

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44368
Docket No. SG-45826
21-3-NRAB-00003-200012**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(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 D.V. Girard, for compensation for all time lost, including overtime pay, with all rights and benefits unimpaired and any mention of this matter to be 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, 35-day actual suspension, with a 3-year review period to the Claimant, without providing him a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on August 17, 2018. Carrier's File No. 35-18-0028. General Chairman's File No. 18-053-BNSF-87-B. BRS File Case No. 16104-BNSF. 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.

At the time this dispute arose, the Claimant held the position of Signal Maintainer and was assigned to the West Great Falls territory in the Carrier's Signal Department. On August 8, 2018, at approximately 12:13 AM, the Carrier's Signal Operations Center reported an activation failure at the Cleveland Drive Railroad Crossing located at Mile Post 9.59 on the Great Falls Subdivision. Upon investigation, it was determined that the Claimant had disconnected the commercial power to the crossing during an inspection but had not restored power.

On August 8, 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 failure to complete inspection of the power off test for the highway grade crossing DOT number 098927X at approximate MP 9.5 on the Great Falls Subdivision that led to an FRA reportable activation failure."

After a formal investigation on August 17, 2018, the Claimant was found in violation of STP TP-234 - Highway Grade Xing Warning Test Procedures and was assessed a Level S, 35-day actual suspension with a 3-year review period.

In a letter dated December 3, 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 shown with substantial evidence that the Claimant failed to follow Signal Instructions and Testing Procedures and thereby did not restore commercial power to the Cleveland Drive Crossing prior to leaving on August 7, 2018. The Carrier contends that the Claimant admitted to leaving the power disconnected and that doing so was a rule violation. The Carrier contends that where there is an admission of guilt, there is no need for further proof.

The Carrier contends that under its Policy for Employee Performance Accountability (“PEPA”), this type of violation is a serious one and the assessed discipline was lenient.

The Organization contends that the Claimant was denied a fair and impartial hearing as guaranteed under Rule 54 of the parties’ Agreement. The Organization contends that the Carrier’s failure to identify the charged rule in the charge letter or to include it during the Investigation hearing, violated Rule 54. As a result of this omission, the Organization contends, the Claimant was disciplined for violation of a rule that was never made known to him or his representatives.

The Organization also contends that the Carrier reached an unsubstantiated conclusion that the Claimant was responsible for the activation failure based on inconclusive evidence. The Organization contends that the Carrier failed to carry its burden of proving with substantial evidence that the Claimant is guilty of the alleged violation.

This Board finds that this claim must be sustained prior to review of the merits because the Claimant was not given a fair and impartial hearing as contemplated by Rule 54 of the current Signalman’s Agreement. The Organization promptly notified the Carrier of its objection, writing,

“However, as a review of the complete investigation record reflects, it was not the Carrier’s failure to list a specific rule in the investigation notice which demonstrated a monumental violation of due process. The Carrier failed to submit into evidence, or quote during the investigation, the rule listed as the basis for the subsequent discipline. This is the action which undeniably constitutes a violation of due process.”

The Carrier deprived the Claimant of a fair and impartial hearing by its failure to identify or introduce the allegedly violated Rules during the investigation. As stated in Third Division Award 42832, “A fair hearing must not involve a guessing game in which the Claimant and/or the Organization must anticipate which rules the Carrier is likely to rely on and which must be addressed in the hearing.” See also, Third Division Award 42699, in which the Board stated, “The investigation cannot be considered ‘fair and impartial’ when the claimant and his Organization have not had an opportunity to address the rules that might thereafter form the bases for discipline or dismissal.”

When the Rules were neither quoted during the hearing nor attached to the Transcript, this Board is unable to determine whether a violation of the rule has been proven with substantial evidence. In light of the fatal procedural flaw, the claim must be sustained in full.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of January 2021.