

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20306
Docket Number MW-20470

Frederick R. Blackwell, Referee

[Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE:
(Southern Pacific Transportation Company
(Pacific Lines)

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

(1) The dismissal of Welder Helper S. J. Schmidt for allegedly violating "portions of Rule 801 and 810" was without just and sufficient cause and on the basis of unproven charges (System File 011-181(S)).

(2) Welder Helper S. J. Schmidt be reinstated with seniority, vacation and all other rights unimpaired, his record cleared and that he be compensated for all wage loss suffered in compliance with Rule 45(b).

OPINION OF BOARD: This is a discipline case in which the Claimant, a Welder Helper, was dismissed for violating Rules 801 and 810 of the Rules and Regulations for the Maintenance of Way and Structures. The gravamen of the charge was that the Claimant was 3 or 4 car lengths from his post of duty and that such was an unsafe neglect of duty in view of the character of the work being performed. The Employees attack the discipline both on procedural grounds and on the merits.

The Employee's first procedural point is that the Claimant's due process rights were violated, because the hearing officer who took the testimony and observed the witnesses did not render the disciplinary decision. The record fails to show that potential or actual prejudice to the Claimant resulted from this fact and, accordingly, we find no merit in this contention. Another procedural objection is that the Claimant's prior record is not properly before this Board because it is mentioned for the first time in this dispute in the Carrier's Submission. Arguably, the prior record was touched upon in a letter of Carrier's highest officer which referred to the "number of occasions on which he had been instructed". However, this reference is too generalized to be deemed to refer to a prior official record. Also, the reference more logically applies to instructions on how to perform duties rather than to a prior official record and we, therefore, conclude that the Claimant's prior record is not properly before the Board.

The Employee's merit argument requires a review of the incident from which the dismissal resulted. The hearing record shows that the Claimant was part of a crew engaged in loading continuous-welded rail onto a string of 35 flat cars. The first Step in the loading operation is that, as rails are connected by welds, the finished product is pushed onto the

flat cars. This pushing effect is accomplished by pressure which causes the ribbon of rail to move onto and over the bed of flat cars at about 3 miles an hour. The forward movement of the rail is stopped intermittently, for five minute intervals to weld another rail to the ribbon. Each flat car is equipped with a roller stand through which the rail is moved forward or backward, as the case may be; a safety button at each stand will stop the entire operation upon its activation. A critical element in the operation involves a device called a "rabbet", which is a square piece of cast metal with a point at the end. The rabbet is attached to the forward end of the continuous rail, so that the rabbet's point will thread the rail through the rollers as the rail is pushed forward. The Claimant's part of the operation was to work as the "point" man and to guide the rabbet through each roller. The operation in this instance was loading two rails simultaneously, with the Claimant serving as point man on one rail and another employee serving as the point on the other rail.

Shortly before 2 p.m. on August 31, 1972, the Welding Inspector, who was in charge of the operation, observed the Claimant about 3 or 4 car lengths away from his rabbet; the Claimant was sitting down talking with the other point man. The Inspector testified that, upon asking the Claimant "where was his rabbet and why wasn't he with it", the Claimant gave no answer and walked towards his rabbet. The Inspector further testified that the Claimant would be unable to see his rabbet from where he was sitting, and that his proper position was to be at the point of the rabbet or within one roller assembly ahead of or behind it. The Inspector stated that the duties involving the rabbet had been discussed with the Claimant numerous times, including coverage of the subject at safety meetings attended by the Claimant. It was brought out that the rabbet requires close attention because it could easily malfunction, causing an accident or buckling so suddenly that a person could not get clear sufficiently soon to avoid serious injury. The foregoing was corroborated by another Welding Inspector who observed the incident. This witness also stated that the Claimant was within 4 to 5 feet of a safety button, which would have permitted him to stop the rail if necessary; however, he, too, said the Claimant could not see his rabbet, as his line of vision was obscured by the roller stands. The Carrier's written instructions on how to follow the point of the rabbet were made a part of the evidence; however, substantially different instructions on the same subject were posted by the Carrier on the day following the hearing.

Except for asserting that he was right beside a safety button and that his view of the rabbet was not obscured, the Claimant admitted the factual part of the testimony of the two Welding Inspectors. However, as he interpreted the facts, he was not in an improper position in respect to the rabbet. He said he was where he was supposed to be before the rail made its last push and that, since the rail was stopped, he had no need to be in a different location; the situation required him to move forward to prepare for the next push, which he was about to do when the

Inspector arrived. **The Claimant** also stated **that** the Carrier had not been consistent or clear in issuing instructions about the duties of the point **man**, and that there was no **uniform** standard for **performing** the duties.

On these facts the **Employees** argue **that: (1)** the hearing **evidence** does not support the Carrier's **action**; (2) the written instructions were inadequate; and (3) the penalty of dismissal is excessive, as evidenced by the Carrier's offer to **reinstate** the **Claimant**. (A reinstatement offer is an offer to **compromise**, from which no inference **may** be drawn; hence, this offer is not **part** of our considerations.) With respect to the **hearing** evidence, it **may** be **true**, as argued by the Employees, that the two Inspectors could not say with certainty that the Claimant could not see his **rabbit** from 3 or 4 car lengths **away**; however, there **was** no uncertainty in their **opinions** about what they thought the **Claimant** could see and the Claimant's contra statement does not invalidate their **testimony**. The Claimant's own admissions proved material elements of the charge and such admissions, coupled with the Carrier's evidence, constitutes substantial evidence of record **to** support a measure of discipline. With respect to the written instructions, the Employees are on more solid ground. The **critical** duties of the point man, as described orally at the hearing, are not even suggested in the texts of the pre-hearing **instructions**, whereas such duties are described in rather **full** detail in the post-hearing instructions. Moreover, the inadequacies and confusing nature of the old instructions were forcibly confirmed by the Carrier's posting of new, detailed instructions immediately after the hearing in which the old instructions were challenged. While these considerations do not **fully** excuse the **Claimant's** actions, because his **admissions** made a sufficient case to warrant discipline, we conclude that the inadequacies of the old instructions, and the fact that the old and the new instructions do not remotely resemble **one** another, constitute important mitigating facts in the total context of this **case**. We shall therefore award that the Claimant be restored to service without back pay, but with all rights 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

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Discipline was warranted, but the ~~quantum~~ thereof should be reduced because of ~~mitigating~~ facts.

A W A R D

Claim sustained in part and denied in part. The Claimant shall be restored to ~~service~~ with ~~all~~ rights ~~unimpaired~~, but the Claimant shall not receive any compensation for wage loss.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of ~~Third~~ Division

ATTEST:

A. W. Paulos
Executive Secretary

Dated at Chicago, ~~Illinois~~, this 28th day of June 1974.