

Award No. 8809
Docket No. MW-8300

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY**

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

(1) The Carrier violated the effective Agreement when it refused to permit Mr. A. R. Eggleston to exercise seniority rights as a Bridge and Building Foreman following his release as Foreman of Steel Bridge Paint Crew No. PT 1;

(2) The Carrier now be required to permit Claimant Eggleston to exercise seniority rights as a Division Bridge and Building Foreman and to reimburse him for all wage loss suffered since June 6, 1955, because of the violation referred to in part (1) of this claim.

EMPLOYEE'S STATEMENT OF FACTS: The Claimant, Mr. A. R. Eggleston has established and holds seniority rights as a Bridge and Building Foreman as of September 29, 1945 on the seniority district comprising the Iowa and Dakota Division, having been in the Carrier's service since April 27, 1927.

The Claimant also held seniority rights as a Painter Foreman on the District comprising the Carrier's lines East of Mobridge.

On May 4, 1955, the Claimant was employed as Foreman of District Steel Bridge Paint Crew No. P. T. 1, having been assigned to this position on or about February 12, 1954 in accordance with the applicable agreement rules.

Under date of May 10, 1955 the Carrier's Assistant Chief Engineer-Structures advised the claimant as follows:

"Chicago, May 10, 1955

Mr. A. R. Eggleston—

232	2216	2767	3217	4615
373	2297	2768	3235	4652
418	2376	2769	3253	4683
419	2378	2770	3342	4771
435	2440	2772	3411	4808
811	2472	2798	3618	4840
891	2498	2937	3734	4905
892	2531	3036	3827	4973
1022	2554	3112	3965	4982
1297	2621	3125	3984	5009
1497	2632	3127	3985	5011
1310	2633	3149	3986	5031
1513	2648	3171	4106	5033
1587	2652	3172	4252	5634
1755	2696	3185	4269	5833
2069	2766	3213	4326	

The policy of your division in respect to cases of discipline was established early in its existence. That policy, contained in the above awards, and applicable to the instant dispute, continues to be consistently supported by later awards. To assent to the employees' demands in this case would constitute an unwarranted encroachment on the power to discipline or dismiss which properly rests with the Carrier.

The claim is entirely without merit and should be denied.

All data contained herein has been presented to the employees.

(Exhibits not Reproduced.)

OPINION OF BOARD: Claimant A. R. Eggleston held seniority as a Bridge and Building Foreman since September 29, 1945, on the Carrier's Iowa and Dakota Division. (Emphasis ours) He also held seniority as a Painter Foreman in the Bridge and Building Subdepartment on the District (again emphasis ours) comprising Carrier's lines East of Mobridge.

On May 4, 1955 Claimant while on a six months' leave from his B&B Foreman position on the division took a job as paint foreman on a bridge job in St. Paul, and while on that job his crew was spray painting a bridge, and a high wind came up and blew some of the atomized paint on to a string of automobiles parked nearby to the damage of the Carrier of \$1200.00. For this he was investigated under the discipline rule and in due course was advised on May 10 that

"Because of your negligence on May 4th, permitting your crew to spray paint Bridge L-324½ in St. Paul when the wind was of such intensity that it carried the paint over 100 ft., damaging the paint on over 30 automobiles, you are today released as Foreman of Steel Bridge Paint Crew PT No. 1.

"You may if you wish bid in as a carpenter on the Division that you have your seniority rights on."

On June 6, 1955 the Claimant exercised his seniority on the carpenter's job.

This demotion was later protested by the Organization, without avail, and in due course is before us.

Carrier concedes the dual seniority of the Claimant, but insists that as a result of the investigation it was disclosed that Claimant was not fit to continue to serve as a foreman in any capacity relying on the definition Rule 46, Classification, Section (a) provides that:

"An employe who, in addition to his other duties, directs the work of men and reports to officials of the Railroad will be designated as a foreman."

and argues therefrom that unfitness as foreman in one capacity justifies the conclusion of unfitness in all capacities as foreman, and argues in support of the discipline imposed that it

"* * * was not without reason or proper cause, was not harsh (emphasis ours) or severe, nor was it imposed arbitrarily."

Employees insist, however, with considerable justification that

"Seniority acquired on a district is separate and distinct from seniority acquired on a Division."

and rely on that portion of Rule 5 (h) NOTE: 1, which says Employees holding rights in division B&B crews

"will also retain pre-existing seniority on the division"

while working on district jobs.

But the difficulty with that is that paragraph 6 of that same note says:

"The provisions of this NOTE do not apply to employees in steel bridge crews."

Whatever seniority Claimant had, he certainly was an employe in a "steel bridge crew" at the time of the investigation.

Employees do not attempt to meet this last provision, but rely on Award 6135 wherein we upheld a claim in a somewhat similar situation and said that the discipline imposed was too "harsh."

We feel the same way about this case. We do not feel that Claimant should be penalized unduly for what happened on that 4th of May when there was a quick shift in the wind (testimony is even in sharp conflict as to which way the wind was blowing) after Claimant had taken all reasonable precautions against the atomized paint being windblown. Even the Carrier's Engineer when asked if Claimant had taken all the precautions he could answered in part.

"Perhaps some immediate action could have been taken to clear the paint from the cars before it had a chance to set." (Emphasis ours)

No suggestion is made as to what Claimant could have done other than he did (putting up the canvas on the fence to protect the cars) to guard against a sudden change in the wind. While the U. S. Weather Bureau reported a wind of 20 miles an hour at 8 A. M. and 23 miles an hour at 9 A. M., the Claimant stated that at 8:30 A. M.,

"what little breeze there was blowing directly from St. Paul to Mpls."

Mr. Kruse, Carrier's chief carpenter when asked

"In your opinion how fast was (would) the wind velocity have to be to carry paint this far (well over 300 ft.)"

answer:

"* * * 30 to 35 MPH depending upon the course of the wind."

The highest velocity of the wind on that day as reported by the U. S. Weather Bureau was 34 M.P.H. at 10 A. M., which was around the time that Claimant told the crew to stop spraying, and it did.

There were no specific instructions given to Claimant except

"* * * the importance of being careful not to spray during windy weather * * *"

and as already noted it was suggested that "perhaps" he could have done something else.

We are not overlooking Carrier's strong reliance upon Award 8681, but in that case Claimant was an habitual drinker which would disqualify him from any employment on the railroad.

Even assuming there was an element of negligence (which we do not concede) in Claimant's performance on this paint job, it bears no reasonable relationship to his ability to perform the duties of the B&B foremanship which he seeks reinstatement to. It may also be noted in Award 8681 we said the

"* * * disciplinary action was not without cause, as the record clearly shows."

Under all the circumstances we feel that the portion of the claim seeking reinstatement should be sustained, but since Claimant has been in the continuous employ of the Carrier pending this Award the claim for wage loss is denied (Award 6135 *supra*).

In conclusion we will say that Carrier violated the Agreement only to the extent that the penalty imposed was too harsh because Claimant admitted that his investigation had "been fair enough."

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 Employees involved in this dispute are respectively Carrier and Employees 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 as indicated in the Opinion.

AWARD

Claim for reinstatement sustained.

Claim for reimbursement for wage loss denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of April, 1959.