

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40684
Docket No. SG-40653
10-3-NRAB-00003-080543**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Kansas City Southern Railroad**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Kansas City Southern:

Claim on behalf of C. Charles, for reinstatement to his former position with payment for all time lost and with his rights and benefits restored, account Carrier violated the current Signalmen’s Agreement, particularly Rule 47, when it issued the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation in connection with an investigation held on April 10, 2007. Carrier’s File No. K06076174. General Chairman’s File No. 07-017-KCS-185. BRS File Case No. 13965-KCS.”

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.

At the time of the incident leading to his discharge, Claimant C. Charles had been employed for approximately seven years.

According to the Carrier, on March 25, 2007, the Claimant was driving a Carrier vehicle on his way home from a trouble call when he encountered two vehicles riding side by side on the highway. The repetitive speeding up and slowing down of the two vehicles lasted several miles, making it impossible for the Claimant to pass. When the Claimant was finally able to pass the vehicles, he was agitated and made an obscene gesture. This is uncontested, and the Claimant admitted as much. According to the Claimant, he then stopped by the side of the road to answer his cell phone. However, the drivers of the other involved vehicles believed that he was brandishing a weapon, which led to a reporting of such to the Carrier, leading to the instant discipline. During the Investigation, the Claimant admitted carrying his personal weapon in the vehicle to avoid leaving it in his house with his children.

By letter dated April 2, 2007, the Claimant was removed from service pending a formal Investigation. The Carrier directed the Claimant to report for a formal Investigation on April 10, 2007, to ascertain the facts and determine his responsibility, if any, in connection with the charges that he allegedly was:

- “1. Brandishing a weapon at two citizens around Highway 59 and 390 returning from a trouble call at the Union Pacific interlocker in Jefferson, Texas on March 25, 2007 while driving MW 3755. Carrier’s first knowledge of this was March 30, 2007 and;
2. A weapon allegedly being found April 2, 2007 in company vehicle MW 3755 which you are assigned.”

The Hearing took place on April 10 pursuant to which, in a letter dated April 13, 2007, the Claimant was notified that he was terminated. By letter dated May 24, 2007, the Organization appealed the decision based on the contention the Carrier failed to meet its burden of proof and the discipline assessed was unwarranted and excessive. On July 20, 2007, Signal Engineer V. A. Jones denied the appeal. On August 1, 2007, the matter was appealed to Director of Labor Relations J. Albano. On October 1, 2007, the appeal was denied. On October 31, 2007, a conference was held and the parties were unable to resolve the matter.

According to the Organization, the discipline imposed upon the Claimant was unwarranted, harsh and excessive. The Organization contends that the Carrier's burden of proof has not been met. The Organization asserts that the Carrier was arbitrary and capricious in its treatment of the Claimant, that the Carrier abused its discretion and that its determination to discipline the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. In addition, the Organization asserts that the Claimant was denied a fair and impartial Investigation. The Claimant contends that he never brandished a weapon; he only was answering his cell phone. In addition, the Claimant contends that he fully cooperated with the Carrier's Investigation. Further, the Organization contends that the Carrier did not utilize progressive discipline. It concludes that the Carrier should now be required to overturn the dismissal and make the Claimant whole for all losses.

Conversely, the Carrier takes the position that it has met its burden of proof. The Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing made it clear that the Claimant was guilty as charged. He admitted that he made an obscene gesture to the drivers and that he was improperly carrying a weapon in his vehicle. The Claimant's explanation, that he was merely answering his cell phone, is simply implausible. Based on the instant offense, dismissal is the appropriate penalty.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325 and Third Division Award 16166.)

The Board has found substantial evidence in the record to uphold the Carrier's position with regard to the incident of March 25, 2007. We note that the Carrier proved that the Claimant violated the Rules alleged. However, we find that discharge was inappropriate based on the unique circumstances of this case and the Claimant's good service record. We note that the Claimant cooperated fully with

the Carrier's Investigation. Based on all these factors, we conclude that the Claimant shall be reinstated with seniority unimpaired, but without backpay.

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 1st day of November 2010.