of or regarding personnel policies, practices or procedures that are or may be issued by the Company or any official or department thereof from time to time do not and shall not constitute a contract of employment and create no vested rights, nor are there covenants that any such provisions may not**

be changed, revised, modified, suspended, cancelled or eliminated by the Company at any time with or without cause.

(10) I understand and agree that the Company reserves the right to establish additional rules and regulations or policies, practices or procedures which shall be considered and enforced as conditions of my continued employment.

(11) I represent all information given on this form and on any other forms completed at the time of employment to be true. I agree that any misrepresentation or concealment of information will be sufficient reason for dismissal.

I hereby acknowledge that I have read the foregoing "Terms of Employment" and fully understand and agree to the same."

According to the Carrier, all employees, including the Claimant, have access to rules and policies as they are available on the intranet and employees receive training from Human Resources. Supervision and management are available for assisting employees with questions or concerns about rules or policies.

In response to the Claimant's assertion that he was acting in his capacity as local chairman engaged in "protected activity" under the RLA, the Carrier states that the Claimant never informed the DSO at any time of his status. The concept of "protected activity" is rooted in Section 7 of the National Labor Relations Act; a similar concept does not exist under the RLA. Regardless, there is no violation of the RLA when an employee is subjected to discipline for an unauthorized recording of a conversation with a supervisor or manager. *Stewart v. Spirit Airlines, Inc.,* 503 Fed. App. 814 (11th Cir. 2013). Finally, the Claimant's status, the substance of the recorded conversation, the DSO's comments, and the notice of hearing are not at issue in this claim despite the BRS' attempt to brand them as retaliatory, harassing or intimidating to the Claimant.

The issue in this claim, the Carrier avers, is the Claimant's recording the conversation in violation of the Policy. This shows the Claimant is untrustworthy and dismissive of "open and honest communication" which is promoted by the Policy. The Claimant committed a major infraction under the Discipline Policy; therefore, discipline is not arbitrary or an abuse of discretion but warranted and should remain undisturbed.

On-property Award 5 of Public Law Board 6287 addressed a situation resembling the incident in this claim - - recording workplace conversation with employee professing no knowledge of rule prohibiting recording and intending no harm.

> **"The Board finds no merit in the professed contention of the Claimant that he was not aware of any rule prohibiting the use of a tape recording device while on duty[.] . . . It has many times been held in awards of boards such as this that when it is shown, as here, that an employee has acknowledged receipt of a book of rules that contains the rule at issue, that a subsequent claim of a lack of knowledge of that rule is not a proper excuse for a failure to obey the principles of the rule. In this same connection, it seems to the Board that it may be properly presumed that the Claimant knew or should have known that use of a hidden electronic device to record conversations is not a generally recognized or accepted practice in the employee-employer relationship, even absent a rule of record which contemplates that use of such a device is prohibited.**
>
> *** * * ***
>
> **While the Claimant would offer that he intended "no damage or nothing" in his unauthorized recording of a conversation between himself and the supervisors, such conduct, on its face, must be viewed as inimical to the interests and an implied employee duty of loyalty to the Carrier. It is an act of misconduct that has been recognized in awards of boards such as this to support the imposition of severe discipline, including dismissal from service."**

In other words, an employee not informing a supervisor that the employee is recording their conversation is engaging in an activity not conductive to maintaining the employment relationship. Claimant acknowledged not informing the DSO that he recorded their conversation notwithstanding the prohibition on recording in the Policy:

> **"[KCS]prohibits employees . . . from using any recording device to capture any image, or sound ("recording") while on [KCS] property, while conducting [KCS] business and/or during working time, unless one of the following exceptions apply[.]"**

The recorded conversation occurred on KCS property during duty hours and exceptions to the prohibition under Acceptable Use in the Policy do not apply or cover

Claimant's activity. In short, the Claimant violated the Policy on April 18, 2017 when he recorded the conversation without the DSO's consent.

The Claimant points out that the Policy was enacted in 2013 or (10) years after his hire in 2003; he was not aware of and had no knowledge about the Policy since the KCS failed to inform him of its existence in any way at any time. Even after his local chairman representative informed the Claimant where to find the Policy, the Claimant testified he could not locate it. The Claimant: "no idea where to find it or if it even existed" and his "Supervisor could not point out where to find it".

