

The Third Division consisted of the regular members and in addition Referee Stanley E. Kravit when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

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

(1) The dismissal of Extra Gang Foreman M. F. Schulte for alleged violation of General Rules A, B, I and K and Rules 1510 and 1511 of the Maintenance of Way Rules was without just and sufficient cause on the basis of unproven charges and in violation of the Agreement (System File D-90/870084).

(2) The Claimant shall be reinstated with seniority unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was discharged on September 12, 1986, for damage to a boom truck under his supervision which occurred when the truck hit a high tension wire. On August 8, 1986, Claimant was a Foreman on an Extra Gang. A crane operated by one of his crew was lifting a track panel when the boom cable hit an overhead power line. A high voltage electrical arc resulted, causing more than \$3,000 worth of damage to the truck. The record reveals that a safer method of operation and the equipment to implement it were available and the Claimant should have instructed the crew to make use of such equipment. Although Claimant was not present at the precise location and moment of the accident, he clearly had supervisory responsibility.

In addition, Claimant admitted during testimony that he did not follow proper flagging procedure as required by Rule 99(E). The difficulty with this aspect of the original charges is that the discharge notice fails to include Rule 99(E) in its statement of the bases for discharge. Since this Rule is itemized as a possible violation for which investigation was initiated, in paragraph 1 of the Notice, it seems unlikely that it would be overlooked in the second if the Carrier intended discharge to rest, in part, upon this Rule.

On the basis of the record, particularly the testimony of the Claimant, the Board finds that Claimant's inattention to safety rules on August 8, 1986, validates the other charges against him and is just cause for disciplinary action. As to the procedural questions raised by the Organization, we find that Claimant knew and understood the charges against him and had full opportunity to defend himself at the investigation.

An employee's record bears upon the determination of the penalty to be assessed whenever disciplinary action is justified. Naturally, past incidents do not prove present offenses. However, the Board finds that the Claimant's past record was not used to determine violation of the present charges. The parties must monitor and govern their hearing procedure, but the Board is not justified in overturning a disciplinary action unless the Claimant was denied a fair hearing or prejudiced in his defense by a failure of Agreement due process. Such is not the case here.

The issue remaining before the Board is whether the penalty exacted against the Claimant is excessive. On November 3, 1986, the Carrier offered to reinstate Claimant with seniority unimpaired provided the Claimant would agree not to appeal his claim for lost time. This leniency reinstatement would have cost Claimant 56 days' pay, however, he turned it down and the Organization continued to process his claim.

Correspondence and negotiations continued regarding leniency reinstatement, culminating in Carrier's reinstatement of Claimant effective August 3, 1987, while allowing Claimant to maintain his claim. The Organization contends that discharge was excessive under the circumstances; in part because the Carrier has not consistently discharged employees responsible for allowing boom-type equipment to come in contact with electrical wires, resulting in damage, and on occasion has not even disciplined, much less discharged, the foreman.

The Carrier contends that the resulting penalty of approximately 11 months suspension is fully justified by the damage and safety violations for which the Claimant, as foreman, was responsible. In addition:

"it is the Carrier's position, therefore, that Claimant is responsible for the wage loss suffered subsequent to (the first leniency offer of) November 7, 1986, and that the claim before this Board should be denied based on the rationale contained in ... AWARD NO. 22002 - Third Division .. (and) AWARD NO. 23824 - Third Division ..."

both of which support the theory that the Claimant was at risk for declining a leniency offer and, "any loss from that date was of his own volition."

We begin our analysis by noting that leniency is the prerogative of the Carrier and, as with any settlement offer, may be made on terms satisfactory to the Carrier. In November 1986, therefore, the Carrier had the right to make such offer as it did and the Claimant naturally had the right to accept it and cut his potential losses or turn it down and retain his claim. That he chose the latter does not prejudice his position before the Board nor does it play a role in our judgement of the eventual penalty. Justification for disciplinary action must arise out of the facts of the incident.

The reinstatement offered and accepted in August 1987, which allowed Claimant to maintain his appeal to this Board, stands on the same footing as if we had heard his case that day. Although reinstatement concedes that discharge may have been excessive, the Carrier should not be placed at a disadvantage for its offer. Otherwise no such offers are likely to occur and this would not be to the advantage of either party or the employees. The same judgement as to whether the penalty was excessive must be made today as would have been made if this matter had come before the Board on August 3, 1987.

Backpay is frequently denied upon reinstatement, depending upon the circumstances, when discharge is deemed excessive but the Claimant is regarded as having engaged in serious or intentional misconduct. The results of such conduct are also naturally considered.


In evaluating the Claimant's conduct on August 8, 1986, the Board finds that it was not severe enough to justify discharge; however, a 90 day suspension would not have been excessive. The Claimant shall be made whole for all time lost in excess of 90 days in accordance with the normal rules of setoff.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1989.