

Award Number 5544
Docket Number MW-5261

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the agreement when it held Section Foreman C. N. Glass out of service during the period February 1 to 23, 1949 and assessed his personal record with 45 demerits.

(2) C. N. Glass be compensated for wages lost during the period referred to in part (1) of this claim and his personal record be cleared of the 45 demerit marks assessed against it.

OPINION OF BOARD: This is a discipline case. Claimant is a foreman of a maintenance crew. The charges against him were that he failed to properly post the time of men under his supervision and that he was guilty of insubordination in relation to the Roadmaster in failing to carry out his instructions. These incidents were alleged to have occurred on January 3 and 4, 1950. He was also charged with failure to comply on September 26, 1949, with the Roadmaster's instructions not to go into headquarters for lunch unless working within one mile of the tool house, and with failure to comply with the Roadmaster's instructions relative to furnishing help to signalmen on January 9 and 10, 1950.

The notice of charge which the claimant received on January 30, 1950, advised him that an investigation would begin February 2, 1950, at 8:00 a.m. On January 31, 1950, the foreman requested the Roadmaster for time to prepare for the hearing. The Roadmaster inquired as to how much time the foreman desired although it was obvious that there was only one day intervening between that date and the day of the hearing. The foreman replied he wanted one day, and he was then advised by the Roadmaster that his request would be allowed. Simultaneously the Roadmaster ordered him held out of service pending the completion of the investigation.

The investigation began on February 2, 1950, and was completed on February 7, 1950. On February 17, 1950, claimant was informed by the District Engineer that on the basis of the investigation made, his personnel record was assessed with 45 demerit marks. The letter stated:

"Leniency is being shown in assessing this discipline due to your length of service with this Company and with the thought that you

will profit from this experience and properly perform your duties in the future."

In this letter no reference was made to the period of time that the claimant was held out of service, nor was the claimant informed he was to return to service and when. Subsequently, he was informed that he should return to service and did report for service on February 23, 1950.

An appeal to the carrier requesting that the demerit marks assessed against the claimant be removed and that he be paid for all time held out of service was declined by the carrier.

The claim which is made is that the carrier violated the agreement in two respects: First, in assessing his personnel record with 45 demerits; and second, in holding him out of service during the period from February 1-23, 1950, without compensation.

We have examined with care the transcript of the evidence taken at the hearing which was held over a substantial period of time. Numerous witnesses testified, and their testimony is in hopeless conflict. Portions of the record are confused and numerous inconsistencies appear.

If this Board were permitted under its rules to weight the evidence, it would indeed be difficult to determine where the truth lies and whether, in fact, the charges made against the claimant were sustained. The carrier's letter of February 17 does not indicate which of the charges made against the foreman were established. The language used is: "For your failure to properly perform your duties, and other irregularities on your part, as developed in the above investigation your personal record is assessed with forty-five (45) demerit marks." We cannot say, however, that there was no substantial evidence in the record to support this conclusion and it is therefore not permitted us to say that the imposition of the penalty in this case of 45 demerit marks is either arbitrary or capricious. It is therefore our conclusion that the part of the claim which charges the carrier violated the agreement with reference to the imposition of 45 demerits cannot be sustained.

It is our opinion, however, that the part of the claim for wages for the period during which the claimant was held out of service is meritorious. From the time that claimant was notified until February 7, claimant was engaged either in preparation of the case or in the investigation. However, from February 8, 1950, to the close of business on February 22, claimant was held out of service pending decision. The letter of February 17, 1950, which is the only notification which the claimant received imposes as its sole penalty 45 demerit marks. No reference whatever is made to the period the employe was held out of service, and there is no indication that the carrier intended to impose as an additional penalty the wages lost by the employe during the period February 8, 1950, to the close of business February 22, 1950. Under these circumstances there is no record to support the action of the carrier in holding the employe out of service, or in failing to recognize his claim for compensation lost during the period in question.

The claim erroneously refers to the period in question as occurring in the year 1949. This is obviously a clerical error, and this Board will treat the claim as though it referred to the period in 1950.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing, thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the carrier violated the agreement in holding the claimant out of service during the period from February 8, 1950 to the close of business February 22, 1950.

AWARD

Claim denied in part and sustained in part in accordance with the opinion. Carrier is ordered to compensate claimant for wages lost during the period from February 8, 1950, to February 22, 1950.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 8th day of November, 1951.