

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44217
Docket No. SG-45493
20-3-NRAB-00003-190266**

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 G.L. Davis, for reinstatement to his former position with 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 dismissal 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 December 28, 2017. Carrier’s File No. 2017-0735. General Chairman’s File No. 18-001-KCS-185. BRS File Case No. 16002-KCS. 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.

This proceeding and claim is the companion to the proceeding and claim in NRAB-00003-190265. Each claim was presented in a separate hearing on the same day to the same presiding official. The claims arise from events occurring between December 16, 2017 and December 18, 2017; under each claim the Carrier dismissed Claimant. Although separate hearings with separate transcripts and different exhibits and rules, the parties refer to testimony both hearings in their submissions for the instant claim.

In 2011 the Claimant established seniority in the Carrier's Signal Department. On Monday, December 11, 2017 Claimant was displaced from his Signal Maintainer position in New Roads, LA. Pending bid he was assigned as Relief Signal Maintainer to New Orleans, LA. On Thursday December 14 he worked relief and on Friday December 15 Claimant was on vacation followed by off-days on the weekend (Saturday December 16 and Sunday December 17).

On Saturday (December 16) Claimant was involved in a vehicle accident at 0544 hours. The East Baton Rouge Parish Sheriff's Department arrested and booked the Claimant on charges of Driving While Intoxicated (1st Offense) and Failure to Maintain Control (Careless Operation).

A formal investigation ensued into the Claimant's alleged failure to comply with the rule that required the Claimant to contact the KCS at a designated notification line telephone number and disclose specific information within forty-eight (48) hours of the situation involving charges on certain offenses. Rule 1.6.4 Notification of Criminal Charges applies to the Claimant's off-duty conduct resulting in his arrest and booking on charges of Driving While Intoxicated (DWI) and Failure to Maintain Control:

"Any employee charged with a crime involving any of the following is required to report the situation within 48 hours to the Company's notification line (1-844-289-4763). The report of the situation shall include the employee's name, identification number, job title and work location. In regard to the criminal charges, the employee must report the crime(s) that s/he has been charged with committing, the date of the criminal charge(s), the circumstances leading to the charge(s) and the jurisdiction(s) where the criminal charge(s) are pending.

- Operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance or refusal to undergo testing to determine whether s/he was operating a vehicle under the influence of alcohol or a controlled substance.**

- Possession, use or distribution or use of any illegal drug, controlled substance or related paraphernalia.
- Any crime involving violence, theft or fraud.
- Any felony.”

Instead of contacting the Carrier at the designated notification line in Rule 1.6.4, the Claimant contacted the Carrier’s ethics hotline - - SpeakUp! - - at 0800 hours on December 18, 2017 but he did not disclose the nature of his arrest (“We are supposed to report our arrests”). At some time after the Claimant left a message with the ethics hotline which is operated by a third party vendor, the Vice President - Human Resources contacted the Claimant. This record does not contain the substance of their discussion.

Following a formal investigative hearing on December 28, 2017 the Carrier determined that the Claimant violated Rule 1.6.4 Notification of Criminal Charges and dismissed the Claimant from service effective January 5, 2017.

This matter was advanced through the agreed-upon on-property process up to and including the highest official designated by the Carrier to address this claim. Following conference wherein the parties’ positions remained unchanged, the Organization referred the claim to the Board.

Addressing, first, the BRS’ assertion of a Rule 47 - Discipline/Investigations violation (no fair and impartial hearing), the Board finds no violation. A fair and impartial hearing occurred because the notice of hearing apprised the Claimant of the matter under investigation and he and his representative BRS were afforded time to prepare a defense. They appeared at the hearing where they produced evidence in support of the Claimant’s position and cross-examined the Carrier’s witness testifying against the Claimant as well as examined the Carrier’s evidence. The presiding official’s conduct of the hearing and examination of the Claimant did not exhibit bias towards the Claimant. The formal investigation provided the fundamental elements that are the foundation for a fair and impartial hearing which the Claimant received.

Further review of the record leads the Board to find that the Claimant’s failure to report and disclose his arrest, booking and charges - - DWI (1st Offense) and Failure to Maintain Control (Careless Operation) - - on the notification line violates Rule 1.6.4 Notification of Criminal Charges. The Claimant testified that his rule book was in his assigned Carrier vehicle seventy (70) miles distant in New Orleans and he did not have access to his personal vehicle. In the companion hearing the Claimant testified that the physician treating him for injuries resulting from the vehicle accident prohibited him

from contacting his supervisor. The Board considers the Claimant's testimony in the context of the record.

The Claimant offered a document as representing his cell phone record of calls; it shows the Claimant initiating calls during the period covering his situation (December 16 - December 18). For example, the Claimant contacted a co-worker on Sunday December 17 and instructed the co-worker to "pass along" to the supervisor on Monday December 18 that the Claimant would not report for several days due to personal reasons. The Claimant acknowledged he did not ask his co-worker to obtain or provide the notification line telephone number for reporting his DWI to the KCS. The Claimant also testified that he left a voice message and text Monday December 18 for his supervisor.

The purpose of the Claimant's contacts, voice message and text, in the Board's view, was not to disclose his arrest, booking and charges or to obtain the notification line telephone number to report his DWI but to inform the supervisor he would not be reporting for duty as scheduled and to have his lay off recognized as an authorized absence.

The Board accepts the cell phone record as offered notwithstanding the unexplained discrepancy where the Claimant points to a thirty-four (34) minute call on Monday December 18 at 1034 hours as with his supervisor but testified he communicated only by text and voice mail with this official. Other testimony by the Claimant about the unavailability of his rules book because it was in his assigned Carrier vehicle parked in New Orleans and no access to his personal vehicle are unpersuasive mitigating circumstances.

The Organization opines that the 48-hour window opened for reporting the Claimant's "situation" on April 19, 2018 when the Claimant was "charged with a crime" reportable under Rule 1.6.4). Law enforcement documents identify the Claimant's arrest and booking on DWI (1st Offense) as a "charge" and Failure to Maintain Control (Careless Operation) as a "charge" and both are timed at 0619 hours and dated December 16, 2017. Zero six one nine (0619) hours marked the opening of the 48-hour window to report his DWI to the Carrier on the designated telephone number. The Claimant never contacted the notification line and the guidance or instruction he obtained from contacting the ethics hotline about his situation cannot be determined from this record.

Instructive and applicable for the Board in the Claimant's situation is Third Division Award 43117:

“Rule 1.6.4 is a long-published rule . . . and the Claimant is charged with knowledge of that rule and its requirements that as an “employee” he must report arrests and criminal charges specified in that rule, which includes “[o]perating a motor vehicle while under the influence of, or impaired by, alcohol.” The Claimant did not do so[.]”

The Claimant’s actions following his vehicle accident show that he was aware of Rule 1.6.4 and he understood it rule applied to his off-duty conduct situation which required reporting his DWI arrest, booking and charge to the notification line but the Claimant chose not to follow the rule.

Substantial evidence supports the Carrier’s decision and mitigating circumstances are insufficient and unpersuasive as a basis to modify the assessed discipline. Under the Discipline Policy, the Claimant’s violation of Rule 1.6.4 is a dismissible offense. As stated in Award 355 of Public Law Board 5760, “[t]he Board is in no position to interfere with management’s discretion to enforce Rule 1.6.4 in this particular case.” Thus, the claim will be 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.