

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44831
Docket No. SG-45627
23-3-NRAB-00003-220355**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Connex Railroad LLC

STATEMENT OF CLAIM:

“Claim on behalf of P. Masutier, for compensation for all time lost, including overtime, 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 Rules 39 and 40, when it issued the harsh and excessive discipline of a 40-day suspension and a one-year probationary period 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 July 10, 2018. Carrier's File No. 180602. General Chairman's File No. SCL-08-19-18A. BRS File Case No. 16068-Connex. 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.

Factual Background:

At issue in this case are Rules 39 and 40, quoted below in pertinent part

RULE 39 – DISCIPLINE “(a) An employee who has been in service more than ninety (90) days except for the provisions of Rule 21 (b)(2) will not be disciplined or dismissed without a fair and impartial investigation at which investigation he may be assisted by a duly credited representative of the Organization. The General Chairman and the employee will be advised in writing at least fifteen (15) calendar days prior to such investigation of the exact charges which have been made against him. The charge(s) will be made in writing within (30) days of knowledge of the offense. The investigation shall be held within twenty (20) days of the date the employee is charged with the offense, except in cases where an employee is withheld from service, in such cases the investigation will be held within ten (10) days, unless postponement is arranged. In special cases the employee may be held out of service pending investigation. During an investigation, an employee shall have the right to call witnesses to testify in his behalf. During the investigation the accused employee or his duly accredited representative and the Company officer conducting the investigation shall have the right to question and cross-examine all witnesses who testify. A decision and copy of the transcript of investigation will be furnished to the employee and his representative within thirty (30) days after completion of the investigation.

RULE 40 – CHARGES NOT SUSTAINED If the charge filed against an employee is not sustained, it shall be stricken from the record, and if the employee has been removed from position held, reinstatement to his position will be made with seniority and other rights unimpaired and payment allowed for the assigned working hours actually lost while out of service, at the rate of the position he was entitled to fill during that time. Actual amount lost means amount lost less other amounts earned by the employee including any amount received by the employee through Unemployment Insurance, but there shall be deducted from such other amount earned the necessary actual expenses incurred by the employee in earning such amounts.

The Claimant was charged with allegedly fouling the track, outside the limits of authority, and performing work that caused a track occupancy light on June 13, 2018.

Position of Organization:

The Organization maintains the Carrier failed to weigh the mitigating circumstances, including a lack of training, and issued the Claimant the harsh and excessive discipline of a 40-day suspension, with a 1-year probationary period. In its view, the Carrier failed in its obligation to utilize progressive discipline in the enforcement of its rules.

As the Organization sees it, the lack of training provided to the Claimant, the Supervisor's lack of knowledge as to whether Claimant was trained or not, in addition to Claimant's adjustment to the new position and territory, served to mitigate his infraction. In support of this contention, it quotes the transcript from the Investigation:

Q: Okay. So in this case, Mr. Major, where Mr. Masutier apparently made a mistake and it's obvious he got limits that were outside of where he thought he was, wouldn't it be important that he have been trained on the physical characteristics of the territory?

A: Yes.

The Organization argues the Carrier's Officer confirmed that Claimant was not trained on the physical characteristics of the territory where the incident transpired. It contends this demonstrates a failure on the Carrier's responsibility. According to the Organization's analysis, the Carrier's lack of proper management contributed to the event and serves to mitigate the Claimant's infraction. It references the following testimony:

Q: Are you familiar with 802, Mr. Major?

A: Yes.

Q: And do you know if there's an Initial Operating Rules Qualification Form or Territory Qualification Form that's been entered for Mr. Masutier?

A: No, I don't.

Q: Okay. So in this case, Mr. Major, where Mr. Masutier apparently made a mistake and it's obvious he got limits that were outside of where he thought he was, wouldn't it be important that he have been trained on the physical characteristics of the territory?

A: Yes. (See Transcript, Page No. 38)

The Organization also notes that the Claimant put down a shunt. Though it was outside his limits, it was a substantial safety check. In its view, this is yet another mitigating circumstance the Carrier failed to consider. It concludes that the discipline cannot stand.

Position of Carrier:

In 2014, FDOT purchased CSX and put out an RFT under which the Carrier is now working. Connex was not given the Claimant's personnel record under CSX, so it cannot establish exactly what training the Claimant had at the time of the incident in question. It does not contest the argument that he failed to receive a briefing on the physical characteristics of the area, nor does it contest that he put the shunt down as a safety measure. However, it notes that he worked in that area for four years under CSX, and maintains he would have been trained and should have been familiar with the area as a result.

It finds it significant that at no time during the Investigation did the Claimant contend that he had not been trained. Instead, he refers to the incident as an "unfortunate mistake." The Carrier notes that the Claimant's penalty was only a time served suspension and one-year probation, which was by no means excessive or harsh under the circumstances. In its view, the incident carried grave safety risks and therefore could not be treated as minor in nature.

Analysis:

The facts of this case are largely uncontested, and the Organization's key argument is that the Carrier's penalty was harsh and excessive, particularly in view of the mitigating circumstances.

We are not persuaded that a failure of training has been established. The Claimant made no such assertion during the Investigation. Instead, the Organization seeks to rely on the unavailability of prior records to establish this point. Without any assertion by the Claimant that he had insufficient training, the Organization's evidence regarding training is inadequate.

However, as to putting down the shunt, this is a strong mitigating circumstance, establishing that the Claimant was maintaining safety precautions rather than solely relying on his perception of his limits. We find this mitigating circumstance was not given adequate weight.

Claim sustained in part. The Claimant's disciplinary suspension shall be reduced to 20 days. The Carrier shall make him whole for 20 days' time lost as a result of this incident, less any interim earnings from replacement employment. Lost overtime shall be compensated at the overtime rate. Any other claims not expressly granted by this Award are hereby denied.

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 31st day of January 2023.