

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37055
Docket No. SG-37202
04-3-02-3-83**

The Third Division consisted of the regular members and in addition Referee Joshua M. Javits when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Grand Trunk Western Railroad, Inc.)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Grand Trunk Western Railroad (GTW):

Claim on behalf of R. A. Feasel, for reinstatement to service with all rights and benefits unimpaired and compensation for all lost time. Account Carrier violated the current Signalmen's Agreement, particularly Rule 42, when it failed to provide the Claimant with a fair and impartial investigation on December 27, 2000, and imposed the harsh and excessive discipline of dismissal without meeting the burden of proving the charges against the Claimant. Carrier's File No. 8390-1-129. General Chairman's File No. 00-79-GTW. BRS File Case No. 11879-GTW."

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.

The Claimant was formerly employed by the Carrier as a Signaller beginning June 13, 1994 until his dismissal on January 16, 2001. This dismissal occurred after a formal Investigation on December 27, 2000 for events alleged to have occurred on December 12, 2000. The Claimant was charged with violation of CNIC USOR General Rules B, C and N and was found to have violated the latter two. The Claimant had been found to have damaged the power train of vehicle CN091501 in his attempts to free the vehicle when it became stuck in the snow rendering it unable to drive in reverse; failed to report the damage in a timely manner and continued to drive the damaged vehicle despite the transmission defect.

The Organization contends that Rule 42 - Discipline of the Agreement of November 30, 1992 requires a "fair and impartial" Hearing prior to the institution of discipline. Commensurate with that requirement is that substantial evidence supporting the disciplinary action must be developed at the Hearing, held to be greater than a mere scintilla, with the burden on the Carrier to develop the facts. See First Division Award 23936; Second Division Award 11626; Third Division Awards 10260, 20766 and 33385. Additionally, the Organization cites precedents for the proposition that such discipline should be corrective and progressive, not punitive. See Second Division Award 8157; Third Division Awards 19037 and 19537. The Organization cites to the Board's authority to alter disciplinary actions that are harsh or excessive. See First Division Award 24987; Third Division Award 16800.

The Organization asserts that the decision to discharge was based not on fact but upon conjecture. In support of this assertion the Organization points to the use of the phrase "in your opinion" at the Investigation directed to purportedly fact witnesses. However, the Organization's objections are those of form not substance, as it does not object to questioning which calls for an opinion even though the phrase "in your opinion" is not used. Both Signal Foreman A. P. Lauzon and Assistant Signaller F. H. Beckman gave their opinions; the Organization seeks only to credit the opinion favorable to the Claimant. The Organization also asserts that the Hearing Officer did not give due consideration to other possible causes for the damage. The Board disagrees. It is not the Board's prerogative to weigh evidence, resolve conflicting testimony, and assess credibility. See Third Division Awards 13475, 14187, 21278, 23501 and 27476; Fourth Division Award 1063. That the Hearing Officer chose to credit Assistant Signaller Beckman's testimony, which goes beyond a "mere scintilla" is not for the Board to alter. Furthermore, the Organization does not dispute that the

Claimant failed to properly report that there was damage to the vehicle, nor that he continued to use the vehicle despite the damage. Thus the Board will not overturn the findings of the violations of Rules C and N.

Turning to the question of the discipline imposed, the Organization asserts that the conduct does not constitute a dismissible offense. Rather, the Organization believes that discipline imposed should be of a corrective and progressive nature. At the same time, the Organization would have the Carrier turn a blind eye to the Claimant's disciplinary history, which includes five other offenses in the prior three and one-half years, one of which led to a prior discharge (with a subsequent leniency reinstatement) and another which was for damaging a different vehicle. The Claimant attempted to explain away his prior offenses before the Board. However, the Board will not pass judgment on prior disciplinary measures not properly before it. Suffice to say that none of these disciplinary acts were shown to have been expunged from the Claimant's record. Although the Board fully hopes that discipline will rehabilitate, correct and guide employees, the Claimant has shown a continued inability to conform to the Rules. Progressive discipline ceases to have meaning if past discipline cannot be considered.

Based on the foregoing, we have no alternative but to deny the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of June 2004.