

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44346  
Docket No. SG-45610  
21-3-NRAB-00003-190479**

**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 R.D. Williams, for any mention of this matter removed from his personal record, 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 1-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 April 19, 2018. Carrier's File No. 35-18-0013. General Chairman's File No. 18-021-BNSF-33-K. BRS File Case No. 16046-BNSF. NMB Code No. 106.”**

**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.**

At the time of the incident herein, the Claimant held the position of Signal Foreman in the Carrier's Signal Department. On March 17, 2018, the Claimant was tasked with getting a power cable installed to an AEI site for a future cutover.

On March 22, 2018, Signal Construction Supervisor Matthew Wilkins received a phone call from Signal Construction Foreman Deon Quick that a power wire was live and exposed near the China Hat Highway Crossing, where an old Signal bungalow was being removed from service and a new one was being placed into service. Upon investigation, Supervisor Wilkins discovered that the Claimant performed this wiring work on March 17, 2018.

On March 27, 2018, 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 violation of the Lock Out/Tag Out procedures by not properly locking out the power distribution panel with power off and leaving an exposed cable to an AEI site and with the potential for power to be on, near LS 54 at MP 4.6z on March 17, 2018, between the hours of approximately 0700-1700 PST, on the Oregon Trunk Subdivision while working as a signal foreman on gang SSCX0320."**

After a formal investigation on April 19, 2018, the Claimant was found in violation of MWSR 3.1.6, Lockout/Tagout, and MWSR 3.1.7, Signal Power Lines of Fewer than 600 Volts, and was assessed a Level S 30 Day Record Suspension.

In a letter dated July 11, 2018, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Carrier contends that it has presented substantial evidence showing the Claimant's violation of MWSR 3.1.6 and MWSR 3.1.7. The Carrier contends that the Claimant should have de-energized the circuit box and placed a Lock Out/Tag Out lock on the circuit box but did not. Those Rules state,

**"MWSR S-3.1.6. Lockout/Tagout**

**Follow approved lockout/tagout procedures:**

- Assume all wires, conductors, and other electrical equipment are energized, unless known to be locked out...

**MWSR 3.1.7, Signal Power Lines of Fewer than 600 Volts**

**When work is to be performed on signal power lines of fewer than 600 volts, the following will apply:**

- Lockout/Tagout (LOTO) will be attached to indicate to other employees that power is off due to work being performed on the line.
- Power must not be restored except by the person who deenergized the line..."

The Carrier contends that the Claimant admitted that he failed to properly follow the safety rules and did not place a Lock Out/Tag Out lock on the breaker. As a result, the Carrier contends, it was not necessary to include the Lock Out/Tag Out policy in the investigation record because the violated Safety Rules were introduced.

The Carrier contends that the Organization's argument that the Claimant was denied a fair and impartial hearing because Quick was not called as a witness comes too late. Quick was not a material witness, and the Organization raised no objection at the hearing. Thus, the objection was waived and cannot be heard belatedly before this Board.

The Carrier contends that if the Claimant had properly followed the Lock Out/Tag Out policy, it would not have been possible for the circuit to be re-energized afterward. Although the breaker did not have power when the Claimant left the area, it was later re-energized because no lock out lock had been placed there.

The Carrier contends that the discipline imposed was not excessive or arbitrary. The Carrier's Policy for Employee Performance Accountability (PEPA) classifies this type of violation as a serious one and the assessed discipline was consistent with the nature of the offense, the Claimants' records, arbitral precedent, and the PEPA. The assessed discipline was not excessive, arbitrary, or unwarranted.

The Organization contends that the Claimant was denied a fair and impartial hearing because the Carrier failed to call Foreman Quick as a witness at the hearing, depriving the Claimant of the opportunity to cross examine him.

The Organization contends that the Carrier failed to present the applicable rules and policies at the investigation. It points out that MWSR 1.3.6 applies to cables being energized, not de-energized. Further the Organization contends that the Carrier failed to meet its burden of proof by failing to produce the Lock Out/Tag Out procedure to support the charges.

The Organization contends that the imposition of a 30-day record suspension with a one-year review period is harsh and excessive. The Organization contends that the Carrier has failed to utilize progressive discipline.

Before reaching the merits of the claim, the Board will address the procedural objections raised by the Organization, which, it argues, precluded a fair and impartial hearing. In its submission, the Organization objected to the Carrier's failure to call the Foreman as a witness. However, a careful review of the transcript reveals that this objection was never raised during the investigative hearing. Numerous decisions of this Board have made clear that failure to raise such an objection on property constitutes a waiver of the issue.

The Organization also objected that the Carrier failed to include a copy of the Lock Out/Tag Out procedure in the on-property record during the investigation hearing. However, this Board does not find the omission fatal to the Carrier's case. The Rules that the Claimant was charged with violating were included and they directed the Claimant to follow the Lock Out/Tag Out procedure. The Claimant admits that he placed no Lock Out/Tag Out lock on the breaker and does not claim that he followed the procedure. The Claimant was not charged with improperly placing a lock; if he had been, the Carrier's omission would be more troubling. The Claimant admitted he placed no lock and with that neglect, he failed to follow the Safety Rules.

The Carrier has shown with substantial evidence that the Claimant violated MWSR S-3.1.6 and MWSR S-3.1.7. His failure allowed a de-energized line to become inadvertently re-energized. Under the circumstances, the penalty of a 30-day record suspension was neither excessive nor arbitrary.

### **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 6th day of January 2021.**