

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Elgin, Joliet and Eastern Railway Company

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

(1) The dismissal of Welder Foreman R. C. Gayton for alleged '... responsibility for accident which occurred at about 10:15 a.m., January 21, 1988....' was arbitrary, capricious, exceedingly harsh and in violation of the Agreement (System File DJ-4-88/UM-12-88).

(2) The Claimant shall be reinstated to service with seniority and benefits 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.

The Claimant was employed as a Welder Foreman. He had 29 years of service and, prior to his discharge, had no demerits on his record.

On January 21, 1988, Claimant was driving a Hi-Rail truck which was loaded with welding equipment being used to weld switch frogs. He was responsible for the safety of the welding crew and its equipment. The truck was being driven on the Eastbound Main track. That track was occupied by Extra 667 East, whose rights were superior to those of the Hi-Rail truck. Claimant had been advised that Extra 667 East was scheduled; indeed, he had received and signed for a copy of the lineup. He acknowledged that he read the lineup and read it back. Notwithstanding Claimant's knowledge of the scheduled arrival of Extra 667 East on the track, he left the truck on the track, and it was struck by the train. The truck was damaged in the amount of \$12,000. No injuries were sustained. The train was not damaged. Claimant was unable to explain why he had not taken proper precautions to keep clear of the scheduled train.

Claimant was ordered to attend a Hearing "... relative to the charge that you were allegedly responsible for the accident which occurred at about 10:15 a.m., January 21, 1988, involving a collision between Extra 667 East and Truck 431 at Walker at the Illinois River Line switch." Based on the Investigation, the Carrier dismissed Claimant from service.

At the Hearing, the Organization objected that the charge against Claimant was vague, since it did not include a description of the way or ways in which Claimant was allegedly responsible for the accident. The Organization also objected to the disparate treatment of Claimant, on the basis that other employees had been allowed to waive Hearing and accept demerits for similar accidents.

Subsequent to the dismissal, the Carrier offered Claimant a leniency reinstatement, but without any backpay. Claimant declined. A second offer of reinstatement as a Welder was made on June 8, 1988, without prejudice to the Organization's Claim for backpay and Foreman seniority. Again, Claimant declined the offer.

The Carrier argues that the Organization and Claimant were well aware of the nature of the charges against him and were not prejudiced in preparing their defense. The Carrier argues that Claimant acknowledged responsibility for the dereliction and points out that it was an extremely serious, and unexplained, violation for which dismissal was an appropriate discipline. The Carrier urges that the Claim be denied. The Carrier urges, in any event, that its unconditional offer to reinstate Claimant in June, 1988, relieved it from further liability for wages Claimant could have earned as a Welder, even if Claimant were reinstated.

The Organization argues that the charges against Claimant were defective because he was not notified in writing of the precise charges, as required by Rule 57(a), there being numerous ways in which Claimant could be responsible for the accident. The Organization also argues that the Carrier impermissibly appended to the record and relied on maps, letters and other documents which were not entered into the record, thereby depriving Claimant of a fair Hearing. The Organization points out that other employees involved in similar incidents have been allowed to waive Hearing and accept demerit marks; and it urges, therefore, that dismissal was an arbitrary, capricious, and abusive penalty, particularly in light of Claimant's long service and clean record. The Organization asserts that the Carrier's offer of reinstatement indicates recognition of its prior practice. It urges, therefore, that the Claim be sustained and Claimant reinstated with all rights and benefits unimpaired and he should be compensated for all wage loss suffered.

Charges against an employee must be sufficiently specific to allow the employee and organization to prepare a defense against the charges. The Board is persuaded that the charge against Claimant was sufficiently specific; the failure to specify, in advance of the Hearing, the manner, if any, in which Claimant might have been negligent was unnecessary and premature. Indeed, gathering information with respect to that question was one of the purposes of the Hearing.

Concerning the Organization's argument that the discipline must be overturned because the Carrier included in the record and relied on documents not introduced at the Hearing, the Board is not persuaded. Claimant readily admitted that he was responsible for the accident; it was his own statements on which the Carrier relied. If the Carrier's inclusion in the record of additional documentation was error, it was not harmful error, and Claimant was not prejudiced thereby.

The Carrier's 1981 Notice which established the demerit system on the property contained an exception for "[m]ajor offenses such as ... inexcusable violation of rules resulting in endangering or destroying company property ... [which] may subject the offender to dismissal, regardless of demerits." This was, clearly, such a case. The Carrier is, of course, obligated to mete out discipline to similarly-situated employees for similar offenses in an even-handed way. There is, however, insufficient evidence in the record in the instant case to persuade the Board that other employees committed equally-flagrant violations or caused equivalent amounts of damage and is therefore insufficient to require overturning the discipline.

The Board is persuaded that the offense constituted a serious breach of Claimant's responsibilities as an employee and, in particular, of his responsibilities as a Foreman. Nevertheless, the Board is persuaded, in light of Claimant's 29 years of service and his demerit-free record since 1983 that the penalty of dismissal was excessive and that he deserves reinstatement to service and a second chance.

The Board is not, however, persuaded that Claimant should receive back wages upon his return to work, in the first instance because of the seriousness of Claimant's offense and, after the Carrier's unconditional offer of reinstatement in June, 1988, for the additional reason that its liability thereafter was reduced by the amount Claimant would have earned as a Welder had he accepted the offer and thereafter pursued his Claim. See Third Division Awards 23559, 22034 and 14443.

The Board deems it otherwise appropriate to reinstate Claimant on the terms offered unconditionally by the Carrier at the earlier date, that is: restoration to service as a Welder and restoration of Claimant's Welder Foreman seniority, but without backpay for time lost.

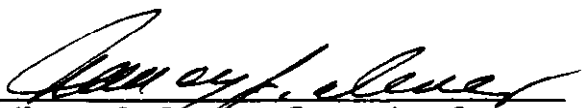
A W A R D

Claim sustained in accordance with the Findings.

Form 1
Page 4

Award No. 28508
Docket No. MW-28567
90-3-88-3-405

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1990.