

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30865
Docket No. MW-31024
95-3-92-3-912

The Third Division consisted of the regular members and in addition Referee Dennis E. Minni 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 discipline fifteen (15) demerits imposed upon IETO J. E. Farmer for allegedly, ... being unavailable for service on the dates of June 17, 18, 19, 20, 21 and 22, 1991., was unwarranted, on the basis of unproved charges and in violation of the Agreement (System File SAC-4-91/MM-5-91).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be cleared of the charge leveled against him and the discipline assessed in connection therewith shall be rescinded."

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 on 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, an Industrial Elevating Transporter Operator, was issued fifteen demerits placing him five demerits from dismissal after a formal Investigation held on July 8, 1991 concerning the allegation that he violated Rule "X" (Safety Rules & General Regulations Governing Truck Systems Employees) by not being

available for one of nine calls to come to an assignment between June 17 and 22 in 1991.

The third paragraph of Rule X states:

"An employee subject to call must not absent himself from his usual calling place without notice to those required to call him and must insure that in any case he can be contacted for a call to duty."

The Carrier based a portion of its decision and the degree of penalty upon the past record of the Claimant in that he was similarly unavailable five times during the last two year period.

Although not scheduled to work he was subject to call and well aware of his need to make himself available. He received a fair hearing and the penalty assessed is within expectations and issued in good faith and upon the preponderance of the evidence according to the Carrier.

The Organization stresses that Claimant was not actively assigned on the dates in question being instead on furlough and accepting work off an Extra board per Rule 42 of the Agreement. Also, the Carrier failed to prove that the Claimant failed to make himself available and denied Claimant a chance to defend himself against the charges.

The reliance upon or use of, at least in part, the Claimant's past record in arriving at the decision and/or affixing the penalty herein was incorrect. Rule 57(b) of the Agreement precludes evidence not raised at the hearing from being utilized. This is crucial because in essence Claimant would be found to have been purposefully unavailable on the June, 1991 dates in question due to his availability status on earlier dates. This is unfair and illogical. Also, the record does not support the Carrier's claim as to June 17, 1991 unavailability based on Carrier witnesses own testimony. Whatever number of calls not connected on this date cannot be charged as refusals to the Claimant.

The actual employment status of Claimant at all times pertinent herein was that of a furloughed employee. Since he had no assignment to protect he cannot be convicted of circumventing management efforts to press him into service as an extra board nominee. In fact Federal Law (Railroad Retirement Board) requires furloughed employees to actively seek employment. That law pays fringe benefits for missed days if an employee is looking for optional work.

Thus, the record does not support the allegations against the Claimant and the conclusion is unduly harsh and inequitable to this Claimant.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of May 1995.