

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

(Brotherhood of Maintenance of Way Employees
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 Mr. C. D. Mengedoht for alleged violation of General Manager's Notice to all Employees, second paragraph, Page 1 of the Safety Rules and General Regulations Governing Truck System Employees and General Rules of Conduct 'J' and Safety Rules and General Regulations #18 on March 5, 1990 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MM-9-90/147-293).

(2) The Claimant shall be reinstated in the Carrier's service with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him, reflect no interruption of service 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 by the Carrier as an Industrial Elevating Transporter Operator (IETO) at Gary, Indiana. His assignment consisted of operating a CTEC to move bolsters loaded with slabs of rolled steel. On January 15, 1990, at approximately 2:30 P.M., the Claimant completely lowered CTEC 720, and positioned it evenly under Bolster (Pallet) 151 on the north pad at No. 2 Caster. He was unaware of the malfunctioning holding valve on the left side of CTEC 720, and the uneven, "wavy" ground apparently caused the machine's rub rail to ride under the "... shorter than the usual slider plates ..." on the left side of the bolster. When the Claimant raised the machine, he was suddenly jarred as the CTEC slipped out from underneath the short slider plate, and the weight of the loaded bolster fell on the machine's platform. Claimant was not injured. Subsequent inspection revealed the slider plate on Bolster 151 and the rub rail on his machine were slightly damaged.

Under date of January 30, 1990, a formal Investigation was scheduled in connection with the following charge:

- "1. Failed to perform your duties in a safe and proper manner, knowingly engaged in an unsafe practice and utilized poor judgment when you allegedly backed CTEC 720 with an uneven deck under Pallet 151 on the north pad at No. 2 Caster at approximately 2:30 p.m. January 15, 1990, in violation of the General Notice and Safety Rule and General Regulation 12 and/or
2. Were dishonest when you allegedly failed to give a factual report of same to Assistant Superintendent A. S. Wirtes in violation of General Rules of Conduct D and J governing Truck Systems employees."

After a Hearing, the Carrier dismissed the Claimant from its service effective March 5, 1990.

The Organization maintains the Carrier violated the Agreement when it failed to afford the Claimant a fair and impartial Hearing. The Organization contends the Claimant was not afforded a fair and impartial Hearing in connection with the charges leveled against him because the Hearing Officer repeatedly interrupted the Claimant and/or his representative where questions/answers relevant to the Claimant's defense were involved. The Organization alleged the Hearing Officer also prevented proper cross-examination of the Carrier's witnesses by the Claimant's representative, and the Hearing Officer demonstrated his prejudgment of the Claimant by repeatedly asking leading questions, the answers to which would tend to militate against the Claimant.

The Carrier argued the Claimant was afforded a fair and impartial Hearing, with representation of his choosing present and participating, in full accord with the terms of the controlling Agreement.

The Organization contends the Claimant was arbitrarily disciplined for an offense for which he was not charged. The notice of Investigation listed charges, but the letter of decision established that the Carrier's decision to impose discipline upon the Claimant was because it found him guilty of the charges leveled against him in the notice of Investigation and (emphasis in original) because he was allegedly in violation of General Manager's Notice to all Employees, second paragraph, page 1 of Safety Rules and General Regulations Governing Truck System Employees, General Rules of Conduct "J", and Safety Rules and General Regulation #18.

The Organization argues the Carrier failed to prove the charges leveled against the Claimant because the Carrier's determination of guilt was based entirely on speculation and conjecture. The Organization argues the Claimant operated his assigned CTEC in a proper and safe manner. The Organization argues the Carrier based its finding of guilt on assumption and speculation that the slight damage to CTEC 720 and the slider plate on Bolster 151 was the result of malfeasance on the part of the Claimant.

The Carrier maintains the testimony establishes the Claimant's negligence caused the incident because when the Trainmaster requested another CTEC operator to reenact the particular backing operation with the same equipment, the operator performed the assignment correctly and safely. The slippage and resultant jolt did not occur.

The Organization asserts the discipline imposed upon the Claimant was arbitrary and capricious. The Organization notes the Carrier failed to reference Claimant's prior record during the Hearing but considered prior discipline on appeal.

The Carrier notes it maintains a progressive discipline policy, whereby the degree of discipline administered, reflects consideration of an employee's prior work record, the individual's longevity with the Carrier, and whether the individual has been disciplined before for a similar offense. In this case, the Claimant was hired in June 1987, worked sparingly because of personal injuries, and returned from sick leave in October 1989. By November 20, 1989, the Claimant amassed 45 demerits for violations of Safety Rules. The subject incident occurred 3-1/2 months later. The Carrier indicates the degree of discipline also reflects the nature and seriousness of providing false and/or misleading information to a Carrier official. The Board has reviewed and considered the Organization's argument, and there is insufficient evidence to support the contention.

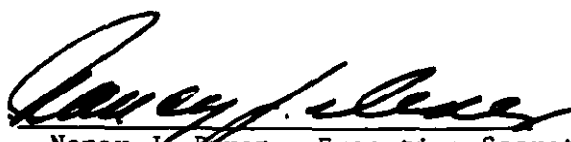
The evidence supports the Hearing Officer's finding that the Claimant violated the Rules as charged. Permanent dismissal was, however, excessive. The Claimant is to be reinstated with seniority and all other rights unimpaired, but without backpay.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest


Nancy J. Bever - Executive Secretary

Died at Chicago, Illinois, this 24th day of July 1992.