

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36121
Docket No. SG-36056
02-3-00-3-201

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 Co. (former Southern Pacific):

Claim on behalf of C. L. Burks for reinstatement to service with compensation for all lost time and benefits lost in connection with his dismissal following an investigation held on March 31, 1999, and to have all reference of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it did not afford the Claimant a fair and impartial investigation, and imposed harsh and excessive discipline against him without meeting the burden of proving the charges. Carrier’s File No. 1178396. General Chairman’s File No. SWGC-1953. BRS File Case No. 11109-SP.”

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.

There is no dispute on the basic facts at bar. On March 17, 1999 at the Seville Road Crossing at Huntington Park, in the Los Angeles area, Lead Signalman Omotayo had an altercation with Signalman C. L. Burks, the Claimant. The exact nature of the altercation that occurred contains argumentative comments between the parties while they were just inches away from each other, face to face and toe to toe. Following the verbal dispute, Omotayo turned to leave and testified that at that moment:

“ . . . I just saw a hand coming at me. I raised my left hand up to stop the hand. I believe his ring or his wrist watch, or but something caught my finger.”

The record shows that Omotayo reported the incident and it triggered the Investigation.

Following a postponement, the Investigation was held on March 31, 1999. By Notice dated April 12, 1999, the Claimant was dismissed. The Carrier maintained that the evidence warranted the dismissal.

The Organization filed a claim disputing the Carrier's action. It maintained in its letter of April 19, 1999, and throughout this dispute, that both Signalmen were equally involved in this dispute. The Organization pointed out that Omotayo had his finger in the Claimant's face, utilized profane language toward the Claimant and whatever occurred, never felt threatened, endangered or in a violent confrontation. Yet, while Omotayo admitted involvement, he was cleared, returned to work and made whole for lost time. The Claimant was not treated equitably and the Organization challenges the outcome of the Claimant's dismissal.

The Carrier disputes any allegation that the two employees were equal. In fact, it argues that they were not equal and that Omotayo was in violation of no Carrier Rule. It maintains that as the Claimant initiated the physical contact, he was in violation of the Rules. The Carrier argues that its findings of guilt are appropriate.

The instant claim does not center upon the Claimant's guilt, but upon the discipline assessed. From the first instance, prior to the Investigation, the Claimant was willing to accept a Level 4. The Carrier did not agree that either employee could accept a waiver for a dismissible offense and insisted that Investigations be held. At the conclusion, Omotayo was cleared, returned to work and made whole and the Claimant

was dismissed. Subsequently, the Organization challenged the quantum of discipline that now stands before the Board.

On April 19, 1999 the Organization pointed to the Claimant's clean discipline record and good work history and requested that he also be cleared of all references and made whole for lost time. It thereafter rejected all offers developed and presented on the property.

On June 16, 1999 the Carrier offered a one-time leniency reinstatement, which included a 12-month probationary period and no compensation or filing of claims. On June 30, 1999 the Claimant was offered a Level 3 discipline, but without compensation for time withheld or the right to pursue claims. On July 15, 1999 the Carrier offered reinstatement with the right to pursue backpay and removal of discipline, but argued that if rejected, its liability ceased.

The Organization argued that it would accept a Level 3 discipline, which is a five days suspension, but anything beyond that was excessive. The Organization further argued that the Carrier's liability did not cease on July 15, 1999, but continued due to the fact that the Claimant was treated unfairly and differentially compared to Omotayo who acknowledged involvement and received no discipline.

The Board concludes after a study of the Investigation that the altercation was minimal. The evidence from all parties demonstrates that what took place was a jointly concluded exchange of strong words and vulgarity over an earlier radio conversation. As it ended, Omotayo turned and "saw a hand coming" which he did not understand. As Omotayo raised his hand his finger was scratched and his safety glasses came off. Omotayo testified that he never felt threatened or endangered. He testified that he considered the scratch to be something very minor and the incident itself ended quickly with everyone going right back to work. Certainly there is evidence that suggests the behavior of Omotayo was clearly contributory, including putting his finger near the Claimant's face. However, Omotayo was injured, had his glasses bumped off, and in some manner was shoved or pushed.

The Board finds the Claimant guilty and the discipline excessive. The Claimant has a clean personnel record. The Carrier found the Claimant was more involved and the Board agrees. This is a record of a minor incident in which the Claimant was not shown by evidence to be any more aggressive, dangerous, or questionable an employee

than Omotayo, who was almost equally responsible for the incident. Given the full testimony, the Board finds that the discipline should have been a Level 3 and a five days suspension. As the Board reads the record, the Carrier offered full rights to progress the claim with an unconditional leniency reinstatement on July 15, 1999. The Claimant's rejection failed to mitigate damages and any liability thereafter is his own and not the Carrier's. Accordingly, the Claimant is to be reinstated with seniority unimpaired and made whole for lost time as indicated.

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 22nd day of July 2002.