

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38221
Docket No. SG-38238
07-3-04-3-142

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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:

Claim on behalf of S. C. Suhl, J. R. Walker, E. R. Johnson, R. Davis Jr. and C. D. Miller, for the Claimants to be returned to their former position with the Carrier and that they be made whole for all loss of earnings they have incurred, account the Carrier violated the current Signalmen’s Agreement, particularly Rules 68 and 80, when on March 24, 2003, Carrier improperly removed the Claimants from service and then failed to provide a fair and impartial investigation evident when Carrier issued discipline of dismissal against the Claimants without first meeting the burden of proving the charges. Carrier also violated Rule 68, when it failed to allow Claimants Davis and Miller to return to work as it did with three other Claimants in its letters dated October 30, 2003. Carrier also violated Rule 68, when it failed to timely notify the Claimants of the decision within the 15 day time requirement, and also did not furnish the complete transcript of investigation to the Organization’s representatives or the Claimants for more than 3 days after the 15 calendar day time limit had expired. Carrier’s File No. 1356/804 D. General Chairman’s File No. N disp 334. BRS File Case No. 12816-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 essential facts in this case are not in dispute. On or about March 23, 2003, the Claimants constituted a crew assigned to work in the Rochelle and DeKalb, Illinois, vicinity cleaning up after some construction had been completed. There were overhead power lines at the site in close proximity to the clean-up area. The crew's boom truck parked near the power lines and when the boom was raised it made contact with the power line and two live cables came into contact with each other. As a consequence the boom lost power and came to rest on the power lines. All Claimants escaped without injury and the crew immediately contacted the Fire Department and the Power Company.

By letter dated March 25, 2003, all Claimants were notified to attend an Investigation:

“ . . . to develop the facts and place responsibility, if any, for an incident which occurred on March 23, 2003 concerning a boom in a power line.

Your alleged actions indicate a possible violation of Union Pacific Rule 1.6 (1) – Careless of the safety of themselves or others, and failure to comply with instruction, effective April 2, 2000.”

The Claimants were withheld from service pending the outcome of the Investigation, which was held on April 10, 2003. Following the Investigation each

Claimant was notified that he was assessed a Level 5 discipline and was, therefore, dismissed from the Carrier's service.

The Organization appealed the Claimants' discipline by letter of May 5, 2003. In that appeal, the Organization generally objected to the discipline as excessively harsh. In particular, it pointed out that Claimant Davis was not present at the site when the truck was initially parked or when the incident with the power lines occurred. The Organization argued that Davis should therefore not be held accountable for the events at issue. It pointed out that, as Foreman, Davis was required to be apart from the crew for occasional periods of time, and insisted that testimony in the transcript confirmed that such was the case. At bottom line, the Organization contended that to end five employees' careers for an incident that resulted in less than \$5,000.00 damage was entirely unreasonable and disproportionate to their actions. The Organization also pointed out that none of the Claimants had any evidence of "repeated safety rule infractions," which would subject them to a Level 5 discipline.

The appeal was declined on July 11, 2003. On August 8, 2003, the Carrier informed the General Chairman of its offer to return Suhl, Walker, and Johnson to work on a leniency basis in light of each man's length of service and overall record. Each was to be returned on a probationary basis for a 12 month period beginning with the first day he returned to service, and was to sign an agreement not to progress his claim any further. The Organization rejected the offer because of the probationary period and the revocation of the right to file a claim. The Carrier agreed to reinstate each of the three without prejudice to filing claims on their behalf. Each of the three men subsequently returned to work. Miller subsequently settled the matter with the Carrier and is no longer a Carrier employee.

The Board reviewed the record in this matter carefully. We find that, given the potential danger to the entire crew, the discipline assessed Suhl, Walker and Johnson was reasonable. All were long term, experienced employees who should have intervened at some point to discourage Miller from parking the boom truck where he did. Their discipline of seven months suspension is harsh, but not beyond the bounds of the Carrier's discretion, and the Board is not inclined to substitute its evaluation of the gravity of their actions for that of the Carrier.

The matter of Davis who was Foreman of the crew is more problematic. The record indicates without doubt that he was not at the scene at the time the incident

occurred. The Organization contends that, accordingly, he should not have been disciplined for the incident in question. The record of the Investigation indicates that, once he had received his orders, Davis – who drives a separate vehicle from the boom truck – sent the crew on to the site, headed toward the rest room and then planned to check on a lock near where the rest room site was before proceeding to the site. Davis also testified that he did not give the crew specific orders before sending them to the site. The Manager of Signal Maintenance confirmed that he had just had a “safety stand-down” with the entire crew and had informed Davis not to leave the crew alone. He further testified that he specifically told Davis that if something needed to be checked on, he should stay with the gang and send a member of the crew to do that. Clearly, a rest room break is not in that category, but there does not appear to be any reason Davis could not have had the crew get to the site and wait until he arrived before raising the boom on the truck.

The Carrier pointed out that when a Foreman leaves a gang, there is a Company Rule (Rule 41.1.1 Leaving Gang) that indicates what his responsibility is. Specifically, the Foreman must:

- * Assign the most reliable person to be in charge.
- * Provide definite instructions as to the work to be performed.
- * Notify the supervisor.

Davis acknowledged that he did not comply with any of the foregoing listed responsibilities. Thus, he clearly bears considerable culpability for the incident in question, despite the fact that he was not actually at the site when the boom fouled the power lines. Accordingly the Board finds that Claimant Davis should be returned to service without pay for time lost, subject to passing his return-to-work physical. He shall not be permanently disqualified from the position of Foreman, but shall be eligible to re-bid such a position, once the Carrier is satisfied that he is again qualified to do so.

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 25th day of June 2007.