

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 26295
Docket No. 46117
06-1-04-1-M-2128**

The First Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Locomotive Engineers and Trainmen**
(**MidSouth Rail Corporation (Kansas City Southern**
(**Ry. Co.**

STATEMENT OF CLAIM:

“Claim of MidSouth Rail Engineer J. R. Francis for reinstatement to service with seniority and vacation rights unimpaired, all notations of discipline assessed on March 4, 2004 expunged from his personal work record and compensation for all time lost, including loss of earnings for attending the investigation until the date he resumes service, plus out of pocket expenses for attending the investigation until the date he resumes service, plus out of pocket expenses for health & welfare and any other benefits which would be provided to him as a MidSouth Rail Locomotive Engineer, for the alleged violation of KCS General Order No. 7, Item 6, Paragraphs 1, 2, 3 and 4 in connection with his alleged failure to inspect his train, I-ATLA when allegedly no response was given to him by the Track-side Warning Detector located on or around Mile Post 64.3 on the Vicksburg Subdivision at approximately 2035 on Wednesday, January 7, 2004.”

FINDINGS:

The First 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 January 7, 2004, Claimant was working as the Engineer on Train I-ATLA, operating between Vicksburg, Mississippi and Shreveport, Louisiana. According to the Carrier, an operational field test was being conducted at Mile Post 64.3, near Monroe, Louisiana. This test involved the deactivation of the radio transmitter on a Trackside Warning Detector. When operational, the transmitter either sends a signal indicating an irregularity on the train or a "proceed" message. If no message is received, the Carrier asserts the train crew is required to stop the train, perform a roll-by inspection and notify the dispatcher.

By letter dated January 16, 2004, Claimant and his crew were directed to attend a formal Investigation at which each was charged with:

"your alleged failure to inspect your train after no response was given by the Track-side Warning Detector located on or around MP 64.3, on the Vicksburg Subdivision. This incident occurred at approximately 2035 hours on January 07, 2004, while serving as crewmembers of the I-ATLA."

The Investigation was conducted on February 24, 2004, and, by letter dated March 4, 2004, the Investigating Officer informed Claimant that he was in violation of Kansas City Southern General Order No. 7, Item 6, Paragraphs 1, 2, 3 and 4, and was consequently dismissed from service.

The Organization appealed Claimant's dismissal, asserting, *inter alia*, that the Carrier had neither quoted the Rules at the Investigation nor included them in the transcript of the Investigation. In its denial of the claim, the Carrier asserted the Rules were appended to the transcript. The Organization renewed its argument in its submission before this Board, while the Carrier did not address it.

Inasmuch as this is a discipline case, the Carrier bears the burden of proof that it had just cause to dismiss Claimant. Much has been written about the concept of "just cause," both within and outside of the railroad industry. Credit is generally given to Carroll R. Daugherty for codifying the elements of just cause. Long before

he did so in other industries, Referee Daugherty defined “just cause” in Third Division Award 8431. One essential element, according to Referee Daugherty, is proof, by substantial evidence, that the employee violated Carrier’s rule or rules. It stands to reason that a violation cannot be proven if the existence of a rule has not been proven. That proof must be presented at the Investigation. To find such proof, we must look to the transcript. Just as the Organization may not defend an employee with evidence not proffered at the Investigation, so may not the Carrier discipline an employee on the basis of something other than what is contained in the record. In Award 19394, the First Division held:

“In assessing discipline imposed as the result of a trial or investigation, the scope of our review is necessarily confined to the transcript or record. (Awards 14319, 15745). The reason behind this principle is that the evidence adduced at the trial or investigation is the sole basis for the discipline imposed.”

In our review of the record before the Board, we find that the Rules relied upon by the Carrier were neither quoted in the Investigation nor attached to the transcript. Although the Carrier’s submission contains a transcript of the Investigation with the Rules attached, a close examination shows that those pages were faxed by the Carrier’s Labor Relations Department on January 10, 2005, almost eleven months after the Investigation. In light of this, we do not find credible the Carrier’s assertion that the pages were part of the original transcript. A mere citation of the Rule by number is not sufficient. In closing the Investigation, the Hearing Officer stated that “whoever reviews the transcript will determine if these rules or other rules were violated.” Without the Rules before us, we are unable to make such a determination. We must find, therefore, that the Carrier has failed to establish Claimant’s guilt. The discipline must be rescinded. In light of this finding, it is unnecessary to address the Organization’s other arguments.

We direct that Claimant be returned to service and that the discipline entry be removed from his record. Claimant is to be compensated for wages and benefits lost, but not to include any time Claimant was unable to work due to suspension or revocation of his engineer license. In accordance with Awards 25971, 26088, 26269 and others, the Carrier may offset Claimant’s back pay with earnings received by Claimant from other employment.

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 First Division**

Dated at Chicago, Illinois, this 28th day of April 2006.