Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35747
Docket No. SG-35662
01-3-99-3-598

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Kansas City Southern Railroad

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern Railroad (KCS):

Claim on behalf of M. J. Kalczynski for payment of all time lost as a result of his deferred suspension from service for three working days and for any reference to this matter to be removed from his record, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when it failed to provide the Claimants with a fair and impartial investigation and imposed harsh and excessive discipline without meeting the burden of proving its charges in connection with an investigation conducted on March 10, 1998. Carrier's File No. K0698-5179. General Chairman's File No. BRS 9810247. BRS File Case No. 11071-KCS."

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.

This dispute involves an assessment of discipline in a situation in which an employee sustained a personal injury (cut finger) during the performance of his regularly assigned duties as a Signalman. No time was lost by the employee as a result of the injury. Proper treatment was given to the injury and proper reports were prepared by the appropriate parties detailing the injury. The Claimant was properly notified to attend a formal Investigation to ascertain the facts and determine responsibility in connection with the incident. The Claimant attended the investigatory Hearing; he was properly represented thereat; he acknowledged that he understood the purpose of the Investigation and was ready to proceed. The Claimant testified on his own behalf and his representative was permitted to cross examine the one witness presented by the Carrier. Following conclusion of the Hearing, the Claimant was properly notified that he had been found in violation of three Company Rules and was disciplined by suspension from service for three days. Proper appeals were perfected on the Claimant's behalf by the Organization and, after partial resolution of the situation during the on-property handling, the unresolved issue has come to the Board for final adjudication.

At the outset, it is evident from the case record that it is not necessary for the Board to review or rule on the monetary loss of time issue as mentioned in the Statement of Claim inasmuch as the three-day suspension was, in fact, served on dates on which the Claimant was not scheduled to work. Therefore, there was no actual monetary loss sustained. The only issue for the Board to resolve is whether the Hearing record supports the assessment of discipline and whether the suspension should remain on or be removed from the Claimant's service record.

It is the Board's conclusion that in this case the Claimant was accorded all of the due process rights to which he is entitled under the terms of the negotiated Rules Agreement. The Organization's arguments relative to specificity of charges as well as the fairness and impartiality of the Hearing are found to be non-persuasive and are rejected. The Claimant knew why he was attending the Hearing and acknowledged the fact that he was ready to proceed with the Hearing.

The Carrier Rules which are involved in this dispute read as follows:

"Rule 1.1.2

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

Rule 51.6.2 Protective Gloves

Wear protective gloves when protection is required to prevent injury.

Rule 56.7.6 Wrench

When using a wrench, select the proper size for the job. Do not use extensions or cheaters unless they are approved by the original tool manufacturer. Whenever possible pull on the wrench. If necessary to push, do so with an open palm. In close spaces follow these precautions: position hands to avoid injury if the wrench slips; when tightening or loosening a track bolt, limit your stroke to a 45 degree angle on either side of your body; brace yourself to avoid falling if the wrench slips or the bolt breaks; do not straddle the rail."

From the Board's review of the Hearing transcript, several points are apparent. The Carrier's only witness obviously had no first-hand knowledge of the situation that brought about the injury. His entire knowledge came from second-hand reports and an after-the-fact re-enactment of the event. He acknowledged that the Claimant "had already tightened at least 50 other nuts, prior to sustaining this injury" apparently without injury to himself. He acknowledged that "no specific instructions" had ever been given to the Signalman on how to do this particular job. His answers to the Hearing Officer's extremely leading questions were conjecture and surmise - not fact. When queried about what the Company could have done to prevent this particular injury, he obfuscated but did not deny that the Claimant, in fact, had a 25-year work record that was marred by only one other non-lost time injury - a turned ankle. This record does not paint the picture of an unsafe, careless employee.

To be sure, the Board has regularly held that it is not our function to substitute our judgment for that of the Carrier in discipline situations. Rather, the Board should only determine whether - from the Hearing record - there is "substantial evidence" to

sustain the finding of guilt. The term "substantial evidence" has been held to be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consolidated Edison Co. v. NLRB, 305 U.S. 197,229). The fact that a personal injury occurred does not, ipso facto, mean that the employee is presumed to be guilty of a Rule violation. As was said in Second Division Award 12692:

> "While strict adherence to Safety rules will reduce the chances of an employee sustaining a personal injury, it cannot guarantee that no injury will ever occur. The mere fact that an employee sustains an injury is not sufficient to meet Carrier's burden of proving a violation of the Safety rule."

In this case, the Board concludes that the record does not support the finding of guilt by "substantial evidence." Therefore, the discipline as assessed should be removed from the Claimant's record.

AWARD

Claim sustained.

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 24th day of October, 2001.