

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

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

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

(1) The discipline of thirty (30) demerits imposed upon Truck Driver A. Kelly for alleged violation of Driving Rule 9 on June 8, 1989 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File SAC-19-89/MM-18-89).

(2) The Claimant shall have the discipline of thirty (30) demerits imposed upon him rescinded and his record cleared of the incident."

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 is employed by the Carrier as a CTEC Operator at Gary, Indiana. His assignment consists of operating a CTEC to move bolsters loaded with slabs of rolled steel.

On June 8, 1989, while preparing to move a bolster loaded with slabs of steel, the CTEC, which the Claimant was operating in a lowered position in order to position it under Bolster 106, struck a fire hydrant. As a result of the collision, the vehicle's fuel tank was damaged and bent upward; one battery, the battery box and a polarity were destroyed; and the vehicle's frame was cracked. The Carrier required the Claimant to submit to a drug screen test, and the Claimant requested a blood test accompany his drug screen test. The Carrier removed the Claimant from service effective the same day.

Under date of June 12, 1989, the Claimant was directed to report for a formal Investigation in connection with the following charge:

"Your alleged failure to properly operate your assigned vehicle in the proper and/or safe manner, while backing in the vicinity of No. 2 Caster, incurring damage to equipment at approximately 6:40., and during your 2:00 P.M. CTEC assignment on June 8, 1989."

After the Investigation, the Carrier determined that the Claimant was responsible as charged in violation of Driving Rule 9 of the Carrier's Safety Rules and General Regulations Governing Truck System Employees. The Claimant was assessed 30 demerits.

The Organization asserts the Carrier violated the Agreement when the Carrier failed to timely afford the Claimant a Hearing in connection with the charge leveled against him. The Organization cites Rule 57(a) which provides:

"...The Hearing will be held within ten (10) days of date when charged with the offense or held out of service."

The Organization notes the Claimant was removed from service on June 8, 1989, but the Hearing was not held until June 21, 1989. Thus, the Organization alleges the Carrier violated the Agreement when the Claimant was not properly afforded a Hearing within ten days following the day on which he was removed from service.

The Organization argues the Carrier's contention that the Claimant was withheld from service pending the result of the drug screen test is not valid because the Claimant would not have been withheld from service had his assigned vehicle not struck the fire hydrant.

The Organization maintains the Claimant was unjustly disciplined for an offense for which he was not listed in the letter of charges. Although a violation of Driving Rule 9 was not listed as a charge in the letter of charges, the Carrier found the Claimant guilty of this charge. In the letter of decision, the Carrier included the Claimant's violation of Driving Rule 9 as a reason to impose discipline.

The Carrier contends that the rule cited as a result of the Investigation was fully embodied in the charge. The Carrier notes the Claimant was charged with a specific action, and the transcript verifies that all parties were fully apprised and fully cognizant of the reason for the Hearing. The Claimant's own statement during the Investigation demonstrates no ambiguity.

The Organization contends the Claimant failed to prove the charges leveled against the Claimant. The Organization argued the Claimant operated his assigned CTEC in a proper and safe manner because the fire hydrant was not

clearly disclosed nor identified, and it could not be seen by visual inspection. In addition, the Claimant previously reported he had limited vision while operating his assigned CTEC.

The Carrier maintains the facts establish the Claimant is responsible as charged, and thereby in violation of Driving Rule 9 as it is embodied in the charge. The Carrier refers to the unrefuted testimony which shows the Claimant, during daylight hours, backed his vehicle over a fire hydrant that was protruding approximately two feet from the ground causing significant damage and disabling the vehicle.

The Organization asserted the discipline imposed upon the Claimant was arbitrary and capricious because the Carrier presented no evidence whatsoever in support of the charges leveled against the Claimant. The Carrier maintains the degree of discipline, 30 demerits, was not excessive or arbitrary, when consideration is given to the negligent and overt nature of the violation, coupled with the fact that the subject incident was the Claimant's second driving violation within 18 months that resulted in significant damage and costly equipment downtime.

With regard to the procedural issue that the charges lacked sufficient specificity:

"Charges against an employee must be sufficiently specific to allow the employee and organization to prepare a defense to 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." Third Division Award 28508.

In this case, this Board finds the charge in the notice of Investigation was sufficiently specific to allow the Claimant and the Organization to prepare a defense to the charges.

With respect to the substantive charge, this Board finds that there is sufficient probative evidence in the record to establish that the Claimant is guilty of the charge against him.

With respect to the disciplinary action, the Board will not set aside discipline imposed by a Carrier unless it is unreasonable, arbitrary, or capricious. Third Division Award 26160. In this case, the imposition of 30 demerits was reasonable.

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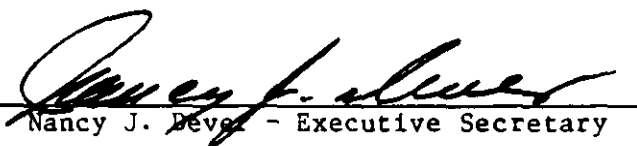
Award No. 29248
Docket No. MW-29404
92-3-90-3-334

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 12th day of June 1992.