

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35026
Docket No. SG-34910
00-3-98-3-649**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Company (UP):

Claim on behalf of J.R. Hernandez to have his record cleared of the discipline assessed against him following an investigation on April 22, 1997, account Carrier violated the current Signalmen’s Agreement, particularly Rule 40, when it did not provide proper notice of the investigation, did not afford the Claimant a fair and impartial investigation, and imposed discipline against him without meeting the burden of proving the charges. Carrier’s File No. 1078471D. General Chairman’s File No. 72402824. BRS File Case No. 10781-UP.”

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.

On April 15, 1997, the Carrier notified the Claimant to appear for a formal Investigation into charges that while working as a CTC Maintainer on March 21, 1997, in Buford, Wyoming, at approximately 2:30 P.M., while assisting Track Inspector Jesse Magallanes with a handyman jack, he allegedly was not working in a manner according to the Rules, which resulted in a personal injury to himself. The Carrier contended that the Claimant failed to promptly report the injury. The Carrier charged the Claimant with possible violation of Rules 1.2.5, 70.12, and 1.1.2. The Hearing took place on April 22, 1997, and the Carrier thereafter notified the Claimant that he had been found guilty of violating Rules 1.1.2 and 70.12 and was being assessed a Level 2 discipline, which consisted of attending one day of alternative assignment with pay to develop a corrective action plan.

On May 23, 1997, the Organization appealed the Carrier's decision on the grounds that the Investigation was held outside the confines of the parties' current working Agreement in that the Local Chairman never received the Notice of Investigation dated April 15, 1997, in violation of Rule 40. The Organization also contends that it never received the offer of proposed disciplinary action or notice of charges and objected to the Signal Maintenance Director conducting the Investigation, as well as his issuance of discipline upon the Claimant. The Organization argues that the Claimant was not afforded a fair Hearing. The Organization also contends that the Claimant was not in violation of the cited Rules as he positioned himself as far away as thought necessary by his supervisor to prevent injury and that he was alert to the fact that the jack had slipped and that it had the potential to slip. The Organization argues that the Claimant even tried to warn Magallanes that the jack was slipping out further. Therefore, the Organization argues that no evidence was produced that would indicate that the Claimant acted in a way that was unsafe or in a way as to get himself injured by the actions of himself or others. The Organization contends that the Claimant sought medical attention for his injury before reporting the accident, which is permissible by Carrier Rules, and that the accident report was filed exactly as the Carrier Rule provides. The Organization also contends that Rule 70.12 does not apply in this situation as the Claimant was not working in a group; he simply was waiting to get his jack back after stopping to help a man that appeared to be in a hazardous situation. The Organization also maintains that it was the fellow employee's, not the Claimant's, decision to perform the jacking operation on the truck and it was his subsequent action that later caused the accident, for which he should have been disciplined.

The Carrier denied the claim. It contends that the Claimant was given a waiver of discipline option that he declined. In addition, the Carrier argues that the Local Chairman was notified of the Investigation and charges by phone conversation with the Carrier and that the Organization had ample time to prepare a defense of the Claimant. The Carrier also notes that the Claimant testified at the Investigation that he was aware of the possible hazards associated with handyman jacks. Yet, the Carrier argues the Claimant still placed himself parallel to the front bumper on the driver's side of the vehicle directly in the path of the possible movement if the jack slipped. The Carrier contends that the Claimant also failed to act in the best interest of his health and safety when he drove his truck to another location after the incident to fix a switch instead of contacting his manager. The Carrier argues that the work performed was not of an emergency nature and that there was the alternative of calling a wrecker by either party involved. The Carrier contends that the Claimant himself testified that the jack was being used for other than its intended purpose. In addition, the Carrier argues that Rule 70.12 does apply as it covers work performed by employees in a group, two or more, and awareness of the work being done, as was the case in this matter.

The Board reviewed the procedural arguments raised by the Organization, and finds them to be without merit.

With respect to the substantive issue, the Board reviewed the evidence and testimony in this case and finds that the Carrier failed to meet its burden of proof that the Claimant violated several Safety Rules on March 21, 1997. It is clear that the Claimant was injured as a result of poor performance on the part of another employee. However, there is insufficient evidence in the record to support the finding that the Claimant acted in violation of the appropriate procedures or Safety Rules on the date in question and that the Claimant's behavior was responsible for his injury. As a matter of fact, the Claimant's supervisor testified that the Claimant was a safe distance away from the jack when the accident occurred.

In cases of this kind, the Carrier bears the burden of proof. Because the Carrier failed to meet its burden of proof in this case, the claim must be sustained and any discipline issued to the Claimant must be removed from his 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 25th day of October, 2000.