

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44807  
Docket No. SG-46678  
23-3-NRAB-00003-210138**

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

**(Brotherhood of Railroad Signalmen  
PARTIES TO DISPUTE: (  
(BNSF Railway Company**

**STATEMENT OF CLAIM:**

**“Claim on behalf of M.J. Janssen, for reinstatement to service with compensation for all time lost, including overtime pay, 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 54, 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 October 2, 2019. Carrier's File No. 35-19-0043. General Chairman's File No. 19-080-BNSF-119-D. BRS File Case No. 16283-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.**

The Claimant began working in the Carrier's service on October 29, 2007. On September 24, 2019, the Claimant was assigned to work as a Signal Maintainer with Maintenance of Way at Third Street in Tecumseh, Nebraska. While the Claimant was disabling the Third Street Crossing, he was informed the crossing at Highway 136 was activating due to the equipment working on the track. As the Claimant drove one-half mile to the Highway 136 crossing, he stopped to place a shunt on the tracks, disabling it. Later, the Claimant was observed removing the shunt by managers performing ops tests in the area. When the Claimant returned to the Third Street crossing, he was questioned about proper disabling procedures at Highway 136 and proper paperwork. The Claimant acknowledged that he did not have authority to place the shunt and that he did not fill out the proper paperwork.

On September 24, 2019, 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 follow crossing disable procedures as instructed in Signal Instruction 7.2 while disabling crossing at 3<sup>rd</sup> Street in Tecumseh, NE, DOT 083641K, on September 24, 2019 at approximately 1100 hours while working as a signal maintainer. The date BNSF received first knowledge of this alleged violation is September 24, 2019.

After a formal investigation on October 2, 2019, the Claimant was found in violation of Signal Instruction 7.2A, Highway Grade Crossing Warning Systems - Disabling and was dismissed from the Carrier's service.

In a letter dated December 17, 2019, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal in a letter dated February 14, 2020. 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 of the Claimant's violation of protocols regarding disabling a crossing, which were designed to keep its employees and the traveling public safe. The Claimant admitted to not following SI 7.2A Highway Grade Crossing Warning Systems – Disabling, which reads, in part:

**Signal Instruction 7.2A**

Before disabling any crossing, a crossing disable ticket within Remedy must be created for each crossing that is to be disabled, using either the web-based Remedy tool or the Interactive Voice Response (IVR)... Contact your Supervisor for instructions in the event you are unable to comply with these requirements.

Signal personnel responsible for disabling a grade crossing warning system must document the disabling and method used to bypass equipment or relays on Form CDC-4093 (Crossing Disable Checklist).

The Carrier points out that numerous awards have held that where there is an admission of guilt, there is no need for further proof.

The Carrier contends that it properly dismissed the Claimant because there is no question that he failed to follow the proper steps for disabling a crossing prior to working on the Highway 136 crossing.

The Carrier contends that the Claimant was provided a fair and impartial hearing. The Carrier contends that the transcript is devoid of evidence of prejudice to the Claimant or his ability to present his defense. The Carrier contends that the Investigation Notice, which referred to “disabling crossing at 3rd street” instead of “while disabling crossing at Highway 136,” and “Signal Instruction 7.2” instead of “Signal Instruction 7.2A,” nonetheless gave ample notice of the subject of the Investigation. The Carrier contends that it is not required to list the applicable rule in its Investigation Notice, so the Notice was more informative than it needed to be.

The Organization contends that the Carrier denied the Claimant his due process rights by violation of Rule 54 (B) and (C) of the Agreement. The Organization contends that the Carrier issued an Investigation Notice alleging that the Claimant violated Signal Instruction 7.2 while disabling the crossing at Third Street, DOT 083641K, in Tecumseh, Nebraska, on September 24, 2019. But the Carrier dismissed the Claimant for failure to follow crossing disabling procedure 7.2A while disabling the crossing at Highway 136, DOT 083641K, in Tecumseh, Nebraska, on September 24, 2019. During the Investigation, the Organization objected multiple times to the incorrect Investigation Notice. The Organization contends that even though the Hearing Officer agreed that the Notice was misleading, the Claimant was still dismissed.

The Organization contends that the Carrier has failed to provide substantial evidence that the Claimant was guilty of the charged misconduct, as there is no question that the Claimant properly disabled the Third Street Crossing in accordance with Signal Instruction 7.2.

The Organization contends that the penalty of dismissal was excessive. Moreover, the failure to protect the Claimant's due process rights should mitigate against the disciplinary penalty. The Claimant took responsibility for not filling out the proper crossing disabling paperwork. The Organization further contends that there was no question that the shunt the Claimant used was protected despite the Claimant's error. The Organization contends that the Carrier has exaggerated the Claimant's violation, resulting in his unwarranted dismissal. The Organization further argues that the penalty is excessive when compared to discipline meted for similar transgressions.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant.

There is no dispute that the Carrier provided substantial evidence that the Claimant failed to comply with Signal Instruction 7.2A when disabling the crossing at Highway 136. When asked, the Claimant admitted that he did not have the proper paperwork for the crossing. Where there is an admission of guilt, there is no need for further proof. This failure to comply with protocol formed the basis for the discipline imposed.

However, the Carrier's Notice of Investigation charges the Claimant with failing to comply with Signal Instruction 7.2 when disabling the crossing at Third Street. During the Investigation, the Signal Maintenance Supervisor confirmed that the Claimant disabled the crossing at Third Street in accordance with SI 7.2 and SI 7.2A. In other words, the Carrier took no exception to the Claimant's performance at Third Street.

The Organization argues that it objected as soon as the supervisor realized at the start of the hearing that the Notice had the wrong street location and rule and that the error caused confusion going forward. The Carrier identified the mistake as nothing

more than a “typographical error.” The Hearing Officer accepted this characterization and overruled the objection.

An essential element of due process is that the charged employee is entitled to know the charges against him. The parties’ Agreement provides, at Rule 54 (C), “At least five (5) calendar days advance written notice of the investigation outlining specific offense for which the hearing is to be held shall be given the employee and appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire.”

Numerous Boards have held that the Notice must hold sufficient particulars to allow the parties to prepare their proofs. The charge here correctly identified the date and the DOT number but misidentified the street location of the crossing. The Carrier called it a typographical error, but the mistake muddled the waters, as the Claimant had also disabled the crossing at Third Street. The record shows that on the day of the incident, the Claimant was asked about the crossing at Highway 136 and admitted from the outset that he didn’t have the correct paperwork for that crossing.

With respect to the Organization’s assertion that the wrong Rule was identified, the testimony adduced at the Investigation made clear that SI 7.2A was a subpart of 7.2. Furthermore, this Agreement does not require the Carrier to identify the specific charged Rules at all, so the error in not identifying the more specific Rule was not fatal to the Carrier’s case.

Finally, the Organization has asserted that the penalty of dismissal is excessive for a first offense of not properly completing paperwork, especially when there is no question that the employee was fully protected. With respect to the disciplinary penalty, the Board finds for reasons unique to the circumstances of this case and without precedent for any future similar claims, the Claimant must be returned to duty without back payment, but with all other rights and privileges intact.

**AWARD**

Claim sustained in accordance with the Findings.

**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 28<sup>th</sup> day of October 2022.