

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44870
Docket No. SG-47215
23-3-NRAB-00003-220292**

The Third Division consisted of the regular members and in addition Referee Michael D. Phillips when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Canadian Pacific Railway**

STATEMENT OF CLAIM:

“Claim on behalf of the SOO Line General Committee of the Brotherhood of Railroad Signalmen on the Canadian Pacific Railway:

Claim on behalf of R. Johnson, for compensation of all lost wages and any reference to this matter removed from the Claimant’s personal record; account Carrier violated the current Signalmen’s Agreement, particularly Rule 28 (a) and (e), when Carrier failed to provide the Claimant with a fair and impartial investigation, failed in its burden of proof, and assessed the Claimant with 45-day suspension on September 29, through November 12, 2020, resulting in a loss of wages to the Claimant. Carrier’s File No. 2021-00019407. General Chairman’s File No. 2021-00019407. BRS File Case No. 5390. NMB Code No. 201 – Minor Discipline: Conduct.”

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.

On September 28, 2020, Claimant Ryan Johnson was working as an S&C Maintainer, hi-railing on the Davenport Subdivision. As part of his duties, he inspected and handled switches on the subdivision.

At 12:53 that day, Train 475 was stopped at MP 184.58 for a switch not lined properly. The Claimant and his manager went to the site, and they verified that the switch was gapped, and locks were in place, but the handle was not seated into the latch and secured. The manager threw the switch several times, and it operated properly, and that when latched, it remained secure. The Claimant told his manager that he had stopped to paint the switch circuit controller, but that he had not handled the switch.

By letter dated October 7, 2020, the Claimant was notified to attend a hearing to develop the facts and place responsibility, if any, in connection with a rules violation at MP 184.58 on the Davenport Sub on the date in question. The notice indicated possible violations of GCOR 1.6 Conduct, GCOR 8.2 Position of Switches, and GCOR 8.3 Main Track Switches. The hearing was held October 14, 2020, at which GPS logs revealed that the Claimant had stopped at that location for 21 minutes. Signal logs were also entered, indicating that the switch went out of correspondence three minutes after the Claimant had arrived at that location. Following the hearing, the Claimant was found to be in violation of the cited rules, and by notice dated November 3, 2020, he was assessed a 30-day suspension. The Claimant was also required to serve fifteen days of a previously deferred suspension.

The Organization submitted the instant claim, which the parties handled on the property according to the applicable agreement. The matter now comes to us for resolution.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first contends that the Carrier conducted an investigation on the date of the incident, at which it predetermined the Claimant's guilt, and that the subsequent hearing was merely a formality. The Organization also argues that the Carrier intentionally left the notice of investigation vague, without specification of the conduct at issue. It further contends that the hearing was flawed because the crew from Train 475 was not present to present pertinent information. The Organization posits that the multitude of procedural defects denied the Claimant a fair and impartial hearing, and it avers that the claim should be sustained on that basis alone.

With respect to the merits, the Organization contends that the Carrier did not meet its burden of establishing with substantial evidence that the Claimant was in

violation of the cited rules. The Organization also asserts that the Carrier's decision to issue a 45-day suspension is harsh, excessive and unwarranted on the facts of this case. It states that the Carrier arbitrarily ignored principles of progressive discipline in assessing such a suspension, and it argues that the correct course of action would have been much lesser discipline, such as coaching, and it urges that the claim be sustained.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessment. It states that the Claimant received a fair and impartial investigation, and that he was afforded all applicable rights during that process. The Carrier asserts that the notice of investigation was specific as to location, date, and possible rule violations, and it argues that the Claimant was well aware of the incident under investigation so that he could form a defense. The Carrier also denies that there is any evidence of record to indicate that the Claimant had been prejudged or that the hearing officer was biased against him.

With respect to the merits, the Carrier states that the record contains substantial evidence to support the finding of guilt. It points to the testimony of the Claimant's manager who observed the gapped switch, as well as the GPS and PTC logs which show that the Claimant was at the exact location of the switch when it went out of correspondence. It notes that the records indicate the switch had been lined normal for nearly two days, but that it went out of correspondence only three minutes after the Claimant arrived.

The Carrier asserts that the Claimant's testimony that he did not handle that switch is neither logical nor truthful. It notes that he was at the location for 21 minutes, and it points out that he confirmed having operated two other switches that day when he painted the controllers. The Carrier posits that it is not credible that the only switch he didn't throw was the one that went out of correspondence just after he arrived at that location.

With respect to the discipline assessment, the Carrier states that the Claimant leaving the switch improperly lined constituted a Major offense under its Hybrid Discipline and Accountability Guidelines. It points out that this was the Claimant's second major rule violation within four months, and that under the guidelines he could have faced a lengthier suspension or even dismissal. The Carrier states that there was nothing arbitrary or capricious about the assessment here, and it requests that the claim be denied.

We have carefully reviewed the record, including the correspondence, attachments, and citations of authority, and we find no procedural barrier to our consideration of the merits. While the notice certainly could have been more detailed, we believe that it provided sufficient information, including the date, location and rules at issue, to apprise the Claimant of the incident to be investigated. The record reveals that the Claimant was aware of the specific incident in question, and we believe he was adequately prepared to address the charges.

We also find no indication that the hearing officer was biased or that the Claimant's guilt was prejudged. For obvious reasons, it is to be expected that a Carrier will attempt to determine the cause of a potentially dangerous incident, and that it will do so promptly. We do not believe a Carrier is obligated to delay such efforts until the convening of a disciplinary hearing, or that it would be reasonable to do so, and we find no indication that such activity in this case deprived the Claimant of a fair and impartial hearing. We also find that the absence of the train crew who first reported the gapped switch did not have a prejudicial impact on the hearing, as both the Claimant and his manager also observed the gapped switch. We have reviewed the arbitral authority submitted by the Organization, and we do not believe it requires a different conclusion.

Turning to the merits of the case, we find that the record contains sufficient evidence to support the finding of guilt in this matter. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline assessment, which has been defined in prior awards as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

Here, we believe the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that the Claimant was in violation of the cited rules when he failed to ensure that the switch was properly lined when he left the location, and that he was not honest about the circumstances. The evidence clearly established that the switch was lined normal before the Claimant arrived at the location, and that it went out of correspondence only three minutes after he arrived. Although the Claimant denied having operated the switch and claimed that he only painted the controller and checked bonds and wires, he conceded he had operated two other switches when he performed similar activities at those locations. The Carrier was within its rights to find his testimony about not operating the one switch in question to lack credibility, and as an appellate body, we are not in a position to overturn that credibility assessment.

Having found that the rule violations were established, we turn to the level of discipline assessed. To overturn the Carrier's assessment would require the Board to find that the Carrier acted arbitrarily or capriciously so as to constitute an abuse of discretion. Leaving a main line switch improperly lined has the potential for serious consequences, and the suspension assessed is consistent with the Carrier's discipline policy for such an event, especially when the Claimant's record of having committed another major infraction less than four months prior to this event is taken into consideration. On this record, we cannot find that the Carrier's actions were an abuse of discretion. Therefore, we will not substitute our judgment for the Carrier's now.

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 10th day of March 2023.