

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44808
Docket No. SG-46679
23-3-NRAB-00003-210139**

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. Stevens, for 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 (Serious) 30-day record suspension with a 1-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 October 31, 2019. Carrier’s File No. 35-19-0044. General Chairman’s File No. 19-090- BNSF-129-S. BRS File Case No. 16284-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.

The Claimant began in the Carrier’s service on April 12, 2011. On October 18, 2019, the Claimant was assigned as a Signalman in Carrier’s Signal Department. He

was tasked with setting up Box 1 protections for crossings potentially to be disabled for Maintenance of Way work. The Claimant communicated with the Dispatcher that four crossings would require Box 1 protection for the day. On the third Box 1 request, the Claimant asked for Mile Post 441.63 and the dispatcher repeated back, "Mile Post 431.63," to which the Claimant replied, "That's correct." Approximately sixty minutes later, the Claimant requested another Box 1 from the Dispatcher, this time at Mile Post 443.66. The dispatcher repeated, "Mile Post 433.66" and the Claimant again confirmed an incorrect communication.

On October 23, 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 the Highway Grade Crossing Warning Systems Disabling Procedure on October 18, 2019 near MP 441.63 and 443.66 on the Avard Sub.

After a formal investigation on October 31, 2019, the Claimant was found in violation of SI 7.2A, Highway Grade Crossing Warning Systems-Disabling, and was assessed a Level S 30 Day Record Suspension.

In a letter dated December 18, 2019, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal in a letter dated February 15, 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 showing the Claimant's violation of SI 7.2A, Highway Grade Crossing Warning Systems-Disabling. Although the Claimant correctly informed the dispatcher of the impacted Mile Posts that should have Box 1 notifications, he failed to recognize that the dispatcher responded with incorrect numbers or to verify that the correct crossing was protected. This error created a significant safety risk to the crews and the public.

The Carrier contends that the Claimant was provided a fair and impartial hearing. The Claimant was able to present his defense and there is no evidence of prejudice to him. The Carrier contends that there was no improper communication off the record between the Conducting Officer and a Manager of Dispatching Practices.

The Carrier contends that the penalty of 30 days record suspension is appropriate for a violation such as this, classified as “serious” under the Carrier’s Policy for Employee Performance Accountability (“PEPA”).

The Organization contends that the Claimant was not provided with a fair and impartial Investigation as required by the parties’ Agreement. First, the Organization contends that the Carrier improperly failed to call the dispatcher as a witness, despite him being an eyewitness to the incident.

Additionally, the Organization contends that the Carrier’s handling of the Investigation was improper and biased. The Organization contends that the Hearing Officer improperly called a recess during the Claimant’s testimony to speak with the Carrier’s witness.

The Organization contends that the Carrier has failed to present substantial evidence of violation of SI 7.2A, which applies when a crossing is disabled. There is no evidence that the Claimant was disabling a crossing; the evidence clearly shows that the Claimant was requesting a Box 1 protection.

The Organization contends that while the Carrier took exception to the Claimant’s reply, “correct,” there is no question that the Claimant provided the correct information to the dispatcher. Furthermore, the Field Mileposts do not always align with the Dispatcher’s Milepost.

The Organization contends that the Carrier’s decision to issue a Level S, 30-day record suspension with a 1-year review period is harsh, excessive, and improper in this case. The Organization contends that the proper response would have been a coaching session, which would have corrected the misunderstanding and improved the Claimant’s understanding and performance.

The Organization raised several procedural objections. With respect to the failure to call the dispatcher as a witness, we find that this did not deprive the Claimant of a fair investigation. The Claimant did not refute the statements alleged to have been made by the Dispatcher, and thus, there was no need to present corroborative evidence. In addition, the Conducting Officer called a recess over the objection of the Organization after questioning of the Claimant concluded. The Conducting Officer affirmatively stated that he had no communication with the recalled witness. Thus, we find there is no procedural error that would compel a different result.

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.

The Carrier has presented substantial evidence showing the Claimant's violation of SI 7.2A. The Claimant confirmed that he created a disabling ticket before contacting the Dispatcher to request the Box 1 to protect the crossing. The record shows that on two occasions, the Dispatcher repeated the wrong location to the Claimant and the Claimant "okayed" his reply despite the error. As a result, the workers were left unprotected.

Based on the record, we cannot say that the penalty of a thirty-day record suspension was excessive. Safety violations such as the failure to take the proper steps when disabling a crossing are very serious. We see no reason to disturb the penalty.

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 28th day of October 2022.