

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37756
Docket No. SG-38134
06-3-04-3-24

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation, Inc. (formerly Baltimore & Ohio (Chgo Term.)):

Claim on behalf of C. A. Ford, C. A. Cleghorn, S. A. Paczynski, R. L. Caldwell, and S. Cerda, for reimbursement with all rights and benefits unimpaired; compensation for each Claimant's time lost; reimbursement of any expenses incurred and pay for any time used on traveling outside regular working hours because of Carrier's action, and clear their personal records of any reference to this matter, account Carrier violated the current Signalmen's Agreement, particularly Rule 41, when it improperly withheld the Claimants from service, and failed to provide a fair and impartial investigation evident when it issued excessive discipline of thirty (30) calendar days actual suspension without pay against C. A. Ford, and fifteen (15) calendar days actual suspension without pay against Messrs. C. A. Cleghorn, S. A. Paczynski, R. L. Caldwell and S. Cerda, without meeting the burden of proving its charges in connection with an investigation held on January 30, 2003. Carrier also violated the Claimants' right to a fair and impartial investigation when it only gave one day's notice before the scheduled investigation. Carrier's File No. 15 (03-0022). General Chairman's File No. CT 3-03A. BRS File Case No. 12858-B&O (CT).”

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 January 28, 2003, the Claimants were directed to attend a formal Investigation to respond to charges of failing to work within their prescribed limits under NORAC Rules after fouling track while digging in conduit on January 22, 2003. In addition, Claimant Ford, as Lead Signalman, was charged with failing to provide his gang with proper protection for equipment and team members deployed beyond protected working limits.

Following the joint Investigation, by letters dated February 6, 2003, the Carrier assessed Claimant Ford a 30-day suspension and each of the remaining Claimants 15-day suspensions.

This matter was initiated by the Organization's March 11, 2002 filing of a claim on behalf of the Claimants seeking reimbursement for all time lost and expungement of their records. The dispute comes before the Board following handling on the property in the usual manner and denial by the Carrier's highest designated officer on April 14, 2003.

The underlying facts are straightforward and uncontested. On the morning of January 22, 2003, a safety observation team watched the Claimants' Signal Team digging in signal cables across Track Nos. 1 and 2 at mile post 27.9 on the McCook Subdivision. Work site protection had been properly obtained and stop signs placed to clearly define the area in which the track was out of service. When the safety team observed the Backhoe Operator running his machine on the wrong side of the stop board beyond the limits of his protection, the incident was reported to the

Division Manager who determined that the Signal Team may have violated Rule 135 of the NORAC Operating Rules. That Rule reads in pertinent part:

"135. Protection by Stop Signs When an In-Service Track is Obstructed for Maintenance

Whenever Form D line 5 is to be issued in accordance with item 1 of Rule 132, "Protection When Fouling or Working on a Track," the following procedures will apply. The "Working Limits" refers to the area designated by Form D line 5 Bulletin Order, which must be identified by a whole mile post, station, or other physical characteristic location.

* * *

b. Required Use of Signs

The approach to the Working Limits must be indicated by an Approach Sign. The Approach Sign indication will not apply when permission is received to proceed past the Stop Sign.

The Working Limits must be indicated by a Stop and a Working Limits Resume Speed Sign. A Working Limits Speed Limits Sign may be substituted for the Stop Sign when the track is not obstructed.

c. Action Required Prior to Issuance

The Dispatcher must not issue Form D line 5 authority until:

1. The affected track is clear of movements that are not part of the work group.

AND

2. The employee in charge has advised that all signs associated with the Working Limits have been properly placed."

The record reveals that the Carrier has borne its burden of proof, establishing by clear and credible evidence presented at the January 30, 2003 Investigation that the Claimants failed to follow proper operating procedures by fouling Track No. 2 with the bucket of their backhoe as they worked approximately three ties outside of their protected limits in an effort to avoid a fiber optic cable. The Carrier further demonstrates that such disregard could have resulted in serious injury and/or major damage to Company property.

While it is not the function of the Board to substitute its judgment for that of the Carrier with regard to the quantum of discipline, in this instance the record presents fundamental issues of fairness with respect to the severity of the penalties imposed.

