Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7885
SECOND DIVISION Docket No. 7596
2-AT&SF-FO-'79

The Second Division consisted of the regular members and in addition Referee Rolf Valtin when award was rendered.

Parties to Dispute: (System Federation No. 97, Railway Employes' Department, A. F. of L. - C. I.O. (Firemen & Oilers)
(Atchison, Topeka & Santa Fe Railway Company

Dispute: Claim of Employes:

(1) That the Carrier erred and violated the contractual rights of Joe E. Barry, when they removed him from service on February 7, 1977, as the result of investigation conducted on January 21, 1977.

(2) That, therefore, Mr. Barry be returned to service with all rights, privileges and benefits restored.

(3) That he be made whole for all health and welfare benefits, pension benefits, unemployment and sickness benefits and any other benefits he would have earned had he not been removed from service.

(4) Further, that he be compensated for all lost time, including overtime and holiday pay plus 6% annual interest on all lost wages and that such lost time be counted as vacation qualifying time.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

At the time of his dismissal, in early 1977, the claimant had about 4 years of service with the Carrier. He had been employed as a Switching Tractor Driver for the Locomotive Department at San Bernardino.

The claimant was dismissed under Rule 32-G. The Rule embodies the so-called Brown System of Discipline. Among other things, this System calls for the imposition of demerits for infractions of a non-capital nature, the maintaining of a record of the number of demerits pending against an employe at any particular time, the removal of certain numbers of demerits where the employe has gone without further demerits over certain periods of time, and the employe's dismissal where he accumulates 60 or more demerits over a certain period of time. (The Organization points to the fact that the employe, on such accumulation of demerits, is "subject to" dismissal -- i.e., that the System does not require the employe's dismissal. We view the argument as leading nowhere. For the distinction does not alter the fact that the System authorizes the employe's dismissal under the given circumstances.)

The Brown System of Discipline has been in existence at the Carrier's property for many years and has survived prior challenges as to its contractual propriety. In here asserting an inconsistency between the existence of the System and the present in the Agreement of Rule 18½, the Organization is in effect resurrecting the challenges of yesteryear. We agree with the Carrier that the System, as such, is to be respected as having proper standing and as being enforceable.

The basic facts in the case are as follows:

- On August 28, 1973, the claimant waived investigation and thus accepted discipline in the form of 10 demerits for absenteeism.

- On December 28, 1973, having gone four months without incurring further demerits, the Claimant waa given a 10-demerit credit. He thus had a clear record at this point.

- On July 2, 1975, the claimant waived investigation and thus accepted discipline in the form of 10 demerits for having been away from his work area.

- On July 8, 1975, the claimant waived investigation and thus accepted discipline in the form of 10 demerits for non-performance of assigned duties.

- On July 14, 1975, the claimant waived investigation and thus accepted discipline in the form of 10 demerits for non-performance of assigned duties.

- On July 18, 1975, the claimant waived investigation and thus accepted discipline in the form of 10 demerits for absenteeism.

- On July 22, 1975, the claimant waived investigation and thus accepted discipline in the form of 10 demerits for absenteeism.

- The claimant at this stage had accumulated 50 demerits. In accordance with what appears to be standard practice, the carrier notified the claimant of the fact of the 50-demerit accumulation and cautioned him that he was subject to dismissal if he accumulated 60 demerits. The claimant acknowledged receipt of the notification.

- On November 22, 1975, having gone four months without incurring further demerits, the claimant was given a 10-demerit credit. He thus had a 40-demerit record at this stage.

- On March 22, 1976, having gone four additional months without incurring further demerits, the claimant was again given a 10-demerit credit. He thus had a 30-demerit record at this stage.

- On July 16, 1976, the claimant waived investigation and thus accepted discipline in the form of 20 demerits for absenteeism.

- The claimant was thus of renewed 50-demerit status, and the Carrier again sent him notification of this fact together with the caution regarding the consequences of incurring 60 demerits. The claimant acknowledged receipt of the notification.

- On November 16, 1976, having gone four months without incurring further demerits, the claimant was given a 10-demerit credit. He thus had a 40-demerit record at this stage.

- On January 13, 1977, the claimant waived investigation and thus accepted discipline in the form of 20 demerits for loafing on the job.

- On this accumulation of 60 demerits, the claimant was removed from service and subsequently -- i.e., on due investigation of the facts surrounding his alleged violation of Rule 32-G -- dismissed.

We have already disposed of the Organization's contentions regarding the use of the System itself and the appearance of the phrase "subject to". We additionally reject the Organization's allegations of harrassment and discrimination and its assertions which flow from the fact that one and same supervisor assessed most of the demerits. It may well be that the claimant in many of the prior instances waived investigation and accepted the imposition of the demerits because he deemed it not worthwhile to go to the trouble of pursuing a challenge or because he thought that his own best interests were best served by foregoing a challenge. It may well be, in other words, that some or all of the prior demerits might have been ill-founded and might have been quashed had they been challenged. But it is, the fact of their acceptances by the claimant which must be taken to matter. The Organization is in effect seeking to reopen already-settled questions.

