

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(Elgin, Joliet & Eastern Railway Company

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

(1) The dismissal of Painter Foreman C. L. Homan for alleged violation of Rules 16, 30 and 170 and Paragraph 7 of the General Notice of the Safety Rules and General Regulations Governing Maintenance of Way Employees on August 27, 1988 was arbitrary, capricious, based on unproven charges and in violation of the Agreement (System File SAC-14-88/TM-25-88).

(2) As a consequence of Part (1) above:

'\*\*\* the claimant be reinstated with seniority and rights unimpaired, his record be cleared of this incident, and all compensation for time lost, including all overtime and Holidays from the date of dismissal until he is reinstated.'

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 a Painter Foreman, was injured while on duty. He was using a grinding wheel to grind down the tip of a seven-inch wood spike to make a nail set out of it. While operating the grinder, the spike got caught between the tool rest and the grinding wheel. This resulted in Claimant's fingers being drawn into the grinder wheel. Part of his finger was cut off. Claimant was treated at a local dispensary and then sent to a Hospital. He returned to work on light-duty status for three days and then reported off sick for most of September 1988. On October 11, 1988, Claimant was charged as follows:

"...violation of Rules 16, 30 and 170 and paragraph 7 of the General Notice of the Safety Rules and General Regulations Governing Maintenance of Way Employees at approximately 8:45 A.M., August 27, 1988, at the Kirk Yard Garage when working as a Painter Foreman."

A Hearing was held on October 17, 1988. As a result of that Hearing, Claimant was found guilty as charged and dismissed from Carrier's service. Carrier did not indicate that it assigned any specific number of demerits to Claimant's violation. It only indicated that, based on his guilt in the instant case and the fact that he had previously received 65 demerits, he was being dismissed from Carrier's service.

A review of the record reveals that Claimant was guilty as charged and that some level of discipline was appropriate. The Board, however, does not think that Claimant, a 25-year employee, should be dismissed from Carrier's service at this point, nor do we believe that this incident, standing alone, warrants dismissal.

This Board has reviewed three cases involving this Claimant--the instant case and two prior cases. In the first case, that we reviewed, we found a procedural violation serious enough to warrant setting aside the discipline and clearing Claimant's record of 30 demerits, Third Division Award 28908. In the second case, Third Division Award 28909, the Board denied the Claim and upheld the discipline imposed, 35 demerits. When Claimant's past record is reviewed in the instant case, his record should indicate that he has received 35 demerits, not 65, as Carrier states.

Since Carrier has implemented a demerit system, we conclude that Claimant should be assessed a number of demerits for his infraction, but not dismissed from service. A review of Carrier's notice to all employees that it intended to implement a demerit system reveals that 60 demerits is the maximum allowed for any one infraction. In line with that condition, this Board will assess a 60 demerit penalty on Claimant, thereby bringing the total demerits assessed him to 95. This is five demerits short of enough on which to base a dismissal. We are therefore forced to direct that Claimant be reinstated to service with seniority unimpaired and pay for all time lost from the date of his dismissal.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.

CARRIER MEMBERS' DISSENT  
TO  
AWARD 28915, DOCKET MW-29095  
(Referee Dennis)

The Majority decision contains several errors.

1. The Majority erred in finding that an employee can be dismissed only under the demerit system. The Carrier's discipline policy states that an employee can be dismissed "regardless of demerits" for a variety of offenses including "incompetency." The Claimant was found to have violated Paragraph 7 of the General Rules which, in pertinent part, provides:

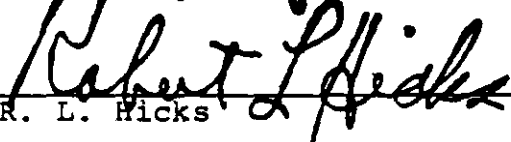
"Employees who are careless of the safety of themselves or others, or who do not have or fail to exercise good judgment in the performance of their duties, will not be retained in the service."

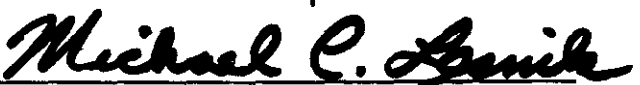
2. The Majority found that the discipline of dismissal was not warranted and reduced the dismissal to 60 demerits, the most discipline that could be assessed under the demerit system for any one rule violation. The same sentence that refers to the 60-demerit cap begins with the words: "Except as otherwise indicated above." In the preceding paragraph, the Rule provides for suspensions "when warranted" wholly apart from the demerit system. Thus, even if the Majority was correct in finding permanent dismissal excessive, it had the alternative under the Rule to impose a suspension.

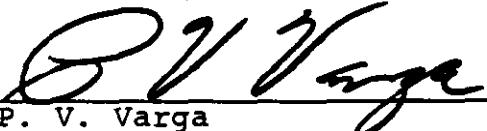
It should be noted that in dismissing the Claimant, the Carrier did not rely upon the demerit system and indeed, as the Majority points out, did not assess demerits but dis-

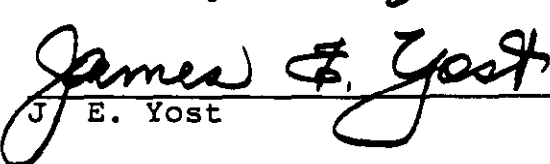
missed the Claimant "upon consideration of the gravity of the offense, the circumstances surrounding the above incident and your prior record." Nowhere on the property did the Organization raise the issue of the applicability of the demerit system to the discipline assessed. If the Majority had confined its consideration to the record before it, the above errors would have been avoided. Fortunately for the Carrier, no monetary liability will result from the Majority's errors as the Claimant has resigned and stipulated that he has not been medically qualified to return to work since his last on duty injury and that he has generally released all claims against the Carrier.

  
M. W. Fingerhut

  
R. L. Hicks

  
M. C. Lesnik

  
P. V. Varga

  
J. E. Yost