Award No. 2813
Docket No. MW-2820

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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

1. That the discipline administered against Section Foreman Eugene Perry by dismissing him from the service and against Section Foreman W. L. Berry by assessing him with 60 demerit marks because of accident occurring between Benning and Columbia Junction on the Sunnyside Branch on February 18, 1944 was improper and unfair.

2. That Section Foreman Eugene Perry shall be restored to the service as Section Foreman with seniority rights unimpaired and paid for all time lost at Section Foreman's rate of pay since the date of his dismissal March 2, 1944 until restored to service:

3. That the 60 demerit marks assessed against Section Foreman W. L. Berry shall be removed and his record cleared.

OPINION OF BOARD: As will be revealed by an examination of the submissions of the respective parties this controversy arises over discipline assessed against two employes because of an unfortunate accident resulting in the death of another.

No material issues with respect to jurisdictional or procedural matters appear in the record. Therefore, the only questions presented for determination are (1) whether the placing of responsibility for the accident was sustained by the evidence, and (2) whether the punishment imposed was so unjust, unreasonable and severe as to amount to an abuse of discretion.

We shall first deal with that portion of the claim having to do with the dismissal from service of Section Foreman Eugene Perry for failing to work properly and according to instructions, and for failure to determine that men working with him were in clear of possible danger at the time such work was being performed.

The question of evidence can be summarily disposed of. Whatever may be said concerning the situation confronting the Foreman with respect to the work which he was in charge of and performing at the moment of the accident, and we readily concede it was an unusual one, it appears from a careful examination of his own testimony, which is too lengthy to relate in detail, that if he had been following instructions received from the Carrier's Roadmaster pertaining to removal of rails under existing conditions he would have performed such work in an entirely different manner. True, as is pointed out,

compliance with those instructions might have resulted in the same tragedy but that is a matter purely of conjecture and in no sense is justification for the conclusion advanced by the Brotherhood that the accident was an unavoidable one. However, the salient fact is, whether it be attributed to haste, carelessness, disobedience or emergency, that he was not pursuing a course of conduct in line with his instructions, which, if he had followed them would have relieved him from all imputations of carelessness, negligence or what-not and placed the primary responsibility upon the Carrier where it properly belonged. Failing in that, he assumed the consequences of his independent action—namely the possibility of being disciplined for failing to work properly and according to instructions. Admitting it, he placed himself in a position where he cannot now be heard to say there was no evidence on which to sustain the Carrier's finding discipline was proper.

There remains the question whether the penalty imposed—dismissal from service—amounted to an abuse of discretion. The rule to which this Division is committed is so well established that it requires no citation of our awards. It is that the Division will not substitute its judgment for that of the carrier in a matter of discipline unless it appears the latter's action is so clearly wrong as to constitute an abuse of discretion. Otherwise stated, the action of the Carrier must be found to be arbitrary, capricious and in bad faith if it is to be disturbed. In the light of the rule as established can it be said that the punishment imposed was so unfair, unreasonable and severe as to permit it to be set aside? It must be remembered that severity of punishment alone is not sufficient. Coupled with severity must appear testimony from which it can be said the Carrier's action was arbitrary and capricious. A diligent search of the record fails to disclose any evidence of that character. Since it is not there we cannot substitute our judgment for that of the Carrier or disturb its action. Admittedly, as pointed out and strenuously urged, the discipline might have been lighter, particularly in view of his long record of service and the unusualness of the situation with which he was dealing when the accident occurred. On the other hand, fairness requires recognition of the fact the Carrier in determining responsibility and assessing discipline was dealing with a serious problem. It had just lost an employe for whose personal safety it was primarily responsible, under circumstances where the man who was doing the work which resulted in the accident admitted he had not performed it in the manner required by the instructions of the Roadmaster. For all we know the Carrier may have decided a severe penalty was necessary not only because of the conduct of the employe involved but also to insure future compliance with instructions and the safety of employes. It may have weighed all matters referred to and given them consideration in reaching its decision. Be that as it may, the question of severity of punishment, so long as it is not arbitrarily and capriciously imposed was for its determination. Therefore, under the circumstances of this case, even though it be conceded there were facts which should have been considered in determining its extent, we cannot say that failure to give those facts the force to which Claimant deems they were entitled constitutes an abuse of discretion on the part of the Carrier.

As we direct our attention to the other phase of this controversy we are confronted with an entirely different situation. The claim is that Foreman Berry's discipline was improper and unfair. With this we are inclined to agree.

It must be kept in mind that the rule to which we have heretofore referred has application only in cases where there was evidence to sustain the finding upon which discipline is assessed. It is never applicable when there is no evidence in the record to sustain the charges preferred. Here, the notice required Berry to attend an investigation to determine facts and place responsibility regarding a fatal injury to one Esquibel on February 18, 1944. Discipline of 60 demerits was imposed for his responsibility in failing to carry out his duties as supervisor and in assisting Section Foreman Perry in having men clear of possible danger during the time the work which resulted in the death of the individual named in the investigation notice was performed.

No useful purpose would be served by relating the testimony in detail. Summarized, as we read it, it discloses the accident occurred on Perry's section and that Berry was merely assisting him on the occasion in question. Under such circumstances the former was in charge of and directing the work. Both employes so testified and the Carrier through the form of its questions to witnesses conceded that to be the fact. It further reveals that shortly after 4:00 P. M. upon arriving on the scene Berry left to procure some angle bars and did not return until about 6:30. The accident occurred around 7:05. At the moment Perry hit the bolt releasing the rails which caused it Berry's back was turned and he did not see that act or have an opportunity to observe whether others there were then clear of danger. Certainly, it cannot be said there was evidence to sustain the finding he failed to assist Perry in having men out of danger at the time. It may well be he failed to carry out his duties as supervisor, although in passing it can be stated we fail to find any direct testimony disclosing his duty was that of a supervisor under the circumstances, but if he did, the Carrier failed to establish such fact by evidence. All the record discloses is that he was there from 6:30 to 7:05 at a time when Perry was in charge. In fact his statement was, and no one refutes it, that when he returned all the work had been done except breaking the bolt. What he did or did not do, in failing to carry out his duties as an alleged supervisor and for that matter what he did or did not do in failing to have men clear of danger while the work was going on, can be determined from the record only through conjecture and speculation. That is not enough. It was incumbent upon the Carrier to establish the findings on which it assessed discipline by positive evidence. Failure to do that, or when the case is brought here for review on charges of impropriety and unfairness failure to produce a record disclosing testimony of that character, is fatal and precludes the sustaining of its action.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the record discloses (1) no basis for disturbing the action of the Carrier in its discipline of Foreman Eugene Perry and (2) no evidence to sustain its action in assessing discipline of 60 demerit marks against Foreman W. L. Berry and that such demerit marks be removed and his record cleared.

AWARD

Claim denied as to Foreman Eugene Perry. Sustained as to Foreman W. L. Berry.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 21st day of February, 1945.