

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44213  
Docket No. SG-45225  
20-3-NRAB-00003-180726**

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

**(Brotherhood of Railroad Signalmen  
PARTIES TO DISPUTE: (  
(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 J.C. Weaver, 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. 2017-0366. General Chairman’s File No. 17-055-TXMX-185. BRS File Case No. 15886-TextMex. 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-00003-180725 involve different claimants but the claims arise from the same incident and were investigated under one (1) 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 Rosenberg, TX. As of 2017 Claimant has approximately three (3) years of service with the Carrier.

On April 18, 2017 Claimant and co-claimant in NRAB-00003-180725 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 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.

At 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. Weaver of the existence of such a policy prior to the investigation. It was additionally revealed Mr. Weaver did not disseminate or otherwise use this recording of the conversation with [DSO] Mr. Jones for any purpose."

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 did not receive a fair and impartial hearing as the notice was vague since 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 the rule in the notice or disclose it to the Claimant prior to the investigative hearing; the Policy at issue 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 BRS states that on several occasions since October 2015, the Claimant requested clarification on “subject to call” requirements but the DSO refused or ignored to the requests. Since the Director did not respond in writing, the Claimant recorded their phone conversation to capture the DSO’s position. The Claimant did not disseminate or use the recording.

The Organization asserts the Claimant was unaware of the Policy as he received no training and cannot recall receiving it or other policies during his new-hire class because there was much paperwork to sign that day and no time to ask questions. The BRS’ position is that the Carrier’s failure to provide training or make

the Policy available are mitigating considerations. In other words, the Claimant violated the Policy but discipline should not be assessed because he was unaware of the Policy and consequences for violating it.

Aside from the Policy, the BRS asserts the notice of hearing and DSO comments constitute harassment, intimidation, or retaliation by the Director. 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 request for clarification about "subject to call" requirements. His harsh, threatening and 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."

The KCS states that the Claimant was aware of the Policy by referring to "Training Acknowledgement & Policy Receipt" ("Training Receipt") dated September 2, 2014 and signed by the Claimant upon hire. The Training Receipt states:

- “● I participated in the [KCS] 2014 training program  
*Diversity: Respect at Work.*
- I have received a copy of the 2014 “A Matter of Respect: Policy Guide to Workplace Conduct” booklet which contains the following policies:

Social Media Policy  
Anti-Retaliation Policy  
Policy Prohibiting Workplace Threats & Violence  
Use of Information Resources Policy  
Business Travel & Entertainment Policy  
Corporate Credit Card Policy  
Equal Employment Opportunity Policy  
Code of Business Conduct and Ethics Policy  
Anti-Harassment Policy  
Video or Audio Recording Policy  
Requests for Employment References & Other Personal Information Policy

**I certify that I have read and understand the guidelines set forth within the [KCS] policies listed above. I understand this is not intended to be an exhaustive collection of all our policies. As an employee of KCSR, I am always required to comply with all rules and policies - not just those contained in this policy guide and I agree to do so. I understand that willful or neglectful non-compliance could result in disciplinary action, including, but not limited to, termination of employment.”**

**The issue in this claim, the Carrier avers, is the Claimant’s recording the conversation in violation of the Policy. The Claimant’s unauthorized recording shows he 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. Not at issue in this claim is the content of the recorded conversation or DSO comments and the notice of hearing which are branded by the BRS as retaliation, intimidation or harassment.**

**This Board notes that on-property Award 5 of Public Law Board 6287 addressed a situation materially the same as posed by the claim in this proceeding - - 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 conducive to maintaining the employment relationship. The Claimant acknowledged not informing the DSO that he recorded their conversation despite the Policy’s prohibition:

“[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 recording occurred on KCS property during work hours and exceptions to the prohibition under Acceptable Use in the Policy do not apply in this situation.

As for the BRS assertion that discipline is harsh and excessive because the Carrier failed to identify the Policy or make it available prior to the investigation and neglected to provide training, that assertion is without merit. Identifying the Policy or providing it to the Claimant prior to the investigation was addressed by the Board with the preliminary issue fair and impartial hearing. Specifically, the TexMex BRS Agreement’s rules do not require the KCS to identify a rule or policy or provide of it to the Claimant prior to the investigation.

The other part of the assertion - - neglected to provide training - - is undermined by the Claimant’s Training Receipt dated September 2, 2014 wherein he confirmed the following:

- “● I participated in the [KCS] 2014 training program  
*Diversity: Respect at Work.*
- I have received a copy of the 2014 “A Matter of Respect: Policy Guide to Workplace Conduct” booklet which contains the following policies:

\* \* \* \*



**Video or Audio Recording Policy”**

According to the Claimant many documents are distributed to new-hire employees in training with time afforded to sign for receipt of them but no time afforded for review and questions. As a result, the Claimant asserts he does not know or recall whether he received the Video or Audio Recording Policy, one (1) of eleven (11) policies in the booklet, or whether he retained possession of the booklet. The Claimant’s assertion as a mitigating circumstance is unpersuasive. There is no viable explanation offered by the Claimant why the booklet he received at new-hire training may not have contained the Policy but contained the other policies. The Board finds the Claimant received the booklet with 11 policies and it included the Video or Audio Recording Policy. Thus, the Claimant was aware of the Policy’s existence in September 2014, three (3) years prior to the incident in April 2017. Ample time existed between receipt of the Policy and incident to review it or, at least, recognize that the title suggests the contents should be examined before recording a workplace conversation.

The Claimant’s inattention to retention of the booklet coupled with his inattention to the Policy is not construed favorably for him. As stated in on-property Award 5, Public Law Board 6287 and applied to the Claimant:

“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.”

The Claimant relies upon Texas one-party consent 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 an individual to record, legally, but companies are not required to allow it in the workplace. The KCS’ recording prohibition on Carrier property during work hours 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”.

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.

As for whether the DSO's comments (harsh, hostile and threatening) and the notice of hearing are intimidating, harassing or retaliating in nature, those will not be addressed at this time since they were not included or identified in the claim referred to the Board.

**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.