NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20033

THIRD DIVISION

Docket Number (XX-20292

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, (Freight Handlers, Express and Station Employes (REA Express, Inc.

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood (Case No. 157) that:

(1) The Agreement governing hours of service and working conditions between the parties, effective January 1, 1967, was violated by the REA Express at Chicago, Illinois, when on June 1, 1971, Employe Larry D. Curtis was held out of service pending investigation of June 7, 1971 and was further violated when on June 9, 1971, he was notified by Line Haul Supervisor Lee Jordan that he was dismissed from service effective June 9, 1971, as a result of the investigation held Monday, June 7, 1971, being allegedly charged with violation of Rules 875 and 877 of the Company's General Rules and Instructions, and specifically charged with losing control of his vehicle on overpass at I-94 and 103rd Street, South. Also in the letter of citation dated June 1, 1971, Employe Curtis, it states, was cited by Police Officer Les Zuminski for speeding, driving too fast for conditions , etc.

(2) That Larry D. Curtis shall be restored to service with seniority rights unimpaired, his record shall be cleared of the charges and he shall be compensated for all monetary loss of pay retroactive to June 9, 1971, and continuing thereafter until such time as he is restored to service, with seniority rights unimpaired, and his record cleared of the charges.

OPINION OF BOARD: The instant case is one of several transferred by agreement between Petitioner and Company to this division from the roster of cases pending before Special Board of Adjustment No. 75'2.

Claimant Larry D. Curtis was held out of service June 1, 1971 pending investigation into charges contained in a certified letter from Company to Claimant, pertinent parts of which read as follows:

> "You are charged with violation of Rules Nos. 875 and 877, of the General Rules and Instructions which read, as follows:
>
> Rule #875 - 'Drivers must always strictly observe all traffic rules and regulations and have their vehicles under control at all times.'
>
> Rule #877 - 'During adverse weather conditions such as rain, snow, fog, sleet or icy pavement, drivers must operate vehicles

" 'with extreme care and adjust their driving to meet these conditions. Skidding on slippery road surfaces can be prevented with ordinary care and is not accepted as excuse for an accident. Use tire chains when necessary.'

The specific charge against you is that on June 1, 1971 at approximately 0400 hours, you lost control of your vehicle on overpass at I-94 and 103rd Street, South. Also, you were cited by Police Officer Les Zuminski, for speeding, driving too fast for conditions. The result of this accident causing total damage to Tractor 67023 and approximately $500.00 damage to trailer REAZ 204053."

Following an investigative hearing into these charges, Claimant was dismissed from service effective July 9, 1971 on findings that he had been "guilty of a negligent and preventable accident, in violation of Rules #875 and #877 as charged."

There is no dispute concerning the basic incident out of which the charges against Claimant arose: Claimant was assigned to an OTR run between Chicago, Illinois and Pittsburgh, Pennsylvania on June 1, 1971. It had been raining heavily that night and the road was wet. At approximately 4:30 a.m., after departing Chicago terminal, Claimant lost control of the rig when it jackknifed and skidded into a guardrail near 103rd Street and Calumet Expressway. No other vehicles or individuals were involved in the crash. When police arrived on the scene Claimant was issued citations alleging two violations of the motor vehicle laws, viz, unlawful use and damage to state highways and driving too fast for conditions. Claimant asked the officer for a court date to contest the charges which were set down for hearing on July 13, 1971. Claimant notified the Company of the accident and about 5:30 a.m. Line Driver Manager Robinson arrived at the scene of the accident, to observe the situation and oversee removal of the damaged units.

Before proceeding to our evaluation of this claim, it is well to reaffirm the oft-repeated jurisdictional parameters within which this Board functions in discipline cases. A most succinct statement to this effect is found in Award 13179 (Dorsey), as follows:

> "In discipline cases, the Board sits as an appellate forum. As such, our function is confined to determining whether;
> (1) Claimant was afforded a fair and impartial hearing;
> (2) the finding of guilty as charged is supported by substantial evidence; and (3) the discipline imposed is reasonable."

It is in pursuit of the first of these lines of appellate inquiry that we now turn to the instant case.

During the investigative hearing on June 7, 1971 the hearing officer read into the record, over objection and as evidence of guilt, the two citations issued by the police officer to Claimant. It is uncontroverted that Claimant

was ruled not guilty Of the charges alleged in the citations in the subsequent court hearing into those matters on July 13, 1973. The hearing officer also read into the record, but did not enter into evidence as an exhibit, a statsment by Line Driver Manager Robinson containing his opinion that Claimant was culpable in the accident. Not only was this report highly conjectural and speculative as to causation of the accident but it was, of course, hearsay twice removed, for which no opportunity of cross-examination could be afforded.

Finally, the hearing officer read into the record, despite objection, parts of a past investigation held in May 1970 in which Claimant was accused by the Company of involvement in a preventable accident in the state of Pennsylvania. The portions of that prior investigation read into the record of investigation of the instant charges were a letter of May 18, 1970 finding Claimant guilty as charged and a later letter of June 15, 1970 allowing him to return to work on probationary status.

We are aware of the numerous awards of this Board sustaining the introduction of an employe's past performance record into the deliberation by Carrier concerning the proper amount of discipline to assess. We also maintain, however, that the employe must not be retried and re-penalized for past violations but must be found culpable, on the basis of substantial evidence, of the instant charges before his past record may be properly assayed for the purpose of assessing discipline.

A careful review of the record in this case thus shows that the evidence against Claimant consists for the most part of the police citations, the conjectural hearsay statements of the Line Driver Manager and selected portions of a prior investigation. The foregoing is of doubtful probative value on the question of Ciaimant's culpability in the instant case. Moreover, in the facts of this case and the manner in which they were presented, they constitute such error in the hearing procedure as to prejudice the right of Claimant to a fair and impartial hearing. We are compelled to hold that the cumulative effect of these irregularities was such, in the circumstances of this case, that the fundamental requirement of fairness inherent in the concept of due process was not afforded Claimant. Accordingly, we must sustain the claim in its entirety.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1973.