

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 30159  
Docket No. MW-29102  
94-3-89-3-541

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 (25 demerits) imposed upon Track Foreman G.M. Watts in connection with alleged 'negligence in the performance of your duties at about 1:50 P.M., December 6, 1988, when EJ&E 71106, being shoved by Yard Sweeper #151 collided with Engine 301 on Track 11-B at the Coke Plant road crossing' was unwarranted, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File TM-5-89/DG-502-89).
2. The Claimant's record shall be cleared of the charges leveled against him, the twenty-five (25) demerits imposed upon him shall be removed from his record and he shall be compensated for any 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 employee 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.

At the relevant time, Claimant was a Track Foreman with 29 years of service. On December 6, 1988, Claimant and a two man crew were assigned to Yard Sweeper #151 to clean Track 11-B in the Coke Plant. Claimant assigned one of the crew members to operate the yard sweeper and another to perform manual cleaning.

On that date, a collision occurred between the yard sweeper and an engine. At the time, Claimant was not operating the sweeper. However, Claimant and the two employees were held out of service effective December 6, 1988, pending the results of a drug screen. The test results were negative and Claimant and the crew members were paid for the three day period they were withheld from service.

By letter dated December 27, 1988, Claimant and the crew members were notified to attend a hearing on January 4, 1989, (which hearing was eventually held on January 18, 1989). Claimant and the Machine Operator were assessed 25 demerits for negligence. By letter dated March 29, 1989, the Carrier rescinded the 25 demerits given to the Machine Operator. Claimant's discipline remained and this claim followed.

The Organization contends that the hearing was not held in a timely fashion. We agree.

In relevant part, Rule 57(a) states:

"...If the offense is considered sufficiently serious, the employee may be suspended pending the hearing and decision. ... The hearing will be held within ten (10) days of the date when charged with the offense or held out of service. ..."

Claimant was held out of service on December 6, 1988, notice of the Investigation issued December 27, 1988, setting a hearing for January 4, 1989, and the hearing was ultimately held January 18, 1989. Because Claimant was held out of service on December 6, 1988, and was not even charged until December 27, 1988, initially setting the hearing for January 4, 1989, the Carrier did not comply with the ten day time limit for holding the hearing from the time Claimant was held out of service.

The Carrier argues that withholding Claimant from service was for purpose of administering the drug screen and, due to the negative result and because Claimant was compensated for the three days he was withheld, the withholding from service had nothing to do with the discipline. Therefore, according to the Carrier, the "held out of service" clause in Rule 57(a) is not applicable.

The Carrier's argument is not persuasive. The withholding from service and the charges forming the basis of the discipline all arose from the same incident on December 6, 1988. Moreover, there is nothing in Rule 57(a) which makes the distinction the Carrier seeks so as to carve out exceptions from the running of the ten day time limit for holding hearings when employees are withheld from service pending the outcome of drug screens and then successfully pass those screens but are then later charged with other misconduct arising out of the same incident. The language is clear and mandatory - "The hearing will be held within ten days of the date when charged with the offense or held out of service" [emphasis added]. Claimant was held out of service on December 6, 1988. By operation of the clear language of the Rule, the clock began to run on December 6, 1988. Under the present circumstances, the reason Claimant was withheld from service - whether such was by choice of the Carrier or by requirement - is therefore irrelevant as a matter of contract to the operation of Rule 57(a). This Board does not have the authority to insert exceptions into the language when no exceptions are provided by the parties.

Taken to its logical extent, the Carrier's argument would allow it to withhold an employee from service for one reason and issue a notice of Investigation many weeks (or months) later for another reason stemming from the same incident claiming the Investigation was for misconduct unrelated to the withholding from service. The carrier could therefore easily avoid operation of the ten day requirement for holding hearings. That kind of logic would read the phrase "or held out of service" out of Rule 57(a) and would make the time limits in the Rule contingent upon how the Carrier chooses to phrase the charges. The phrase "held out of service" then becomes surplusage. A fundamental rule of contract construction requires avoiding constructions which render negotiated language meaningless.

Rule 57(a) was not followed. The discipline shall therefore be rescinded.

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Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Linda Woods  
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 26th day of April 1994.