

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31779
Docket No. SG-31861
96-3-94-3-217**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(CSX Transportation Company (former
(Seaboard Coast Line Railroad Company)**

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation Company (former Seaboard Coast Line):

Claim on behalf of E. F. Fernandez to be made whole for all time lost as a result of Carrier suspending the Claimant from service in connection with an investigation conducted on March 19, 1993, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when it failed to provide the Claimant with a fair and impartial investigation and imposed harsh and excessive discipline without meeting the burden of proving the charges against the Claimant. Carrier's File No. 15(93-61). BRS File Case No. 9376-SCL."

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 or 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 March 11, 1993, Claimant was employed as a Back-hoe Operator performing a ditch digging operation. While performing this activity, the back-hoe uncovered a piece of fiber optic cable. As a result of this action, Claimant was notified on March 12, 1993, that he was withheld from service and was charged with insubordination and failure to follow instructions. A Hearing was scheduled to be held on March 19, 1993 to investigate the charges and determine Claimant's responsibilities, if any. At the request of the Organization, the Hearing was postponed to March 26, 1993, at which time Claimant was present, represented and testified on his own behalf. Following the completion of the Hearing, Claimant was notified on April 12, 1993 that he had been found guilty of the charges and was assessed a 30 calendar day suspension. Claimant was permitted to return to service on April 12, 1993. Coincidentally, the 30-day suspension covered exactly the period of time during which he had been withheld from service. Appeals were taken by the Organization on Claimant's behalf and, failing to reach a satisfactory resolution of the dispute during the on-property handling, the dispute came to this Board for final adjudication.

The position of the Carrier is basically threefold. It insists that the Hearing as held met all required standards of being fair and impartial. It argues that the testimony developed at the Hearing demonstrates that Claimant was, in fact, guilty as charged. It contends that the discipline as assessed was warranted on the basis of the potential seriousness of the incident and especially because of the Claimant's insubordinate act of disregarding the supervisor's instructions.

The Organization argues that the Hearing was not fair and impartial. It also argues that, on the basis of the testimony and evidence adduced at the Hearing, the Carrier has not met the burden of proof that the Claimant was, in fact, insubordinate in any way and that the discipline imposed was, in any event, harsh and excessive.

From the Board's review of the Hearing transcript, we find that all of the Claimant's Agreement-granted due process rights were properly considered and honored. The notice of charges, the scheduling of the Hearing, the right of representation, the right to call witnesses, the timeliness of the notice of discipline all complied with the agreed-upon conditions found in Rule 47- DISCIPLINE.

As for the relative convincing force of testimony and evidence, the Board concludes that there is sufficient misunderstanding and miscommunication found in the case record to mitigate against both parties to the dispute. The Foreman's hand-waving communications and alleged verbal cautions from 125 feet away were, at best, less than clear. His testimony relative to showing the Claimant where the live cable was located and telling him to "ease over the top of that" is less than authoritative. The Claimant's assumptions relative to the depth of the live fiber optic cable are admissions against interest on his part. The fact remains that no live cable was, in fact, severed. The fact remains that the cable which was uncovered was, in fact, not a live cable. Both parties must share the responsibility for the actions which are found in this record.

The Board is convinced that the 30 calendar day suspension in this case was assessed primarily to cover the actual out of service time of the Claimant. The Board does not find any presence of insubordination per se. As was held in Third Division Award 22830, "... we are convinced that Claimant did not, at any time, flout authority or purposely defy an 'order.' If he is guilty of anything, it is a mistake as to the choice of work priorities. This is not insubordination in any sense of the word." So too here, the conclusion of insubordination stretches considerably the customary meaning of insubordination. The Claimant is guilty of stretching the envelope of his assigned duties. He thought he was doing a favor by "making a path for the guys." He must bear the responsibility for that act. However, it is the Board's opinion that, in the absence of any record of prior derelictions of duty or of prior disciplinary action against the Claimant, a 30 calendar day suspension is excessive in this instance. Therefore, we sustain the claim of the Organization to the extent of converting the 30 calendar day suspension to a 15 calendar day suspension.

AWARD

Claim sustained in accordance with the Findings.

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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 November 1996.