As an initial matter, while not minimizing the seriousness of the offense, the Board reads the record as clear in demonstrating that the crew's failure was not one of negligent or intentional disregard of critical Safety Rules as charged, but rather attributable to their misunderstanding the scope of their protection. In short, the offense of working beyond prescribed working limits was proved, but the lapse was not, as charged, an act of complete disregard for their own well being and the safety of trains. The Claimants simply mistook the limits of their protection. For that reason, and in view of the other mitigating factors referenced below, we find the suspensions imposed in each instance to be excessive and disproportionate to the nature of the offense.

The Claimants make no effort to duck their varying responsibilities for the incident. Mr. Ford, for example, clearly admits that both he and his crew were responsible for making certain that on-track worker protection was in place before the track was fouled. He states, however, that the team misunderstood the extent of their limits, believing the diamond constituted the outer boundary, because that is where trains were being stopped. He was, by the time of his Hearing, disabused of that notion. But given the geography of the area, it explains, even if it does not excuse, the understanding the crew had in mind when it acted.

Two further details warrant mention. First, the crew began to dig on the west side of the sign and then noticed an AT&T cable in the ground nearby. In order to avoid it, they moved "about three ties over" resulting in the bucket of the backhoe being placed "just on the opposite side of the sign." It was not a question of not seeing the sign – Claimant Ford simply believed that the Dispatcher was holding

trains at the CP diamond. According to General Supervisor L. Kimmel, the backhoe ended up "possibly a few feet" in advance of the red board, fouling Track No. 2.

According to Bridge Foreman J. Noriega, a 35-year employee, once the Stop Board is up and in place, under CSXT Rules Claimant Ford would have been allowed to move it some short distance - in this case several feet - without talking to the Dispatcher. Kimmel was not so sure that would have been appropriate. The record affords no basis on which to judge, but if Noriega is correct, the suggestion that the offense was an aggravated one loses its vigor.

Second, all charge letters state the offense as, "... failing to work within the prescribed working limits as provided by employee in charge J. C. Noriega under NORAC Rules Form D, line 4 and 5. ..." In reply to the Organization's argument that the Claimants have had no training on NORAC Rules (an assertion with which Kimmel concurs except with respect to Claimant Cleghorn) the Carrier asserts that those Rules are referenced simply to identify Noriega as the source of the authority to occupy the track. Perhaps.

The charges are surely ambiguous, susceptible to being read as the Organization reads them. And the record provides no easy answers to the question of to what extent NORAC Rules overlap the Carrier's Rules, or whether qualification on NORAC Rules would have been required in order to comply with CSXT's on-track worker Rules. But it is clear that if NORAC controlled, with the exception of Ford and Cleghorn, none of the crew had any special reason to be familiar with such Rules: Noriega read the Form D at sunrise but the crew did not see it, and no one except Ford and Cleghorn had received training on those Rules. Indeed, Claimant Paczynski was a relatively new employee; Caldwell had six months service; Claimant Certa had four months; neither had ever attended any Operating Rules class; and the record reflects no evidence of past discipline in the case of any of these Claimants.

Based upon the foregoing extenuating circumstances, the Board finds the discipline to be excessive. Recognizing the undisputed responsibilities of Lead Signalman Ford in assuring complete regard for the safety of his men and the protection of trains, a more severe penalty for him is appropriate. For his mistake in assessing his work limits, a penalty of 15 days is appropriate. His suspension will

be reduced to 15 days and he shall be reimbursed for the difference in time out of service.

Claimant Cleghorn had 35 years of service when this incident occurred. As with Claimant Ford, he either knew or should have known that the limits for track authority on Track No. 2 were between the stop signs. We conclude that a ten-day suspension would have been adequate to alert him to the need for greater caution prospectively. He shall be reimbursed for the difference in time out of service.

In the case of the remaining Claimants, with very short service, no relevant prior training and no record evidence of prior discipline, we find that the 15-day suspensions imposed are excessive. Those suspensions shall be converted to written reprimands and the Claimants reimbursed for the difference in time out of service.

The Board accordingly will sustain the claim in part as to all Claimants.

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 March 2006.