Contrary to what the Carrier is asserting, however, we do not believe that the 20 demerits which prompted the Claimant's dismissal can be similarly disposed of. Here, what the claimant is saying simply has to be accepted -- namely, that it was in ignorance of the consequence that he waived investigation and thereby accepted the 20 demerits as proper. To conclude otherwise is to conclude that the claimant knowingly accepted the discharge penalty and knowingly foreclosed an appeal from it. And, as we are not prepared to hold that the claimant alone is to blame for waiving investigation in ignorance of the consequence, we believe that elemental fairness and due-process considerations require the overturning of the dismissal.

The 50-demerit-accumulation notification is in the form of a letter to the appropriate Superintendent by the affected employe bearing the signature of the employe and a witness. It reads as follows:

> "I understand that I have now accumulated 50 demerits and should I accumulate a total of 60 demerits I would be subject to dismissal under Rule 32 of General Rules for the Guidance of Employes 1975 Issue, Form 2626 Standard."

The waiving of an investigation in connection with the assessment of demerits is in the form of a memorandum signed by the affected employe and countersigned by the appropriate Assistant Superintendent of Shops and the appropriate Superintendent of Shops. "Recommended by:" precedes the signature of the Assistant Superintendent of Shops, and "Approved:" precedes the signature of the Superintendent of Shops. The memorandum has spaces for the insertion of the particulars involved in the action (the name of the employe, and job held by him, the number of demerits, the nature and date of the infraction) and then has the following pre-typed sentence:

> "I hereby waive investigation and accept discipline as recommended above."

As shown, the claimant twice received the 50-demerit-accumulation notification. He did not receive a 40-demerit-accumulation notification. This was apparently in accordance with practice under the System, and there is otherwise no basis in the record for declaring the lack of a 40-demerit-accumulation notification wrongful. But the point that there was no 40-demerit-accumulation notification needs to be made because the Carrier in part relies on the following exchange (which occurred in the course of the dismissal investigation):

> "Q. Were you ever, when accumulating 40 or 50 demerits, alerted verbally or by letter that you had 40 or 50 demerits on your record?
>
> A. Yes, I was."

The exchange can be read as indicating that the claimant received both 40-demerit-accumulation and 50-demerit-accumulation notifications -- in which event a case of different dimensions would be presented. The question in the exchange, however, can also be read as going to one or the other -- i.e., to receipt of either 40-demerit-accumulation notification or 50-demerit-accumulation notification. And on the facts of the record, the claimant's affirmative response must be so read -- for he did not in fact ever receive a 40-demerit-accumulation notification.

The Carrier also relies on the fact that Rule 32-G incorporates the following:

> "Each employe's discipline record will be open for inspection by himself, Division and General Officers only, during business hours, at the office of the Supervisor where such records are maintained. If not practicable for an employe to go to the office, a transcript of his record will be sent to him upon application."

We grant that the Carrier is thus correctly arguing that, if there was any question in the claimant's mind as to his demerit-accumulation status, the claimant had access to information eliminating such question. But we do not accept it as enough to overcome the defect which we see as inhering in the claimant's dismissal.

The defect which we see as inhering in the claimant's dismissal is that, plainly, the claimant signed the last waiver form without appreciation of the difference between signing that waiver form and signing the various prior ones and that Supervision did nothing to alert him to the consequence of signing the last waiver form. The silence is true both of the supervisor who signed the form in the "Recommended by" capacity and the supervisor who signed it in the "Approved" capacity. At least the latter of them, it seems to us, can be expected to hold concern not only for whether the assessed disciplinary action is proper but also for whether the employe who has signed the waiver form understands that he has reached the point of discharge and that, in signing the waiver form, he is in effect destroying his right to appeal the discharge penalty. And even if it is assumed that there is no such obligation at the supervisory level, the least that must be concluded, it seems to us, is that the mechanical fashion in which the waiver form was signed should have been discerned at the Carrier level and that, at the Carrier level, the claimant should have been permitted to rescind the waiver and thereby render himself capable of being substantively heard. It may well be that 20 demerits, rather than the 10 demerits which were assessed in all but one of the prior instances, represented the proper assessment with respect to the last infraction. But it is obviously conceivable that 20 demerits on the last occasion were excessive. Indeed, it is conceivable that the supervisor chose as many as 20 demerits in order to bring about the claimant's discharge.

Based on the foregoing circumstances, we believe the discipline was excessive. We direct that claimant be forthwith reinstated with restoration of seniority rights but without back pay of any sort. Obviously raised, as the claimant returns to work, is the question of his demerit status. On this score, we have determined that the claimant should be given the benefit of the doubt that he would have freed himself of demerits in the intervening two years. He is to be returned to work in clean-slate fashion.

A W A R D

Claim sustained to the extent given in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 4th day of April, 1979.