

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38130
Docket No. SG-38722
07-3-05-3-52

The Third Division consisted of the regular members and in addition Referee Danielle L. Hargrove 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 Railroad:

Claim on behalf of C. M. Hanton, for reinstatement to his former position with compensation for all lost time, including overtime, all benefits restored, his record cleared of any reference to this matter and reimbursement for expenses incurred while attending the investigation, account Carrier violated the current Signalmen's Agreement, particularly Rule 68, when it issued the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on January 27, 2004. Carrier compounded this violation by failing to notify the Claimant of the results of the investigation within the 15 day time limit provisions of Rule 68. Carrier's File No. 1388458 D. General Chairman's File No. S-Investigation-464. BRS File Case No. 13133-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 Carrier held a formal Investigation on January 27, 2004 to consider the charge against the Claimant of violating Union Pacific Rule 1.6. Specifically, the Board is reviewing the dismissal of the Claimant for, in the Carrier's assessment, raising a truck boom into overhead power lines thereby endangering the lives of other gang members and causing an estimated \$50,000.00 worth of damage to Carrier equipment.

The Organization raises a procedural objection and argues that the Board should not even reach the merits of the claim. We disagree. The Organization argues that the Carrier violated the time limits proscribed under Rule 68 of the Agreement, the relevant portion of which states:

"In cases wherein the Claimant is being held out of service, a decision will be rendered and the employee notified within fifteen (15) calendar days after the completion of the investigation."

The Organization states the Carrier failed to notify the Claimant of its decision within 15 calendar days because the Investigation was completed on January 27, yet he did not receive the decision letter until February 12, 2004, the 16th day after the close of the Investigation. As has been interpreted in other decisions, such as Third Division Award 36171, the Board finds that the Agreement does not explicitly require receipt within the 15-day time limit. As a matter of fact, most standards of review require such deadlines to ensure one party takes a particular action to notify the other party within a certain amount of time. Surely, the Carrier cannot be responsible for when the Claimant actually is "notified." Such an interpretation places an undue burden on the party with the burden to

perform, for there is no assurance that the receiving party actually received or read the decision and was, therefore, "notified."

The cases cited by the Organization are misplaced to the extent they address failure of the Carrier to "render" its decision, as opposed to "notifying" the Claimant. In the cited cases, the Carrier actually failed to render the decision within the appropriate timeframe. In this case, the Carrier rendered its decision and put the Claimant on notice by mailing the decision to him within the 15-day time limit and without any impact on the Claimant's Agreement due process rights. Therefore, absent any authority to the contrary, the Carrier's discipline decision should only be overturned on procedural grounds when the Carrier's procedural violations prejudiced the Claimant's defense or appeal. In this case, we do not find any such procedural violation; however, even if we found that the Carrier had committed a procedural violation, we would also find that such violation was insufficient, under the facts of this case, to overturn the Carrier's disciplinary assessment of Level 5 discipline for raising a truck boom into overhead power lines.

The Carrier found that the Claimant violated Union Pacific Policy and Procedures for Ensuring Rules Compliance Rule 1.6 (Careless of Safety) which states:

"When an Employee's actions demonstrate an inability or an unwillingness to comply with safety rules as evidenced by repeated safety rule infractions. When a specific rule(s) infraction demonstrates a willful, flagrant, or reckless disregard for the safety of themselves, other employees, or the public."

The Carrier provided more than adequate evidence to support its disciplinary assessment during the Investigation. The Board finds that the Claimant demonstrated a reckless disregard for his own safety, that of his fellow gang and the public. To their credit, each responsible employee, the Claimant included, admitted that the gang was not "... focused on the power lines being there . . .," "... the power lines never came into [their] job briefing . . .," or was individually "... careless of [his own] safety or the safety of [other] employees." The Claimant's own admission that the power lines were "somewhere in the back of [his] mind," despite the fact that those involved in this incident had been working near these same

obvious, power lines for the prior two months, demonstrates a serious, reckless disregard for the seriousness of the safety concerns related to working around power lines. Coupled with a prior safety incident where the Claimant was injured, the Carrier's assessment of discipline for the Claimant does not appear arbitrary or capricious. Accordingly, we find no proper basis for disturbing the Carrier's decision.

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 23rd day of April 2007.