

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34158
Docket No. SG-34900
00-3-98-3-624**

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

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company (former Southern Pacific
(Transportation Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad (former Southern Pacific):

Claim on behalf of E. C. Gutierrez for reinstatement to service with payment for all time and benefits lost as a result of his dismissal following an investigation held on July 3, 1997, and for all reference to this matter to be removed from his record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 53, when it did not provide the Claimant with a fair and impartial investigation and assessed harsh and excessive discipline against him without meeting the burden of proving the charges against him. Carrier’s File No. 1088677D. General Chairman’s File No. SWGC-1575. BRS File Case No. 10679-SP.”

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 Claimant in this case was dismissed following an Investigation over the alleged violation of Rules relating to conduct, behaving in a manner to avoid criticism, the care of railroad property and the Chief Engineer's Instructions. Those instructions included, among other things, that the Claimant was not to transport unauthorized individuals or use the Carrier vehicle for personal business. The Carrier argued on property that it had provided substantial proof that the Claimant not only used the vehicle for personal business, but also had his girlfriend in the Carrier's truck. The Carrier argued throughout this dispute that it proved violation of the Rules by the letter submitted by another driver. That letter verified the fact that the Claimant had a serious and major confrontation while operating a Carrier vehicle.

The Organization protested the Carrier's evidence during the Investigation. It argued that the sole evidence of record was a letter written by the other driver. It challenged the character, motive and accuracy of the proof. In its closing statement and throughout the on-property dispute the Organization maintained that the letter was "a way to end this confrontation . . . by getting even. . . ." It argues continually that "without the ability to cross-examine [the other driver] this stuff should be disregarded." It further argues that even if the Carrier could prove violation, the discipline imposed was excessive.

The evidence of record upon which the Carrier based its conclusion of guilt is a letter written to the Carrier by an individual about an employee. The letter includes detailed information about the employee's looks, the fact that there was a female passenger in a clearly identified Carrier truck and the license number. The Carrier investigated the information by contacting the individual who wrote the letter and determining that the Claimant was the driver. The letter is forceful stating that the Claimant had "bumped my bumper," "had his head out of the window yelling profanities," "cut in front of me and slammed on the brakes." The letter states that it was a "malicious act" and "completely unprovoked." The investigating officer contacted the complainant who confirmed that all information in the letter was accurate.

Our review of the testimony finds that the Carrier provided substantial proof of guilt. There is no doubt from the record that the Claimant was the driver of the truck on the date in question. The Claimant admitted that his girlfriend's car had broken down and that he was using the Carrier's vehicle to obtain an alternator belt to repair

her car. The Claimant, however, denied the basic details of the incident. He testified in a line by line rebuttal that the incident written about did not occur as stated. He testified that he did not act maliciously, did not bump the other vehicle, did not yell profanities and his actions were minor.

The conflict and discrepancy in this case between the serious incident reported in the letter to the Carrier and that which was presented by the Claimant could easily have been resolved. The only attempt to get at the facts was the testimony presented by the Manager Signal Construction about what the investigation revealed. The Manager stated that he talked with the investigating officer who told him that the letter writer was "probably very accurate" and would be "a good witness." In fact, the letter writer stated to the investigator that he was "willing to testify, if needed." In this instance, the Claimant was dismissed in part for reckless and malicious behavior which he denies. In this instance, the accuser was willing to come and testify. The fact that the Carrier did not ask this willing complainant to attend to develop all the facts leaves an unclear record. What is left is clear doubt about the factual base of the most compelling reason to remove the Claimant from his job.

Accordingly, the burden of proof has been met to demonstrate that the Claimant violated the Agreement. However, the Board finds that in the whole of this case, the discipline is excessive. Claimant is to be returned to service 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 19th day of June, 2000.