

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35016
Docket No. SG-35268
00-3-99-3-119**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 Railroad (KCS):

Claim on behalf of M. A. Davis for reinstatement to service with his record cleared and with compensation for all time, skill differential pay and any expenses incurred as a result of his dismissal following an investigation held on October 9, 1997, account Carrier violated the current Signalmen’s Agreement, particularly Rule 47, 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. Carrier’s File No. K0695018. General Chairman’s File No. 974647. BRS File Case No. 10896-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.

As a result of charges dated October 6, Investigation held October 9, and by letter dated October 16, 1997, the Claimant, a Signalman employed by the Carrier for approximately five and one-half years, was dismissed from service for failure to follow instructions, damaging property at a motel and giving false information to the owner of the motel.

On September 23, 1997, the Claimant struck a flower box with his boom truck in a motel parking lot in an area designated for light duty trucks. The Claimant was instructed by Foreman G. L. Harlon to ask the motel personnel what they wanted to do about the damage.

According to Harlon and Signalman J. R. McCrary, the Claimant told Harlon that he spoke with the lady at the front and she said not to worry about it and that they would take care of it.

On October 1, 1997, Harlon was advised by the motel personnel that the damage to the flower box had not been reported. Harlon asked them to get a damage estimate and he would see that it would be taken care of. Harlon was also asked by the motel manager whether the Carrier would move its business elsewhere if a damage estimate was submitted and informed Harlon that the Claimant had stated that an incident like this had happened before and that it could happen again. Harlon replied that he sincerely doubted it.

Harlon then spoke with the Claimant. According to Harlon:

“A. . . . I told him at that time, I said Mike you know you went up there trying to scare them folks, trying to snow them. You are just trying to keep your ass out of the fire and he said ‘well yeah, I guess so.’”

Signalman D. J. Riggs (who was in the boom truck when the Claimant hit the flower box) testified that he heard Harlon ask the Claimant if the Claimant attempted to con his way out of it, and the Claimant responded, to the effect, ‘something like that.’”

A letter from the motel front desk clerks stated that the flower box was custom made and the damage was estimated at \$95.00. The letter also stated that the Claimant insinuated that due to the incident the Carrier would take its business elsewhere.

The Claimant admits that he struck the flower box on September 23, 1997. The Claimant also admits that Harlon told him to report the incident to the motel office. The Claimant states that he went to the front desk and there was no one there, but he did observe a lady picking up paper. The Claimant states that he told the lady that he damaged the flower box with the truck and that she said "okay we'll take care of it." The Claimant states that he then told Harlon about his conversation and reported that the motel would take care of it.

With respect to the incident on October 1, 1997, the Claimant states that he spoke with a woman at the motel desk and told her that he damaged the flower box and reported the damage on September 23, 1997, but evidently the message was not conveyed. The Claimant states that he offered to pay for the damage. According to the Claimant, he explained to the desk clerk that:

"A. ... you know we had an incident before like this at another motel w[h]ere we bopped a pole and I said they just kind of just slip it under the rug and didn't say anything about it."

The Claimant stated that the clerk got the impression that the Carrier would no longer do business at the motel and he told her "no ma'am that's not what I am saying."

Based on the above, the evidence shows that on September 23, 1997, the Claimant struck and damaged the motel's flower box; he was told by his Foreman to report the damage to the motel; the Claimant did not do so; and when the motel personnel brought the matter to Harlon's attention on October 1, 1997, the Claimant, in effect, told the motel personnel that if the matter is pursued the Carrier would take its business elsewhere. The Claimant's denials and different versions of the incidents do not change those findings. Because the Carrier imposed discipline, the Claimant's testimony was not credited. "It is not the function of the Board to reverse credibility determinations unless clearly justified by the record." Third Division Award 31980. There is no basis in this record for us to credit the Claimant's versions over the evidence offered against him. Indeed, we note that the Claimant effectively admitted

to Harlon (which was heard by Riggs) that he attempted to con his way out of the incident. Harlon's view of the conversation with the Claimant is accurate. According to Harlon "he admitted it." We find substantial evidence supports the Carrier's determination that the Claimant engaged in the misconduct as charged.

Under the circumstances, we do not find that dismissal was arbitrary. The Claimant damaged the motel's property; he did not follow instructions to report the damage; and he then tried to deceive the motel and the Carrier and attempted to interfere with the relationship between the Carrier and the motel. That is sufficiently serious misconduct to warrant dismissal. The Claimant's length of service does not outweigh the seriousness of his misconduct to be a basis for reinstatement.

The Organization's other arguments do not change the result.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 25th day of October, 2000.