When the Claimant signed the "Terms of Employment" in 2003 he "agreed to" and "under[stood]" that he would be bound by subsequent changes or additions to rules or policies as a condition of continued employment. In 2013 the Carrier established the Policy and, in doing so, it accepted the responsibility to communicate it to employees through training or other means it customarily uses to "ensure that . . . employees have reasonable access to . . . policies" and, at least, an opportunity to be aware of them. (Public Law Board 7564, Award 37).

The Claimant has access to the intranet where, the Supervisor testified, the Policy was placed "for us to see" and, the DSO confirmed, "policies are found on the intranet site, on the very front page" along with the "Carrier's Handbook [and] Union Handbook that contains each and every policy that's currently in effect." The KCS uses its intranet to communicate policies to employees and Human Resources complements the intranet. The Claimant had access to these resources and, contrary to his testimony, he did not ask his Supervisor or any other official at any time whether there was a policy or rule on recording a conversation.

The BRS asserts that since the Claimant was not trained or informed how to find policies or rules, thus, the Policy cannot be enforced and this renders the assessed discipline harsh and excessive. The Claimant's receipt of no training and lack of know-how for accessing policies is considered in the context of his role as local chairman. In that capacity, the Claimant serves as advisor and resource for employees on issues involving policies, rules and work-related matters. Aside from his access to resources available for all employees - - intranet, Human Resources, supervision - - the Claimant also has access to institutional resources available for a local chairman - - the BRS' knowledge base. His ability to access information and assess it is reflected in his consulting with the BRS about the situation leading to this claim and following the Organization's instruction to record the conversation.

The Board has considered the Claimant's testimony, as well as the circumstances surrounding it, and finds the Claimant was aware of options available to access the Policy or, at least, be aware of its existence, prior to the investigation. Additionally, the claimant in NRAB-00003-180726 was aware that the Policy existed prior to the investigation because he received it 2014. Based on mutual interests and identical claims between that claimant and this Claimant, more likely than not they shared information. They understood Texas was one-party consent and relied upon that as lawful approval to record. Many activities are legal without requiring companies to allow them in the workplace. For example, individuals can smoke, legally, but employers are not required to allow smoking on company property. Likewise, one-party consent allows recording a conversation, legally, but companies are not required to allow recording in the workplace on company property during work hours.

The rationale for the recording prohibition is grounded in the Policy:

> **"This policy is a good faith effort to, among other things, promote open and honest communication and protect confidential and proprietary information. This policy is not intended, and shall not be construed, to prohibit any conduct protected by the Railway Labor Act."**

The BRS' asserts the affirmative defense that the Claimant "understood" the recording was "conduct protected by the Railway Labor Act" when he was acting in his capacity as local chairman communicating with the Carrier on a contract issue. The transcript shows the DSO stating to the Claimant "this is no union meeting"; the Claimant does not respond to that statement such as confirming his local chairman status communicating with the DSO on a contract issue. Not only is there no response by the Claimant to the DSO's declaration "this is no union meeting" but there is minimal response from the BRS to the court decision relied on by the Carrier that discipline assessed to an employee for an unauthorized recording of a conversation with a supervisor or manager does not violate the RLA. The Organization's response is the Claimant "understood" he was engaged in protected activity. Given the record established by the parties on this item, the Board finds there is insufficient evidence to sustain the affirmative defense advanced by the Organization.

In view of all circumstances relevant to this claim, there is substantial evidence supporting the Carrier's decision that the Claimant violated the Policy. The assessed discipline is not harsh and excessive or in contravention of Rule 31 - Discipline and Investigations. Rather, the discipline is proportional to the infraction as it falls within the Discipline Policy's matrix for a major infraction and mitigating circumstances

offered by the Claimant and BRS to reduce or rescind the discipline are unpersuasive. Since the discipline was not based on an arbitrary decision or abuse of discretion, the Board will deny the claim.

With respect to the BRS' assertion that DSO comments and the notice of investigative hearing constitute harassment, retaliation or intimidation directed at the Claimant, those matters were not presented or identified by the Organization in its claim referred to the Board, therefore, they are not before the Board for adjudication.

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.