# Award No. 1310
# Docket No. SG-1354

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

**James H. Wolfe, Referee**

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

## FLORIDA EAST COAST RAILWAY

**STATEMENT OF CLAIM:** "Claim that J. E. Dubberly be returned to the position of Signal Maintainer, Section No. 14, Buena Vista Station, Miami, Florida and that he be paid the difference between $195.20 per month (signal maintainer's rate) and the amount actually received while working as signalman and signal helper since January 10, 1940."

**OPINION OF BOARD.** Dubberly entered the service of Respondent as Signal Helper May 14, 1925. He was promoted to and successfully held positions of Assistant Signalman, Assistant Signal Maintainer, Signalman, and Signal Maintainer until January 11, 1940, on which date he was removed from his position of Signal Maintainer at Buena Vista Station, Miami, on account of permitting his track motor car to be struck by first section of passenger train No. 87, and when removed from said position was assigned to a Helper's position at 55 cents per hour in the road gang, where he remained until February 15, 1940, when he bid in and was assigned to a position of Signalman at 83 cents per hour. He seeks restoration to his old position as signal maintainer and reparation for the difference in the pay of that position and that which the lower position draws. The accident was not through wilful disregard of regulations but was due to an error in reading a time table, which error may be attributed to failure to use that degree of diligence which the occasion called for but which was not without the bounds of error which might occur to ordinary human imperfection.

In these matters of discipline for infractions of rules made for the safety of the public and fellow employes, the action of the railroad management cannot be lightly interfered with. It has the obligation and responsibility for the safe operation of its road. Mere comparison with one or two instances of other disciplinings in an attempt to show too severe discipline in this case at hand does not suffice. In order to show an unreasonable basis for the disciplinary action which is the test of arbitrariness or discrimination, the discipline must be clearly out of line with discipline imposed in a line of cases involving violations occurring under substantially similar circumstances and similar consequences. The mere fact that the punishment in one case of equal or even more flagrant violative conduct appears to have drawn a lighter punishment than the instant case is not a ground for reversing the action of the railroad. This can only be done where it clearly appears that the carrier has acted "arbitrarily, without just cause or in bad faith." We find no such action in this case. The lighter punishments given to two others whose violations are asserted to have been of a graver nature are explainable along lines which do not involve arbitrariness or bad faith in this case. On the other hand the railroad presents cases in which others suffering similar accidents through carelessness were as severely disciplined as Mr.

Dubberly and apparently without discrimination as to membership or non-membership in the organization. Admittedly the discipline might have been lighter, such as demerits, especially in view of the "clear" record of Dubberly, and the lack of wilfulness, but what we would have done under the same circumstances is not the test. We do not substitute our judgment for that of the carrier.

The Brotherhood bottoms its claim for reinstatement and reparation squarely on the contention that the carrier in this case did not comply with its own published rules promulgated July 1st, 1930. Under its rules the carrier could for infraction of rules reprimand, assess not to exceed thirty demerits or dismiss from the service. There was no provision that the carrier could demote.

We lay aside the discussion as to whether the carrier could legally disregard its ex parte rules when it felt inclined, because we think this case goes off on grounds more morally defensible than such right if it existed, for certainly the morale of the organization would suffer if the carrier, even were it not bound to comply with rules of its own promulgation not arrived at by agreement, disregarded them at will. We think demotion was a proper method of discipline when the offense was serious enough that the carrier could not be considered arbitrary if it had decreed a dismissal and the employe accepts the lesser position even though under protest. It may be considered as a lesser included discipline embraced in dismissal. The employe could have refused to accept the demotion which would have resulted in what would have been the equivalent of a dismissal. While, by accepting the demoted position, he does not waive his right of appeal from the discipline enforced, it must be treated as if he were appealing from a decree dismissing him from the service. If a dismissal could not in this case be considered unreasonable, certainly a lesser dicipline dictated by consideration of leniency cannot be so considered.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That we find no reason for disturbing the action of the Carrier in this case.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of December, 1940.