

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20222
Docket Number MW-20090

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Louisville and Nashville Railroad Company

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

(1) The carrier acted improperly, arbitrarily, capriciously, without just and sufficient cause and on the basis of unproven charges when it demoted Machine Operator O. Bell and took away his seniority as 8 Rank 3 Machine Operator (System File 1-12/D-103878 E-306018).

(2) Mr. O. Bell's seniority as a Rank 3 machine operator be restored and unimpaired and that he be paid at the tamper operator's rate for all time, including overtime, that is worked on the tamper assigned to Gang No. 151 from November 10, 1971 until he is returned to work as a Rank 3 machine operator with seniority 8s such unimpaired.

OPINION OF BOARD: Claimant, Mr. Odom Bell entered Carrier's service on September 5, 1941 and was promoted to position 8s Rank 3 Machine Operator on November 15, 1956. On December 13, 1969, Claimant Bell was assigned to operate a Plassermatic Tamping Machine, as the successful applicant for the operator's job when advertised for bid.

The tamping machine operated by Claimant was taken out of service at noon on November 4, 1971 for the installation of a new lining device. The machine was serviced and tested by Carrier's Mechanized Equipment Mechanic and a service representative of the Plasser Company, manufacturer of the machine. The machine was placed back in service before noon on November 9, 1971, although the Plasser representative and the mechanics noted that a tamper foot rubbed against 8 grease fitting on the lining device when the machine was tested. Despite this observed condition, these service personnel turned the machine over to Claimant with an admonition to be careful and particularly observant of the lining device operation. The record indicated that the Plasser representative and the mechanic planned to adjust the machine to eliminate the grease fitting problem later in the day.

The machine was used to tamp some 80 rail lengths under observation of the mechanic, the service representative and Carrier's Assistant Division Engineer, all three of whom then departed the job site. Shortly thereafter, the Assistant Division Engineer was notified that the tamping machine had broken down and upon inspection the lining device on the tamper was found to be badly damaged.

On November 11, 1971, Carrier charged Claimant with responsibility for the damage, failure to perform routine servicing and minor repairs, and not being able to operate the machine to obtain produceable quality and quantity of work. Following an investigative hearing on November 19, 1971 Carrier demoted Claimant from his position 8s Rank No. 3 operator by correspondence reading in pertinent part as follows:

"LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Office of Superintendent

Evansville, Ind., Dec. 10, 1971

Mr. Odom Bell
Machine Operator

The attached Discipline Bulletin No. 315 refers to you in the case of your responsibility in connection with damage which occurred to the lining device on the tamper which you operated on November 9, 1971, failing to perform all routine servicing and minor repairs to keep his machine in proper and safe operating condition, and not being able to operate his machine to obtain the quantity and quality of work the machine is capable of producing.

It is hoped that you have profited from this experience and that in the future you will take every precaution to see that this type incident does not recur.

J. R. Parsons, Jr.
Superintendent

Discipline Bulletin No. 315, referred to above, reads as follows:

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Office of Superintendent
Evansville, Indiana

December 10, 1971

DISCIPLINE BULLETIN NO. 315

A Machine Operator has had his Rank 3 seniority taken from him for his responsibility in connection with damage to his machine and failing to perform 81.1 routine servicing and minor repairs

to keep his machine in a proper and safe operating condition, and not being able to operate his machine to obtain the quantity of the work the machine is capable of producing.

J. R. Persons, Jr.
Superintendent"

The Organization herein contends that the charges against the Claimant were not supported by the evidence presented at the investigation and that, consequently, Carrier disciplinary demotion was improper, arbitrary, capricious and without cause. Carrier maintains that Claimant received a fair and impartial investigation, that substantial evidence was adduced to prove Claimant's negligence and that the claim must accordingly be denied.

In Award 13179 (Dorsey) the function of this Board was enumerated in cases of this type, as determining whether: (1) Claimant was afforded a fair and impartial hearing; (2) the finding of guilty is supported by substantial evidence; and (3) the discipline imposed is reasonable. There is no dispute herein regarding the fairness of the hearing; but the evidentiary question, and concomitantly the reasonableness of the discipline, cannot be so summarily dismissed on the basis of this record.

As to the first element of the charges against Claimant, the uncontroverted record shows that there were no witnesses to the machine breakdown except Claimant. Claimant testified that he was running the machine on automatic and that the lining device was damaged by a tamper foot striking the above-mentioned grease fitting. The Carrier's service mechanic and the Plasser representative each testified that the damage to the lining device, in their judgment, could have occurred only by Claimant overriding the automatic features and manually depressing the squeeze pedal while raising the unit. (Emphasis added.) These testimonial accounts are the sole evidentiary data in the record on the issue of causation.

It must be observed that the two Carrier witnesses on this point have a demonstrable interest in a finding that Claimant's account of causation of the damage is incorrect. This interest does not disqualify them as witnesses but it does render their testimony subject to most careful scrutiny. In this connection, neither of the Carrier witnesses were present when the damage occurred and their testimony as to whether Claimant manually overrode the automatic device necessarily is speculative and conjectural.

On the charges of failure to perform **services** and maintain production, **Carrier** presented testimonial evidence from the Mechanized Equipment Mechanic and others. The record discloser, however, that Claimant had operated the machine in question from December 13, 1969 until the date of damage on **November 9, 1971** without oral or **written** complaint to him from the Carrier regarding his performance. Moreover, Claimant's direct supervisor, Foreman A. L. Fingers, testified that Claimant's servicing of the machine and quantity and quality of work were satisfactory. Reverting to the **evidentiary** standards set forth in Award 13179 **supra**, we must **conclude** that the placing of **responsibility** for the damaged machine upon Claimant is not on **this** record sustainable by substantial **evidence**. **Nor** does the evidence **substantially** support Carrier's finding that Claimant **was** deficient in service or production. **Accordingly**, part (1) of the claim must be sustained.

In part (2) of the claim, Claimant seeks, in addition to **restored** status, payment at the operator's rate for all time, including overtime since November 10, 1971 until he is returned to operator's status. Claimant apparently **has** been employed in another capacity by Carrier since his demotion. **Accordingly**, we **will** modify part (2) of the claim by awarding that Mr. Bell's seniority as a Rank 3 machine operator be restored and **unimpaired** and that he be paid the difference between what he would have earned as the operator of the **tamping** machine assigned to Gang No. 151, including overtime, and what he has earned as an **employee** of Carrier from **November 10, 1971** until he is returned to work **as a** Rank 3 machine operator **with** seniority as such **unimpaired**.

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 **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 Agreement **was** violated.

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Claim sustained to the extent and in the **manner** set forth in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, **Illinois**, this 30th day of April 1974.