

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44813
Docket No. SG-46684
23-3-NRAB-00003-210406**

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 C.J. Smith, 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 December 23, 2019. Carrier’s File No. 35-20-0022. General Chairman’s File No. 20-004- BNSF-119-D. BRS File Case No. 16352- 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 joined the Carrier's service on June 4, 2007. At the time of the incident in question, the Claimant was working as a Signal Maintainer in the Carrier's Signal Department, headquartered in Plattsmouth, Nebraska.

On December 13, 2019, BNSF Train 4005 was traveling at 25 mph through a flash only crossing at Mile Post 462.3. As the train was approaching the crossing, the crew noticed the flashers not activating, so they reported this incident immediately. An investigation revealed that the breaker was placed in the "off" position and had not been tripped. The on-call Maintainer and Signal Inspector turned the power back to the "on" position and the crossing had enough voltage to begin operating as expected.

A further review showed that the crossing's power had been turned off on December 5, 2019, at approximately 1341. Signal Supervisor Robert Cook determined that the Claimant had tested the crossing on December 5, 2019, and had failed to restore the power to the crossing once he completed the 90-day testing.

On December 16, 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 restore power at South Second St. Crossing (DOT 378195L) when performing 90d test on December 5, 2019 resulting in confirmed activation failure on December 13, 2019 when BNSF 4005 occupied the crossing without warning device properly operating on the Bayard subdivision at or near MP 462.3 while working as a signal maintainer. The date BNSF received first knowledge of this alleged violation is December 13, 2019.

After a formal investigation on December 23, 2019, the Claimant was found in violation of SI TP-234 Highway-Grade Crossing Warning, and was dismissed from the Carrier's service.

In a letter dated March 9, 2020, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal in a letter dated May 8, 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 provided substantial evidence of the Claimant's violations. The Carrier contends that the Claimant's failure to turn the power back on

at the crossing caused a train to traverse through the crossing without any warning system whatsoever. The disabled crossing would not warn pedestrians or drivers that a train was coming, with potentially fatal consequences.

The Carrier contends that it has developed Signal Instructions to prevent these types of errors, which the Claimant admitted he failed to follow. The Carrier contends that where there is an admission of guilt, there is no need for further proofs. There is no question that the Claimant failed to restore power to the crossing once he completed his 90-day test.

The Carrier contends that the Claimant was provided a fair and impartial hearing and that he has failed to show any prejudice to his rights or ability to present his defense. Further, there is no question that the Investigation was timely.

The Carrier contends that the Claimant was properly dismissed for his reckless act. The Carrier's Policy for Employee Performance Accountability ("PEPA") classifies this type of violation as Stand Alone Dismissible. Especially in light of the Claimant's previous disciplinary record, the assessed discipline was consistent with the severity of the offense. It was neither arbitrary nor excessive.

The Organization contends that the Carrier committed a procedural violation of Rule 54 (B) of the Agreement when it deemed the Claimant guilty of a serious infraction of the Rules and held him out of service pending the Investigation. The Organization contends that the Carrier wrongly prejudged the Claimant's guilt.

The Organization contends that the Carrier has failed to establish that the Claimant's violation was so serious as to warrant his dismissal. The Organization contends that the Claimant had attempted to speak with his manager about his heavy workload which caused him to unintentionally leave the power breaker off.

The Organization contends that nearly a dozen employees passed the crossing in the eight-day period the power was off, and no one reported the power off indication. The Carrier's failure to address these other rule violations is creating a culture of noncompliance.

The Organization contends that the Carrier failed to consider these mitigating circumstances when it issued the harsh and excessive penalty of dismissal. The Claimant assured the Carrier that if he had been notified of the power off indication, he would have immediately restored power at the crossing. The Organization contends that the

Carrier failed to consider the Claimant's 15 years of dedicated service with only one infraction, occurring more than six years earlier.

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.

Here, the Claimant admitted that he failed to restore power at the crossing after completion of the 90-day test. As a result of his oversight, the crossing was disabled for days, failing to warn the public of a coming train. The Carrier has met its burden of proving the Claimant's violation with substantial evidence. Even if others had noticed the power off indicator, it would not have excused the Claimant's violations.

The Claimant admitted that he failed to follow the Carrier's Signal Instructions which are in place in order to ensure that all steps are followed. The potential consequences of such a mistake cannot be overstated. While there is no evidence that the Claimant intended to put employees and the traveling public in peril, he did purposely choose not to follow the Signal Instructions as he was trained to do.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit.

The Claimant's violation was a Standalone Dismissible offense, and his record included a previous Level S suspension. We find 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.