

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21239
Docket Number SG-21393

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Florida East Coast Railway Company

STATEMENT OF CLAIM: Claim of the Brotherhood of Railroad Signalmen on the Florida East Coast Railway Company:

On behalf of Signal Maintainer M. E. McCue, who was suspended from duty pursuant to a letter dated March 26, 1975, that this discipline be stricken from his record and that he be reinstated to service immediately with all seniority and rights reinstated and that he be paid for all time that he has been withheld from service. [Carrier File 26]

OPINION OF BOARD: The claim involves the termination of a Signal Maintainer pursuant to the so-called Brown System of demerits and discipline which has been utilized by this Carrier for signal employees since 1930. The details of the system are set forth in pertinent part herein in a "Circular No. 2" and reiterated in a Notice dated May 1, 1973 as follows:

"An individual account is maintained for each employee on a record kept especially for that purpose in the St. Augustine Office; an entry being made on such record in each case of neglect of duty, violation of the rules or of good practices, accidents, improper conduct, etc., the same being determined by the Superintendent Signals and Communications.

* * *

A reprimand or demerit is not noted against an employee's record without written notice to him.

Not less than five demerits are assessed, and in multiples of five, but in no case to exceed thirty demerits for any one offense.

Reprimands and demerits placed against the record of an employee, are cancelled by satisfactory service for various periods, as follows:

- (a) A reprimand is cancelled by a clear record of three months.
- (b) Five demerits is cancelled by a clear record of six months.
- (c) Ten demerits is cancelled by a clear record of nine months.
- (d) Thirty demerits is cancelled by a clear record of one year.
- (e) Sixty demerits is cancelled by a clear record of eighteen months.

* * *

"An accumulation of ninety (90) demerits is taken as evidence that the employee is not rendering satisfactory service, and suspension from duty follows, at which time the entire record is reviewed and such further action taken as the circumstances warrant."

* * *

Also relevant in this matter is Article 33 - Discipline of the Agreement between Carrier and the Organization:

"RULE 33

Discipline

(a) An employee who has been in service more than forty-five (45) days shall not be disciplined or dismissed without investigation, and if he so elects, he may be represented by an employee of his choice within the scope of this Agreement or duly accredited representative. He may, however, be held out of service pending such investigation. The investigation shall be held within ten (10) days of the date when charged with the offense, or held from service. A decision will be rendered within ten (10) days after completion of the investigation.

(b) An employee, on written request, will be given a letter stating the cause of his discipline. A transcript of the evidence, when taken in writing at the investigation or on the appeal, will be furnished, on request, to the employee.

(c) An employee dissatisfied with a decision, will have the right to appeal in succession up to and including the highest official designated by the management to handle such cases, if written notice of appeal is given the official rendering the decision within thirty (30) calendar days from the date of the issuance of the decision. This appeal may be made by himself or his duly accredited representative and shall be governed by the provisions of Rule 34. If no such appeal is made within that time the case will be considered closed and thereafter barred.

(d) If the charge against the employee is not sustained, it shall be stricken from the record. If by reason of such unsustained charge, the employee has been removed from position held, reinstatement will be made and payment allowed for the assigned working hours actually lost while out of service of the Railway, at not less than the rate of pay of position formerly held, or for the difference in rate of pay earned, in or out of the service."

Claimant entered Carrier's service in December 1971 and following accumulation of several demerits was notified on March 13, 1975 of a hearing and investigation into a charge of accumulating 90 or more demerits and being subject to removal from service. It should be noted that at the time Claimant had been assessed 105 demerits, 45 of which had been imposed on March 12 and 13, 1975 for two earlier offenses. The record shows that Claimant on March 12, 1975 was assessed 30 demerits for improper performance of signal repairing duties on February 14, 1975 (turning the signal head away from the track to change lens) and 15 demerits on March 13, 1975 for negligent operation of a Company truck on February 11, 1975. As noted supra in Rule 33 these latter two disciplines were thus subject to appeal by Claimant at any time before April 15, 1975. For reasons known only to Claimant and his local representative no appeal ever was taken of these last two demerit decisions. Thus, at the hearing held March 21, 1975 into the question of 90 accumulated demerits Claimant's record was certified to be as follows:

"DISCIPLINE:

