

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37536
Docket No. SG-38063
05-3-03-3-501

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

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

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of T. Bustamante, for reimbursement for any and all lost time and benefits and his record should be cleared of any and all reference to this matter, account Carrier violated the current Signalmen's Agreement, particularly Rule 68, when it failed to provide a fair and impartial investigation and issued discipline of a Level 3 – five (5) day actual suspension on the Claimant without proving the charges in connection with an investigation held on November 7, 2002. Carrier also violated the time limits when it failed to notify the Claimant of the specific charge or charges within the required time limits. Carrier's File No. 1349206. General Chairman's File No. UPGC-1146. BRS File Case NO. 12765-UP."

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 has a seniority date of April 14, 1997. On August 18, 2002, he was as a Signalman on Gang No. 6431 working out of Portland, Oregon. There were nine members of this gang, including Foreman P. Brown, Assistant Foreman M. Scott and Signalman R. Tucker. There was friction on the gang between Foreman Brown and Assistant Foreman Scott.

On or about August 20, 2002, an anonymous caller reported on the Carrier's Equal Employment Opportunity (EEO) hotline that an employee(s) in Portland, Oregon, was making hangman's nooses. On August 23, 2002, the EEO office in Omaha, Nebraska, apprised Director of Signal Construction R. Macquarrie of the call.

On August 26 and 27, 2002, the Senior Special Agent in Portland, Oregon, interviewed members of Signal Gang No. 6431. Signalman Tucker and the Claimant were interviewed on August 27, 2002. At his interview, Signalman Tucker asserted that on August 18, 2002, the Claimant was attempting to make a hangman's noose and asked him for assistance because he did not know how to do it.

According to Signalman Tucker, a few minutes later, he observed Foreman Brown show the Claimant how to make a hangman's noose with rope. Tucker maintained that the noose that Foreman Brown made was large enough to fit over a man's head. He heard Foreman Brown joking about putting Assistant Foreman Scott's head in it.

On September 10, 2002, the Claimant was notified to attend an Investigation to develop the facts and determined his responsibility, if any, for allegedly creating and/or displaying a hangman's noose while working in Portland, Oregon, on August 18, 2002. The Hearing was held on November 7, 2002.

At his November 7, 2002 Investigation, the Claimant stated that on April 18, 2002, he made a hangman's noose partly out of curiosity and partly to get Foreman Brown off Assistant Foreman Scott's back because Brown had been bothering Scott. He said he was trying to help out Assistant Foreman Scott. He also said that he was too scared to say anything about this because Foreman Brown is very intimidating and he might retaliate against him.

On December 3, 2002, the Claimant was assessed Level 3 discipline for his reputed violation of Rule 1.6 and Rule 1.9 of the Union Pacific General Code of Operating Rules and the Carrier's EEO Policy. The Organization appealed the discipline on January 2, 2003, contending that the charge against the Claimant was not specific; the charge was untimely issued; and the Level 3 discipline was excessive.

The Carrier denied the claim insisting that the Claimant was notified of the Investigation within 15 calendar days of its knowledge of his involvement with making hangmen's nooses as required by Rule 68. The Carrier also argued that Level 3 discipline was actually lenient for the Claimant's admitted violation of Rule 1.6 and its EEO Policy.

Rule 68 of the Agreement between the parties requires employees to be notified of the specific charge or charges against them within 15 calendar days from the date the Carrier had knowledge of the alleged offense. Contrary to the Organization's contention, the Notice of Investigation issued the Claimant was timely. On August 27 the Carrier learned of the Claimant's involvement with making hangman nooses on August 18, 2002, at Portland, Oregon. The September 10, 2002, notice of investigation was served within 15 calendar days as required by Rule 68.

Furthermore, notwithstanding the Organization's contention, the charge against the Claimant was specific as required by Rule 68. Both he and his representative knew why the Investigation was being held. That they were not aware the Claimant was being charged with violating the Carrier's System Special Instructions was not prejudicial because he was not found guilty of violating those instructions. Rather, he was found guilty of violating Rule 1.6 and Rule 1.9 of the General Code of Operating Rules.

As observed above, the Claimant acknowledged making a hangman's noose while working on Gang No. 6431 on August 18, 2002. Although he apparently did not intend to harass any member of the gang by this gesture, it was nevertheless totally inappropriate. His conduct could be perceived as a racially hostile act because hangman's nooses have long been viewed as symbols of oppression against African Americans. The Level 3 discipline assessed the Claimant for his misconduct was not excessive or unreasonable. The claim must be denied as a 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 23rd day of June 2005.