NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 THIRD DIVISION Award No. 30117

Docket No. MW-29754

94-3-91-3-111

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

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

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

1. The thirty (30) demerits assessed against IETO C.D. Mengedoht for allegedly engaging in an unsafe manner which affected his safety on November 1, 1989, was arbitrary, capricious, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File SAC-6-90/MM-2-90).

2. As a consequence of the violation referred to in Part (1) hereof, the Claimant's record shall be cleared of the charge leveled against him and the discipline assessed in connection therewith shall be rescinded.

Note: This Division has recommended that only one party submit the transcript as a part of the record in cases of this kind and has suggested that the Carrier will ordinarily be the party submitting the transcript. Therefore, the Employes will not submit the transcript but will expect the Carrier to submit a true "transcript as part of its submission for the record in this case, as per the last sentence of the first paragraph of 'INSTRUCTION FOR PREPARING SUBMISSIONS TO THE THIRD DIVISION ...' dated December 18, 1958."

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 employe 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 in this case entered Carrier's service on June 3, 1987. On November 1, 1989, while walking in the company of a fellow employee in a lighted, paved area on Carrier's property, Claimant stepped on an oil slick on the pavement, slipped and wrenched his back. But for the presence of the fellow employee, Claimant would have fallen to the ground. The fellow employee broke the fall and prevented Claimant from hitting the ground. As a result of this slip, Claimant's personal injury was properly reported and treated. There is an indication in the case file that Claimant lost time from work as a result of the personal injury but there is nothing in the record to indicate the extent of the time lost. This was the third lost time injury which Claimant had sustained since his employment in June, 1987.

Subsequently, by notice dated November 3, 1989, Claimant was instructed to appear on November 10, 1989, for an investigatory hearing on the charge of:

> "At approximately 7:45 PM, November 1, 1989 during your 2:00 PM CTEC Assignment and in the vicinity of #2 Caster, you allegedly engaged in an unsafe manner that affected your own safety when you failed to avoid a slipping hazard and stepped on a spot of oil allegedly causing you to slip and lose your footing."

The hearing was held as scheduled at which time Claimant was present, represented and testified on his own behalf. Following conclusion of the hear, Claimant was notified by letter dated November 20, 1989, that he had been found at fault on the charge and was assessed discipline in the amount of 30 demerits. The notice of discipline contained the following statement:

> "The degree of discipline assessed was determined, in part, upon consideration of your prior record."

Appeals on Claimant's behalf were initiated and progressed through the normal on-property grievance procedures and the dispute is now properly before the Board.

At the outset, we are impelled to comment on a matter which really has nothing to do with the outcome of this case, but which is disturbing on its face. The Organization's Ex Parte Submission to the Board indicates in the Statement of Claim that the dispute

concerns a 30 demerit discipline situation. In its opening statement to the Board, the Organization states that "His punishment was to be assessment of forty-five (45) demerits against his record. . .". In its summation, they again state that the discipline of "forty-five (45) demerits imposed upon Claimant was arbitrary and capricious and without just cause." They concluded their ex parte submission by stating that "The Carrier violated the Agreement when it assessed discipline of 60 demerits based on evidence not introduced or discussed during the hearing." The disturbing aspect of this is that it is either an indication of careless brief preparation or an attempt to somehow obfuscate the issues. All parties should not need to be reminded that credibility and accuracy of facts is vital in the proper presentation of any dispute to arbitration.

In its handling of this case, the Organization has advanced a fivefold argument. They contend that: (1) the Agreement was violated when no specific rule was referenced in the charge notice; (2) that the discipline assessed was based on evidence not introduced into the hearing record in violation of Rule 58(b); (3) that the hearing officer interfered with Claimant's development of the record and therefore the hearing was less than fair and impartial; (4) that there was no evidence presented to prove that Claimant was negligent or that he caused his injury; and (5) that the discipline imposed was arbitrary, capricious, improper, unjust, unreasonable and unwarranted.

The Carrier argues that not only was the hearing notice proper but also that the hearing record contained substantial evidence, including Claimant's own testimony, to support the charge. Carrier continues its argument that the hearing was fair and impartial and that the record, including Claimant's history of unsafe practices, supports the assessment of 30 demerits.

Rule 57(b) here in dispute reads as follows:

> "(b) A transcript of all evidence given at the hearing will be furnished the employe or his representative, upon written request. No evidence or statement made will be used in considering the discipline administered except such as may be introduced at the hearing and subject to cross-examination."

The application of this Rule 57(b) on this property was examined and ruled upon in the Board's decision in Third Division Award 30116, Docket No. MW-29743. We need not repeat that opinion here. It is, by reference, made a part of this Award.

On the argument of the Organization relative to the specificity of the hearing notice and the failure to include therein a particular Rule reference, we are not convinced that such an argument has any validity in this case. The hearing notice contained all of the required aspects of a "precise charge" as required by the applicable discipline rule. it is interesting to note that, at the outset of the hearing, Claimant indicated that he was ready to proceed with the hearing and it was not until after Carrier's first witness had testified that the Organization raised the issue of charge specificity. Neither Claimant not his representative was taken by surprise by any of the testimony offered. By their questioning of the witnesses, it was apparent that they knew exactly why they were at the hearing and the reason for the hearing. They had their counter contentions well prepared and participated in the hearing process without hindrance. As for the absence of citation of a particular Rule in the charge notice, the Board has repeatedly and consistently held that citation of a specific Rule in a charge notice is not an absolute prerequisite of a precise charge. In this case, the Rule mentioned in the discipline notice had a direct relationship to the charge notice and its citation in the notice of discipline was neither improper nor prejudicial.

We have examined the hearing transcript and do not find any indications in the record to support the contention that the hearing officer acted in a prejudicial manner in his handling of the proceeding. His attempts to limit testimony to germane issues relevant to the incident under investigation is not a prejudicial act. The Organization's argument in this regard is rejected.

On the merits, we find the testimony of the other employee to be significant in our determination of this case. The fellow employee acknowledged that he either saw or knew of the presence of oil slicks in the area and he avoided them. Claimant acknowledged that he also knew that the equipment does, in fact, leak oil when it is parked and that equipment is often parked in the area where he was walking. His knowledge of this type of situation demands that he be doubly cautious as was his fellow employee. It is acknowledged by all concerned that railroad operations are inherently dangerous. This is exactly why rules have been promulgated dealing with the issue of care to avoid slipping hazards. These situations do exist and employees must exercise diligent care to avoid them. We cannot say in this case that Carrier's conclusion that Claimant was less than diligent to avoid the slipping hazard which was obviously avoided by the other employee was an improper, unreasonable or unwarranted conclusion.

There is no indication in this case record as to the degree of assessed discipline which resulted from the finding of guilt on the

instant charge and the degree of discipline which resulted from the consideration of the prior work and discipline record. Carrier's notice of discipline clearly indicates that the degree of discipline was determined "in part" on consideration of the prior record. Therefore, it is the determination of the Board that the assessed discipline should be modified "in part" to rectify the inclusion of the prior record in the determination inasmuch as such prior record had not been included in the hearing record as required by the negotiated rule. The 30 demerits is therefore changed to 20 demerits.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin/lw
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 4th day of April 1994.