Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28603
THIRD DIVISION Docket No. MW-28792
90-3-89-3-186

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

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

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

(1) The twenty-five (25) demerit marks assessed to Mr. O. Salaiz for alleged, '... negligence in the performance of your duties on November 16, 1987, when you damaged concrete in the locomotive inspection pit and destroyed the electrical shut-off box for the overhead door on K-12 West.', was arbitrary, capricious and in violation of the Agreement (System File DJ-3-88/UM-11-88).

(2) The twenty-five (25) demerit marks assessed to Mr. Salaiz shall be rescinded and he shall be reinstated as a crane operator with all seniority rights unimpaired."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

On December 9, 1987, Carrier notified the Claimant of a Hearing for allegedly damaging property. Subsequent to the Hearing, Carrier assessed 25 demerits.

On the day in question, Claimant was instructed to do some cleanup work of dirt and debris. It is alleged that while doing so he became entangled in newly poured concrete and scraped some away. He also damaged an electrical box.

The Claimant testified that the dirt was on the concrete and scraping was the only way to remove the dirt. On the final scraping operation the new concrete was chipped. He also testified that he was moving ties but they did not totally fit into the bucket and some were "sticking out." He did not have enough clearance and while backing out one of the ties hit the electrical box.

The Organization contends that Carrier presented no probative evidence to establish negligence and thus failed to meet its burden of proof. Be that as it may, the Claimant testified and conceded his actions on the day. While the showing of damage to the concrete may be somewhat questionable, such is not the case regarding the electrical box.

The Organization asserts that Carrier violated the Claimant's rights by not calling witnesses who had first hand knowledge. A carrier that does not call witnesses does so at its own peril, but if the elements of disciplinary action are shown with a minimum of witnesses, the action may be upheld. We have searched the transcript in vain to find any indication that the Claimant requested the presence of those witnesses.

We find that the Claimant did not exhibit the degree of care required by an equipment operator when he admittedly had an extended load and he attempted to pass through an area without enough clearance.

While a prior record is not proof of a current charge, it may be considered regarding the quantum of punishment. The Claimant is not a stranger to careless and negligent operation of equipment, even without consideration of other charges pending before this Board.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of October 1990.