

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29247
Docket No. MW-29377
92-3-90-3-291

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro 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 dismissal of Industrial Elevating Transporter Operator J. Goodpaster, effective June 2, 1989 for his alleged violation of '... Operating Within Building Rule 1 and Safety Rules 15, 16, and 17. ***' was arbitrary and capricious, based on unproven charges and in violation of the Agreement (System File SAC-14-89/MM-19-89).

(2) As a consequence of the afore-cited violation, the Claimant shall be reinstated with all rights unimpaired, his personnel record cleared of the charges 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 employes involved in this dispute are respectively carrier and employes 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.

The Claimant was assigned as an Industrial Elevating Transporter Operator, and he was assigned to CTEC 722, located at the Gary Sheet and Tin Mill in Gary, Indiana. On May 12, 1989, while Claimant was operating CTEC 722 near Building 25-P, a switch engineer entered the building with the switch engine lights and siren on. The Claimant allegedly entered the building against the warning lights.

Under date of May 17, 1989, the Claimant was instructed to appear for a Hearing in connection with the charge:

"...that during your 6:00 a.m., CTEC assignment on May 12, 1989, and at approximately 9:15 a.m., you allegedly operated your assigned vehicle in an unsafe and improper manner by allegedly entering the facility located at Tract 25-P Gary Sheet and Tin Mill against the warning light governing movement at this location at the same time EJE locomotive #459 was operating on this track providing service to this facility."

After a Hearing, the Claimant was dismissed from the service of the Carrier for his violation of the aforementioned Rule.

The Organization argued the Claimant was denied his Agreement right to due process because he was not notified in writing of the precise charge against him in violation of Rule 57(a) of the Agreement. The Organization contends the notice of discipline notified the Claimant that a Hearing would be held in connection with the charges of unsafe and improper operation of an assigned vehicle. However, the notice of discipline stated:

"From the facts developed at this investigation and from a review of the transcript, I have determined that you were responsible as charged, thereby in violation of Operating Within Building Rule 1 and Safety Rules 5, 16, and 17."

The Organization argued, inasmuch as the Claimant was not notified in writing of the precise charge leveled against him prior to the Hearing, he was denied his Agreement right to due process.

The Carrier maintains the Rules violations cited in the notice of discipline were embodied in the charge. The Carrier asserts the Claimant was charged with a specific action, and the transcript verifies that all parties were clearly apprised and fully aware of the reasons for the Hearing.

The Organization argued the Carrier failed to present credible evidence that the Claimant operated his assigned vehicle in an unsafe or improper manner because the Carrier failed to establish entering Building 25-P with the "warning lights" and siren on constituted a violation of any Rule. The Organization maintained the Carrier incorrectly characterized "warning lights" as "stop" signals.

The Carrier argued the testimony evidences that all parties, including the Claimant, were fully aware of the fact that activated warning lights and sirens warn against vehicles entering the building because of railroad switching operations. The Carrier indicated the CTEC lacks mobility and maneuverability, so the Carrier must insist upon strict observance of safety rules, especially when these pieces of equipment are operating in and around buildings in close proximity to operational trains.

The Organization argued the discipline imposed upon the Claimant was arbitrary, capricious, and in violation of the Agreement. The Organization noted the Carrier failed to offer testimony to refute the allegations of the Local Chairman. The Organization argued the discipline imposed upon the Claimant was without just and sufficient cause because Rule 57(b) provides:

"no evidence or statement made will be used in considering the discipline administered except such as may be introduced at the Hearing and subject to cross-examination."

The Organization contended the Carrier failed to introduce the Claimant's alleged "prior record" at the Hearing. As a result, the Claimant's prior record was not subject to cross-examination.

The Organization objected to the Carrier's implementation of the demerit system of Discipline because it unreasonably permits the Carrier to impose demerits or any other discipline it might choose, without any showing as to how it determines the number of demerits, and the quantum of discipline for any given offense. The Organization further asserts the imposition of discipline in this case is arbitrary and capricious because the Carrier did not assess the Claimant with demerits on the letter of discipline.

The Carrier noted Claimant amassed 80 demerit marks against his personal record. The Claimant was found to be responsible for violation of Carrier rules on three prior occasions, two of which resulted in considerable property damage, and a third resulted in a near train-truck accident. In addition, Claimant amassed 90 demerits marks within his first full year of active service as a Carrier truck driver. At the time of the subject disciplinary action that resulted in his dismissal, the Claimant had less than two full years of active Carrier service.

With respect to the preciseness of the charges, this Board finds the notice was proper despite the fact that it did not mention a specific Rule violation. As this Board has held in innumerable Awards, the purpose of a notice of Investigation is to place Claimant on timely notice as to the specific incident involved, the date and close approximate time of the occurrence, and sufficient detail so that Claimant can properly prepare his defense. Thus, initially, he is assured Agreement due process. Third Division Award 21020.

This Board finds the notice of Investigation in this case fulfilled these requirements. The notice timely notified the Claimant of the specific incident including the date and the approximate time. In addition, the notice provided sufficient factual detail to enable the Claimant to prepare a defense.

With respect to the substantive charge, this Board finds that there is sufficient probative evidence in the record to establish that the Claimant is guilty of the charge against him. Based on the testimony of the Claimant, the engineer, and the yardman, the Hearing Officer had substantial evidence to find Claimant violated Carrier Rules by backing his CTEC into the building

without permission, notwithstanding the warning lights and a siren were operating indicating the presence of a train in the area.

With respect to the disciplinary action, the Board will not set aside discipline imposed by a Carrier unless it is unreasonable, arbitrary, or capricious. Third Division Award 26160.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 12th day of June 1992.