

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32345
Docket No. SG-32823
97-3-96-3-151

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Railroad Signalmen**
(**CSX Transportation, Inc. (former Seaboard**
(**Coastline 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 C.S. Perry Jr., R.A. Thompson, and J. T. Mitchum for compensation for all time lost as a result of their respective suspensions from service in connection with an investigation conducted on April 12, 1995, and for their records to be cleared of all charges in connection with this discipline, account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when it did not provide the Claimants with a fair and impartial investigation and assessed harsh and excessive discipline against them in this matter. General Chairman's File Nos. CSP-1-95, RAT-2-95, JTM-3-95. Carrier's File Nos. 15 (95-147), 15 (95-148), 15 (95-161). BRS File Case No. 9710-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 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.

Two of the Claimants were employed on April 4, 1995 as a Signal Gang in Warsaw, North Carolina, with Claimant Perry serving as the Safety Man, and Claimant Thompson serving as the Acting Foreman. Because the job was not progressing easily and required more time than the gang could allow, Thompson decided that the gang should move on to another job. Mitchum, a Signal Maintainer not assigned to the Signal Gang in question, happened upon the job site and questioned Thompson's decision several times and each time Thompson explained the decision. Finally, after several exchanges which included the use of profanity by both individuals, Mitchum pushed Thompson. Thompson fell to the ground, jamming his wrist and striking the rail with his back. At this point, Perry intervened and, citing his position as Safety Man, asked Mitchum to leave the site. Mitchum refused and the exchange continued several more times, again with both using profanity. At that point Mitchum grabbed Perry's shirt, but Perry broke loose. Mitchum then struck Perry who returned the blows. Finally, another individual intervened, grabbing Perry. However, Mitchum and Perry continued to exchange words. At some point Mitchum again struck two blows at Perry while he was restrained. Finally, both Mitchum and Perry were escorted from the job site while Thompson was sent for medical attention. Mitchum was assessed a 30 day suspension, Perry a 20 day suspension, and Thompson a ten day suspension.

There can be no question that the Carrier is correct that fighting is a serious offense and, in accord with Third Division Awards in 26786 and 23873, is dischargeable. It is equally true, however, that this Board may set aside or modify a penalty if it is arbitrary (see e.g. Third Division Award 16283) because it is so incommensurate with the misconduct. (See e.g. Second Division Award 5360).

In the instant matter the record is clear that Mitchum was the aggressor in the altercation when he pushed Thompson to the ground. Although it might be true that he is hard of hearing and that his condition may have been the reason he repeatedly asked Thompson about the job, that does not excuse or justify pushing Thompson. With respect to Thompson, who may have been frustrated with the repeated inquiries, he did in fact use "boisterous, profane or vulgar language," which is the conduct prohibited by the Rule cited by the Carrier to justify the discipline imposed upon him. However, his

physical contact was limited to being the subject of Mitchum's aggression. Finally, Perry properly intervened by virtue of his role as the Safety Man on the job. Although he did in fact use profanity and did in fact engage in a physical altercation, he did not do so until provoked by Mitchum. Moreover, Perry did not engage in that conduct until after he had witnessed the unprovoked attack on Thompson.

In light of the foregoing, the Board finds that the discipline of Mitchum was proper, but that the discipline of Claimants Thompson and Perry was not. Although they did in fact engage in prohibited conduct, they did so only when faced with Mitchum's provocation and in a manner not out of proportion to that provocation. Thus, their discipline should be proportionate to the misconduct, but sufficient to convince them that another form of response would be more prudent. Accordingly, Thompson's and Perry's suspensions should be reduced to one and three days, respectively.

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 13th day of November 1997.