

**BEFORE
PUBLIC LAW BOARD NO. 7499
CASE NO. 9
AWARD NO. 9
NMB Subject Code: 106**

BROTHERHOOD OF RAILROAD SIGNALMEN)	
(Organization file: 10-059-BNSF-20-C))	PARTIES TO THE
vs.)	DISPUTE
BNSF RAILWAY COMPANY)	
(Carrier file: 35-11-0021))	

STATEMENT OF CLAIM:

“Carrier should now be required to remove all discipline imposed upon Mr. Roesch as if he were never disciplined (including overtime and skill pay) and restore all time and lost employment rights immediately clearing his record of any part of this incident.”

FINDINGS:

The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated June 22, 2011 that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings.

After a thorough review of the record, the Board concludes that on October 1, 2010, BNSF Signal Inspector Roesch, a 12-year employee, was working on the signals at a crossing in the greater Chicago area. He was charged with failing to properly disable the Monroe Street crossing, resulting in an Activation Failure. After agreed-upon postponements, an Investigation was held on November 11, 2010. The Carrier found the Claimant guilty of violating Signal Instruction 7.2 and assessed a 20-day actual suspension followed by a 10-day record suspension. The Organization appealed this discipline through the proper process under the Collective Bargaining Agreement between the parties. The parties have been unable to resolve this issue and, after an on-property conference, they have placed the issue before this Board for adjudication.

The BNSF Maintenance of Way Operating Rules and Instructions in question are “Signal Instructions 7.2. — Highway Grade Crossing Warning Systems — Disabling.” They are some seven pages and were included in full in the transcript of the Investigation.

Organization Argument:

The Organization argues that the Carrier denied the Claimant the right to a fair and impartial investigation since they failed to "list a specific charge" they believed the Claimant had violated. They say that this was in violation of Rule 54 of the Collective Bargaining Agreement which states:

"At least five calendar days advance written notice of the investigation outlining specific offense for which the hearing is to be held shall be given to 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."

The Organization says that this failure prevented them from being able to properly prepare for the Claimant's defense.

They further say that the Carrier failed to prove that the Claimant had violated Signal Instructions 7.2 since there was an ongoing problem at this location which may have caused the incident. They also say that the Carrier failed to specify which part of the seven-page document entitled Signal Instructions 7.2 the Claimant was alleged to have violated, nor did they prove any violation. They say that the supervisor giving testimony failed to provide a signal log indicating an activation problem, and, therefore, there is no proof of such failure. They also say that the Investigating Officer failed to have entered the Claimant's statement; therefore, it cannot be used as evidence.

In summary, they say that the Carrier has not met its burden of proof and, therefore, no discipline can stand.

Carrier Argument:

With respect to the procedural argument, the Carrier says that inclusion of a specific rule in investigation notice is not required. They say that all that is required is that the notice contain enough information concerning the specific offense to enable the Claimant and his representative to prepare a defense.

With respect to the Rule infraction, they say that the Claimant had authority up through the east crossing sensors at the Monroe Crossing but not for the sensors for trains approaching from the west. By disabling the west sensors, the Claimant caused a train that was approaching the Monroe crossing from the west going east on Main 2 to fail to activate the crossing gates. This resulted in an Activation Failure in violation of Signal Instruction 7.2 and an investigation by the Federal Railroad Administration (FRA) into the matter. The Carrier says that the Claimant's and the Organization's main defense that this Activation Failure was caused by on-going problems related to a September cutover of new equipment, not by the Claimant's actions, is completely unsupported by the facts developed during the investigation. They say that Main 2 sensors did not provide the required 20-second warning by dropping the crossing gates in this case because they were deactivated, not because they were faulty. The Claimant testified that he disabled the west sensors by applying "jumpers" and this caused the train approaching from the west to fail to activate the crossing gates within the required time frame of 20 seconds before the train entered the crossing. When the train eventually crossed over to Main 3 right before entering the area controlled by the Claimant on Main 2, the sensors on Main 3 activated the crossing gates protecting the public from harm. However, since the train did not cross over to Main 3 until almost immediately before it entered the crossing, the required 20 seconds of warning time was not provided. Testimony provided by Construction Supervisor Dickerson and Electronic Technician Jones established that the time was actually 11 seconds, not the required 20.

They say that the Claimant had a "Panic button" so that he could manually drop the crossing gates but he chose not to use it. Ultimately, the Claimant's actions caused an Activation Failure at the Monroe Street Crossing and a failure to provide the advance 20-second warning as required by SI 7.2.

Furthermore, they say, the Claimant failed to prove his affirmative defense that this Activation Failure was caused by alleged on-going problems related to the September cutover of new equipment. The Carrier says this is an affirmative defense shifting the burden of proof to the Organization. No actual evidence that this specific location ever suffered from short warning time incidents prior to, or even following, this specific incident was provided during the investigation. They say the Organization relies on the self-serving testimony of the Claimant and another employee but fails to provide any actual evidence of these supposed incidents. There is nothing in the record proving that the alleged on-going issues experienced involved short warning times. In fact, according to Construction Supervisor Dickerson, the problems that were experienced related to the cutover were resolved before this incident.

While it may be true that the Conducting Officer did not state that the Claimant's statement would be Exhibit 5, it is clear that it was entered as Exhibit 5 and a copy was provided as part of the transcript to the Organization and the Claimant as required. Why else would the subsequent exhibit be identified as Exhibit 6, the Carrier asks?

Result:

With respect to the procedural issue, the purpose of a Notice of Investigation is to allow the Organization and the Claimant sufficient time and knowledge to know the case to be met. There is no specific language in the Collective Bargaining Agreement providing that Rules be specifically enumerated to meet this requirement. Parties in the industry in other agreements have bargained for clauses such as that. That is not the case here. The Board finds that the Notice of Investigation held sufficient particulars to allow the parties to prepare, and that, therefore, there was no procedural error.

With respect to the Claimant's statement, it is clear from a close review of the transcript that this statement was, indeed, entered into the record of the investigation, without objection by the Organization. In fact, the Carrier witness, Mr. Dickerson, repeatedly referred to it as Exhibit 5 and read from it extensively. Further, as the Carrier says in the last Response, the following Exhibit was labeled as Exhibit 6. This Board rules that the Carrier can, therefore, rely upon this statement.

With respect to the proof of the incident, when this Board reviews the transcript in its entirety, it becomes clear that the Claimant put jumpers where he had no authority to, and that was the proximate cause of the failure to have 20 seconds warning. Instead, there were only 11 seconds. While the Claimant's attempt to flag the crossing is laudable, it was only required because he had made an error. On the whole, while there may have been issues with this and other crossings at some time, the evidence, taken as a whole, establishes that at this particular time, at this particular location, the Activation Failure was caused by the error of the Claimant. This was a violation of Signal Instructions 7.2, and the Carrier has met its burden of proof.

Discipline:

Although this is an employee with over 12 years of service, he does not have a clear discipline record. Earlier that same year, the evidence shows that he had a 20-day actual and 10-day record suspension for the unauthorized use of a corporate credit card.

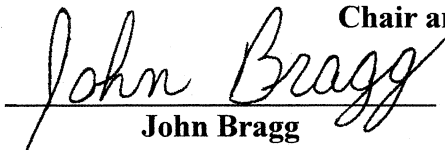
In all of the circumstances, the Board finds that the discipline assessed for the Activation Failure need not be disturbed.

AWARD


The Claim is denied.



Roger K. MacDougall
Chair and Neutral Member



John Bragg
Vice-President
Employee Member



Michelle McBride
Director Labor Relations
Carrier Member

Dated: 6/25/2012

At: Chicago, IL