

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40485
Docket No. SG-40962
10-3-NRAB-00003-080300

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

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 D. B. Kirsch, for reinstatement to his former position with compensation for all time lost, including overtime, with his seniority and benefits unimpaired and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 68, when it issued the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on March 19, 2008. Carrier’s File No. 1496690. General Chairman’s File No. S-Investigation-919. BRS File Case No. 14141-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 facts are clear and undisputed. On January 30, 2008 the Claimant injured himself while working in Settegast Yard testing a switch. The lid fell on his finger, both breaking it and resulting in resetting the bone and stitching shut the wound. The Carrier alleged in its Notice of Investigation of February 4, 2008 that the Claimant was careless in regard to his personal safety. It suggested a possible violation of General Code of Operating Rule 1.6 and General Safety Instructions Rule 70.5. The Rules allegedly violated state, in pertinent part:

“Rule 1.6: Conduct

Employees must not be:

- 1. Careless of the safety of themselves or others**
- 2. Negligent**
Any act of . . . negligence affecting the interest of the company or its employees is cause for dismissal . . . Indifference to duty or to the performance of duty will not be tolerated.

Rule 70.5: Protection of Body Part

Do not place hands, fingers, feet, legs or any part of your body in a position where they might be struck, caught, pinched or crushed.”

Following two postponements, the Investigation was held on March 19, 2008. Subsequently, the Carrier found the Claimant guilty as alleged and on April 2 assessed Level 5 discipline (permanent dismissal).

The central argument in this case is over safety. The Organization asserts throughout the on-property record that the Carrier was fully aware that the switch that the Claimant was testing was unsafe. In fact, the Organization strongly argues that it was not only the cause of a prior injury to another employee, but also, the only switch in the yard without proper safe guards to prevent lids from falling. The Carrier knew this for nearly 12 years. The Claimant did not act in a negligent manner. The Organization maintains that there is no proof in the record that the Claimant violated the above stated Rules.

The Organization points to the fact that the Claimant acted in a safe manner and was not negligent. His hand was in the machine to prevent it from being crushed due to the timing necessary to prevent the point from crushing his hand as the gauge fell. When he started the machine, the target hit the lid over the machine causing it to fall on his finger. The Claimant states that, "... in the process of trying to prevent myself from getting my hand smashed, I got my hand smashed." The unsafe environment known by the Carrier for years, which would have prevented the 75 pound lid from falling, was not due to the Claimant's negligence. The Organization argues that the Carrier's determination and discipline was unproven and improper - an accusation the Carrier fully denies.

The Board studied the full record and the Carrier's arguments that the Claimant was knowledgeable and in clear violation of the Rules, supra. Our analysis supports the Carrier. The testimony documents that the Claimant was familiar with the switch. Manager of Signal Maintenance Chastun testified that the Claimant was doing required monthly tests as he had for years. He further testified that the switch in dispute, the 302 Switch, was also a switch that the Claimant was fully knowledgeable about. Chastun did not deny that the gauge could fall, but clearly stated that the Claimant should not have been on that side of the switch machine - but the reverse side. From the side and in the manner in which the Claimant performed the test, it was unsafe, as stated:

"Question: So a person can't be at the machine operating a button and actually hold the gauge in their hands?

Answer: Not on that side of the . . . switch machine. . . To test the reverse side, it is possible.

Question: But for what he was doing, there was no way for him to hold the gauge on the . . . track and push the button at the same time?

Answer: That's correct."

The Board is persuaded by the record evidence that the Claimant did not take the safe route in the performance of his job. Chastun testified that the Claimant "was our highest paid employee and the senior employee at Settegast Yard for our department and responsible for all the testing of switches." The Claimant

was aware that Switch 302 was the only switch in the yard without a spike behind the lid to prevent it from falling. The Claimant does not deny his awareness of this safety issue or that he had tested this machine numerous times.

The Board is convinced from the full testimony that the Claimant failed to properly perform his job, violating both Rule 1.6 and 70.5. Certainly, the Claimant was competent and informed of the danger involved in this one switch, different from all others in the yard. If anything, he should have been more aware and concerned about the risk of injury. However, the Board is similarly convinced that, in this instance, dismissal is excessive. The Claimant is a 25-year employee with no history of any prior injury or discipline. The Claimant should be returned to service without backpay, but with seniority and benefits unimpaired.

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 14th day of May 2010.