

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37082
Docket No. SG-37427
04-3-02-3-470**

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
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

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

Claim on behalf of D. Catano, Jr., for reinstatement to service with his seniority and benefits unimpaired, with all lost wages including overtime and any reference to this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it imposed the harsh and excessive discipline of dismissal against the Claimant as a result of an investigation held on August 14, 2001. Carrier’s File No. 1275599-D. General Chairman’s File No. W-68-125. BRS File Case No. 12177-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.

The Claimant was a Signal Inspector for the Carrier until his discharge on August 28, 2001. The Claimant had been found to have "used a piece of defective equipment on Friday, July 13, 2001" which was deemed to be a violation of Rules 1.4 and 1.6(1) and (2). The Claimant and the Organization contend that the discipline should be overruled on the ground that the discipline imposed was "harsh and excessive" for lack of substantive evidence.

On July 13, 2001, the Claimant sat in a chair, fell back and suffered an injury rendering him permanently disabled. The Carrier asserted that the Claimant knew that the chair was defective, failed to report the defect, and used the chair to his own detriment. The Claimant disputes having such knowledge of a defect. The Organization contends that Rule 68 of the Agreement of February 1, 2000 requires a "fair and impartial" Hearing prior to the institution of discipline. The Carrier correctly states the threefold standard of review:

- 1) Did the accused employee receive a full and fair investigation with due notice of charges, opportunity to defend and representation?
- 2) If so, did the employer show by substantial evidence that the employee was culpable of the charged misconduct or dereliction of duty? And
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in facts and circumstances of the particular case?

See Third Division Award 27867. The Claimant and the Organization assert that there was a lack of substantive evidence relating to the Claimant's knowledge of the defect in the chair and that the penalty was excessive.

The Claimant testified that he did work on one of the chairs with another employee and that he knew this particular chair leaned back further than the others. There is some dispute as to whether the Claimant deemed it to be "fu**ed up" and whether it was the defect or PVC pipe on the floor which caused the accident, but it is not the position of the Board to assess witness credibility or to find the cause. See First Division Award 14690 and Second Division Award 13559. Rule 1.4 states in relevant part "[employees] must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad." Rule 1.6 states that employees "must not be: (1)

Careless of the safety of themselves or others. (2) Negligent. . . .” The Board finds that there is substantive evidence on the record that the Claimant could be found culpable of violating these Rules. The Carrier demonstrated that there is evidence beyond the mere fact of an accident supporting a violation. Compare with Third Division Award 29195, 31920; Public Law Board No. 4715, Award 10.

It is to the discipline imposed that the Board turns its attention. The Carrier has correctly cited to the proposition that the Board cannot disturb “the penalty imposed unless we can say that it clearly appears from the record that the action of the Carrier with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of discretion.” See Third Division Award 16074. In this case, however, we find that under the circumstances, the imposition by the Carrier of the penalty of permanent dismissal was excessive. While it appears that the Claimant maybe permanently disabled, we believe that the appropriate discipline should have been a lengthy suspension. Accordingly, we shall reduce the discipline assessed by the Carrier to reinstatement of the Claimant, without backpay.

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

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 21st day of July 2004.