- 4-15-74: 30 demerits for failure to have Company Vehicle HR 58 under control, resulting in accident involving this vehicle and 1971 Chevrolet Bel Aire station wagon at approximately 7:00 PM on April 15, 1974, while traveling north on the 2200 block of US Highway No. 1, Dania, Florida, failing to observe the Chevrolet Station Wagon stopping in front to make a left turn, striking the automobile in the rear, causing damage to both vehicles.
- 6-4-74: 30 demerits for having left Company Truck HR 62 in gear and failing to apply emergency brake when parking and leaving that vehicle unattended at the 7-11 Food Store at N.E. 4th Street and 6th Avenue, Delray Beach, Florida, at approximately 9:30 AM, June 4, 1974, resulting in it rolling back and striking a 1974 Oldsmobile automobile owned by Mr. Sam Fishman of Kings Point Saxon Apartment C-11A, Delray Beach, resulting in damage to both vehicles.
- 12-4-74: 5 demerits cancelled account maintaining clear record for six months.
- 2-11-75: 15 demerits account having been charged with negligence in the operation of Company vehicle HR 86 at approximately 7:00 PM, February 11, 1975, resulting in the vehicle becoming stuck near Vero Beach and damage to the vehicle's drive shaft as a result of overtaxing the capabilities of the vehicle when attempting to free it.

"2-14-75: 30 demerits account having been charged with improper performance of duties by having rendered Signal 2438, just south of Ft. Pierce Yard, inoperative for northbound trains at approximately 11:30 AM, February 14, 1975, by turning the signal head away from the track while repairing the lens and hoods of that signal.

3-13-75: Total of 105 demerits outstanding against record.

COMMENDATIONS: None"

Thereafter, Claimant on March 27, 1975 received the following notice:

"Referring to formal investigation conducted with you in Assembly Room at Fort Pierce, Florida on March 21, 1975 for the purpose of reviewing your record account your having accumulated ninety (90), or more, demerits and being subject to removal from the service of the Railway under the provisions of Circular issued by Superintendent, Signals & Communications H. E. Webb, May 1, 1973.

The review of your record established that the entries of discipline were correct and evidenced that you have not been rendering satisfactory service. You are, therefore, suspended from duty, subject to any appeal upon the demerit entries that have not been closed made in accordance with the Discipline and Time Limit Rules of the work rules Agreement governing Signal & Communications Department employees of the Florida East Coast Railway."

Notwithstanding the continuing appeal rights on the last two entries, no appeal was taken and, on April 25, 1975 Claimant was terminated. By letter dated April 25, 1975 the Organization on behalf of Claimant appealed the decision to terminate.

Claimant resists his termination for the most part by contesting herein the validity of the last two discipline entries on his record. Also he asserts that, taken individually, none of his transgressions merit the ultimate discipline of discharge. We do not decide those issues nor do we indicate any view whatever on their merits because they are not properly before us. The time for appeal of the last two entries expired without movement by Claimant and so they presumptively are valid on his record. Also, we note that at the March 21, 1975 hearing Claimant stated as follows:

"Mr. Vlasin: Mr. McCue, are you familiar with the entries that are on your personnel record?

Mr. McCue: Yes

Mr. Vlasin: Have you been notified in each case when discipline has been assessed against your record?

Mr. McCue: Yes, Sir.

Mr. Vlasin: Have you made a protest or appeal on any of these entries that are on your record?

Mr. McCue: No, Sir.

Mr. Vlasin: Are you satisfied, Mr. McCue, with the entries having been entered in this matter.

Mr. McCue: Yes

Mr. Vlasin: Are you then telling me for the record here that the record has been fair and just against your record.

Mr. McCue: Yes, Sir.

Mr. Vlasin: You have no protests to any of the records whatsoever?

Mr. McCue: No, Sir.

Mr. Vlasin: Do you anticipate to appeal any of the notices that are still open to appeal on your record?

Mr. McCue: I don't believe so, Sir."

Additionally there is some indication on the record that Claimant sought reinstatement on a leniency basis.

Our review of the record, within our appellate role, convinces us that substantial evidence supports the Carrier's determination that accumulated demerits exceed the permitted maximum and Claimant was afforded a fair investigation together with all appeal rights. On the record before us we cannot conclude that Carrier acted arbitrarily or unreasonably in this discharge. Leniency in these circumstances is a prerogative for Carrier, but may not be ordered by us. We must deny the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

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

The Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1976.