Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33565
Docket No. SG-34167
99-3-97-3-731

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Illinois Central Railroad

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen of the Illinois Central Railroad (IC):

Claim on behalf of C.N. Roberts for reinstatement to service with compensation for all time and benefits lost as a result of his dismissal from service and for his record to be cleared of all charges in connection with this discipline, account Carrier violated the current Signalmen's Agreement, particularly Rule 35, when it failed to provide the Claimant with a fair and impartial investigation and assessed harsh and excessive discipline against him in connection with an investigation conducted on June 12, 1996. Carrier's File No. 135-296-1 Spl. BRS File Case No. 10265-IC."

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.

As of the date of Claimant's dismissal on June 18, 1996, the Carrier had employed Claimant since October 18, 1965, a period of almost 31 years. Prior to his dismissal, Claimant had received a 60-day suspension for insubordination in April 1976 and a letter of admonishment in October 1989 because his inspection records were in arrears. This letter of admonishment occurred following a fatality at a grade crossing.

Claimant worked as a Traveling Signal Maintainer in the Southern Region from September 1995 through May 1996. In that capacity, Claimant was responsible for the maintenance and inspection of assigned signal systems and grade crossing devices as well as record keeping. In addition to responding to any trouble calls, the Claimant was responsible for inspecting all highway crossings within his territory on a monthly basis.

Signal Supervisor T. H. Magee indicated that in early May 1996 he noticed that one such crossing had not been inspected in five months. Pursuant to that discovery, Magee ordered a job inspection to assess the condition of Claimant's entire territory. The results of this May 1996 job inspection indicated that the condition of the Claimant's territory from September 1995 through May 1996 was wholly inadequate. The results of the inspection were as follows:

MONTH	YEAR	% OF CROSSINGS INSPECTED
SEPTEMBER	1995	40%
OCTOBER	1995	53%
NOVEMBER	1995	27%
DECEMBER	1995	64%
JANUARY	1996	42%
FEBRUARY	1996	20%
MARCH	1996	38%
APRIL	1996	20%
MAY	1996	69%

Based on the serious deficiencies found in this job inspection, the Claimant was removed from service by the Assistant Engineering Superintendent of Signals, L. W. Winn. Winn indicated that the lack of inspections caused a significant hazard to the motoring public.

By letter dated May 24, 1996, Claimant was instructed to attend an Investigation on June 5, 1996. Claimant was charged with violation of Operating Rules, General Rule H, Signal Standard Procedure Number 28 and Signal Rules, General Rule B, Rule 2 and record of results of test parts (a) through (d), when as a result of an inspection performed during the period of May 22 through May 24, 1996, Carrier supervision discovered that he failed to perform required inspections on his territory.

On May 28, 1996, an amended notice was sent to Claimant changing the date of the Investigation to June 3, 1996. On May 31, 1996, another letter was sent to the Claimant postponing the Investigation until June 12, 1996, pursuant to mutual agreement of the parties. The Investigation was in fact held on June 12, 1996. As a result of the Investigation, it was determined that Claimant was guilty of the alleged Rule violations and he was dismissed effective June 18, 1996.

The Organization claims that the Carrier violated the Agreement when it failed to provide the Claimant with a fair and impartial Investigation. Further, the Organization contends that even if it could be held that Claimant failed to perform his duties, the penalty of permanent dismissal was too severe. According to the Organization, Claimant was denied the benefit of progressive discipline. The Carrier did not place Claimant on notice prior to removal that he was not properly performing his duties. For these reasons, the Organization asks that Claimant be reinstated, be paid for all lost time and have this action expunged from his record.

The Carrier contends that it acted appropriately in all ways. According to the Carrier, the Investigation was fair and impartial. As to the merits, the Carrier alleges that the results of the Investigation fully support a finding of guilty for the offense of failing to perform required inspections. According to the Carrier, the Claimant was familiar with the relevant Rules and failed to follow them. Claimant was aware that he was to perform monthly inspections on all crossings in his territory, but yet failed to fulfill this function. According to the Carrier, by Claimant's inaction, he placed the motoring public at great risk and subjected the Carrier to considerable liability. The Carrier alleges that dismissal was the only appropriate penalty in light of the circumstances. However, even if somehow the violation did not merit dismissal on its own, the

Claimant had been previously disciplined for both insubordination and having his inspection records in arrears. Given the instant Rule violations as well as his prior record, the Carrier contends that dismissal was the only appropriate penalty, citing Third Division Award 25229.

The Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord to what we might or might not have done had it been ours to determine, but to pass upon the question whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325; Third Division Award 16166).

The Board reviewed the transcript and the positions of both parties. On the question of whether there was substantial evidence that Claimant was guilty of violating Carrier Rules when he failed to properly complete inspections, the Board finds that there is substantial evidence to uphold Carrier's position. Claimant was responsible for inspecting a 180 mile territory which includes 45 grade crossings and two train control signals. The inspection that was completed on Claimant's territory turned up very serious deficiencies in Claimant's assigned responsibilities. Without working signals, there can be a significant chance of injury or death. As L. W. Winn testified:

> "A. ...The inspections - - very few of the inspections were up to date. The inspections that were made were not properly made. The reports that were in the signal cases were not inspection reports - - the SP 28 was not correctly filled out, not - - a lot of them were not signed. We found various conditions. We found bulbs out. We found one crossing with both bulbs on the same side on the same pole out.
>
> Q. And what does that really mean in English?
>
> A. What that really means is that you've got a situation where you could have somebody not see a light at all."

After a review of the entire record, we find that there is substantial evidence to uphold the Carrier's conclusion that Claimant failed to properly fulfill his duties.

We next review the question of whether Claimant was denied a fair and impartial Hearing. First, Claimant did receive adequate notice of the Investigation. While there were some modifications to the date of the Investigation, it was postponed until June 12 by mutual agreement and took place without incident. Further, as to the objection that two of the Carrier witnesses improperly remained in the room throughout the Investigation, we note that the Organization did not object to the two Carrier witnesses being present until the end of the Investigation, thus mooting this argument. Finally, we find that the letter of dismissal did accurately state the reasons for the dismissal and that Claimant did receive a copy of the transcript. Thus, we find that the Organization failed to sustain its burden of proof to show that Claimant was denied a fair and impartial Investigation and these objections are rejected.

Finally, we turn to the degree of penalty imposed in this case. As noted above, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. While there are certain offenses that warrant dismissal in the first instance, we are also cognizant that the concept of progressive discipline is used in this industry. In Second Division Award 7604 the Board held:

> "We have also recognized that a Carrier should utilize progressive discipline to make a good faith attempt to teach and correct its employees, and if this fails, discharge is fully warranted."

Here, at least to some extent, the Carrier relied on Claimant's prior record to impose the discipline. Claimant had previously received a 60-day suspension for insubordination as well as a letter of admonishment for having inspection records in arrears. While the instant matter did not involve insubordination, the 1989 letter of admonishment is arguably related to the instant matter because it involved inattention to duties. The substance of this case deals with a failure to inspect, as well as a failure to maintain adequate inspection records.

We, note, however, that Claimant had received no recent notice that he was in any way deficient in his duties as a Traveling Signal Maintainer. In addition, Claimant had been with the Carrier for 31 years at the time of his dismissal.

After a review of all these considerations, we believe that dismissal was too severe. We find that the Carrier should have imposed a lesser penalty in light of Claimant's long service, as well as the fact that Claimant had no recent notice of his deficiencies. To some extent the Carrier should have been monitoring Claimant's work on a more regular basis, but its laxness does not excuse Claimant's deportment.

While we believe that dismissal was excessive, we are cognizant of the seriousness of the offense. In light of these considerations, the Board concludes that the Claimant should be reinstated, with seniority unimpaired, but without backpay. Further, in light of the very serious nature of Claimant's offenses, he is to be restricted to a position where he is required to work with other Signal Maintainers under close supervision. We hasten to add, however, that the Board will not tolerate any recidivist behavior in the future, and Claimant's reinstatement is on a last chance basis.

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 20th day of October, 1999.