

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Burlington Northern Railroad Company)

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Railroad Company (BN):

On behalf of R. C. Nostdahl, for reinstatement to service, account of Carrier violated the current Signalmen's Agreement, as amended, particularly, Rule 54, when it assessed him with excessive and harsh discipline." General Chairman's file D-88-490. Carrier file ESI-89-1-26.

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 employees 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 waived right of appearance at hearing thereon.

Claimant was employed by the Carrier as a Signalman. He entered Carrier's service on July 22, 1976. He was a fully qualified and experienced Signalman. On September 21, 1988, Claimant was assigned to work as one-half of a two-man team to change out track wires at M.P. 55.6 and M.P. 58 south of Reno, Wyoming. Claimant and the other Signalman completed the work which they performed at this location at approximately 11:30 A.M. on September 21, 1988. At approximately 5:00 P.M. that date the Signal Maintainer at Reno Junction was informed that the signals on which Claimant and the other Signalman had previously worked were not functioning properly. The Signal Maintainer - along with the Signal Supervisor from Gillette, Wyoming - investigated the reported occurrence and found that the signals on which the two-man team had worked were displaying "False Clear" aspects. Their further investigation developed that " - the east track wires were plugged in on the west side of the insulated joints and the west track wires were plugged on the east side of the insulated joints."

By notice dated September 22, 1988, both Claimant and the other Signalman were instructed to attend an Investigation on October 4, 1988, "for the purpose of ascertaining the facts and determining your responsibility in connection with your failure to properly check the operation of Intermediate Signal 55.6 and 55.7 on September 21, 1988, between East Reno and Nacco Junction, resulting in an Unsafe Signal Condition (sic) at intermediate 55.6."

The joint Investigation Hearing was held as scheduled. Both Claimant and the other Signalman were present and represented. Both were permitted to cross examine witnesses. Both were permitted to - and did - testify on their own behalf. Both Claimant and the other Signalman were accorded all of the due process rights to which they were entitled under the terms of the existing labor contract.

Following the completion of the Investigation Hearing, the other Signalman - who had no prior discipline on his record - was assessed discipline by suspension of thirty (30) days for his involvement in and responsibility for the incident in question. No appeal was taken from that assessment of discipline. Claimant, whose prior discipline record contained three disciplinary suspensions plus a previous dismissal from service (reinstated after 2 1/2 months out of service), was dismissed for his involvement in and responsibility for the incident of September 21, 1988.

An appeal on behalf of the Claimant was initiated and progressed by the Organization. The on-property handling of the appeal alleged that Claimant was not guilty as charged; that the other Signalman was the individual who created the malfunctioning signal; that the Carrier acted in an arbitrary and capricious manner in their assessment of dismissal against Claimant; that the discriminatory dismissal of Claimant should be rescinded and that Claimant should be returned to service and compensated for all time lost. The Statement of Claim to this Board seeks reinstatement to service because of an alleged violation of Rule 54 of the Schedule Agreement and because of the excessive and harsh discipline assessed against Claimant.

The Organization does not specify which section of Rule 54 was allegedly violated in this case. We have read the entire Rule as presented by the Organization in their Ex Parte Submission and can find nothing in that Rule which was violated by Carrier in the handling of this case.

We have read and studied the Hearing transcript and find that Claimant readily admitted that he was fully responsible with the other Signalman for the work done at the location in question. He readily admitted that he made no attempt on his own or in conjunction with the other Signalman to test or otherwise determine the working capability of the signals after the two of them had completed their work. His response in this regard was "I was sure that mine were all right - - - I thought he probably checked his." This cavalier attitude is what leads to signal malfunctions and dangerous operating conditions. The Investigation Hearing record contains more than substantial evidence to support the conclusion that the Claimant contributed to the signal malfunction which followed the work done by him and the other Signalman on the date in question.

Once the guilt of the charge had been established by the testimony and evidence in the Hearing record, Carrier was entirely proper in considering the employees' past records in determining the amount of discipline which should be assessed. The fact that the other Signalman involved in this case was disciplined to a lesser degree than Claimant based upon the absence of prior derelictions by the other Signalman does not create a discriminatory situation. On the contrary, the Carrier has not only a right but also an obligation to consider the absence of prior assessments of discipline when determining the amount of discipline to assess on a first-time offender.

However, there are factors in the record of this case which cause us to believe that permanent dismissal from service of Claimant may indeed be arbitrary, capricious and excessive. The Hearing transcript indicates that the signal diagram print which the Signalmen were using during the work in question was not completely correct and that this error on the print could have been a contributory factor in the malfunction which resulted from the work performed by the two Signalmen. This alleged incorrect print is referenced at pages 25, 27, 28, 29 and 43 of the Hearing transcript. It was also referenced during the on-property appeals of this case. This issue, therefore, is properly before our Board for consideration. However, the print itself was not made a part of the case record submitted to this Board even though it was identified on the property by Carrier.

While we are fully aware of the function of this Board as an appellate tribunal in deciding discipline cases, we believe - in this case - there is sufficient mitigation of the proven charge against Claimant to justify permitting him to have one last chance to prove to the Carrier that he can and will perform his duties in a complete, competent and correct manner in the future. Toward that end, Claimant should be reinstated to service with seniority unimpaired, but without any payment for time lost. His return to service is dependent upon his ability to successfully pass any return to service examinations which are normally required of employees of his craft and class.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1991.