

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

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Eastern Lines)

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

(1) The dismissal and subsequent disciplinary disqualification of Track Foreman E. J. Baggett for alleged failure to protect track structure from dangerous conditions on July 7, 1988 was arbitrary, capricious, without just and sufficient cause and on the basis of unproven charges (System File MW-88-148/474-30-A SPE).

(2) The Claimant shall be reinstated as a track foreman with seniority and benefits unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all 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 employe or employees involved in this dispute are respectively carrier and employees 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.

On the afternoon of July 7, 1988, Claimant was advised of engine burns on main line trackage. After inspecting the burns, Claimant called the dispatcher and placed a 10 mile per hour slow order on the track. He had his crew repair the track the following day. On July 12, 1988, Claimant was removed from service pending investigation in connection with his failure to properly protect the track from dangerous conditions and his failure to notify his Supervisor. The investigation was held on July 27, 1988, at which time Claimant testified that he thought the track was safe for a slow order on July 7, but needed to be taken out of service the next day because "[t]he track structure had deteriorated to a maximum that is getting unsafe and [he] decided that [he] did not want gas trains or any other train go over the track until it was repaired." Claimant also testified that the engine burns had not gotten any worse overnight.

Claimant was dismissed from service effective August 2, 1988. On November 28, 1988, the Carrier sent Claimant a letter advising him that the discipline had served its purpose and he was offered reinstatement. The letter went on to advise him that he was disqualified from all supervisory positions because of his past record of his inability to perform satisfactorily as a Foreman and Assistant Foreman. Because he was able to exercise his seniority only to positions which did not require him to supervise other employees, Claimant did not resume work until April 3, 1989.

The Carrier asserts that Claimant's disqualification as a Supervisor is independent of the disciplinary action and was the result of its exercise of discretion granted by Article 8 of the Agreement, which governs promotion and demotion. In light of the circumstances in this case, we do not agree. Claimant was never permitted to return to service as a Foreman. His reinstatement, therefore, was conditional upon the disqualification. The Organization, on the other hand, has appealed for Claimant's "restoration to duty, with seniority, and all other benefits restored intact." The Claim, therefore, is for Claimant's reinstatement as a Foreman. The Carrier's final denial of this Claim states: "As the discipline assessed and the disqualification were justified, the claim is respectfully denied in its entirety." As we understand the Carrier's position, we conclude that Claimant's disqualification was part of the modification of his discipline.

There is substantial evidence in the record to support the Carrier's conclusion that Claimant failed to take the track out of service when the defect was first discovered and further failed to notify his Supervisor. According to the testimony, the engine burns were as serious on the day they were discovered as they were when the track was repaired the following day. The repairs, therefore, should have been made when the defects were first discovered. Furthermore, Claimant testified that he did not make any effort to notify his Supervisor of the condition of the track other than an attempt to call him at the office. His responsibility to inform the Supervisor did not end there.

Because of the seriousness of Claimant's offense, we do not agree that the Carrier improperly withheld him from service pending Investigation.

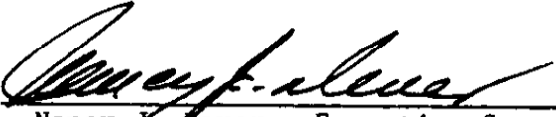
Claimant's failure to take the appropriate actions certainly warranted discipline. Permanent disqualification, however, is excessive under the circumstances. Accordingly, we direct that Claimant's seniority as a Foreman and Assistant Foreman be restored and that he be allowed to exercise such seniority as positions become available.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1990.