

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41705
Docket No. MW-42006
13-3-NRAB-00003-120367**

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

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Florida East Coast Railway**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. T. McClary by letter dated September 1, 2010 in connection with his service record review as a result of demerit accumulation totaling one hundred (100) demerits was arbitrary, capricious and in violation of the Agreement (Carrier’s File D-106).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. McClary shall now be reinstated to service with all rights and benefits restored and he shall be compensated for all lost wages as a result of the aforesaid dismissal.”**

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 June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The material facts in this case are largely undisputed. The Carrier utilizes a demerit discipline system whereby misconduct is generally handled by the imposition of demerits. This discipline system is contained in Rule 12 – Discipline of the parties' Agreement. Under this system, the Carrier may assess between five and 30 demerits, in multiples of five, for any one offense. Demerits may be removed from an employee's record after a period of satisfactory service. If the Carrier deems that a more stringent disciplinary action is warranted rather than the issuance of 30 demerits, but barring dismissal, Rule 12 permits the Carrier to suspend an employee, without pay, for a period of time up to 60 days. Discipline cannot be administered without the employee first receiving a fair and impartial investigation, but Rule 12 (a) also permits an employee to admit responsibility in writing and waive hearing.

Rule 12 (x) reads as follows:

“(x) Disloyalty, dishonesty, desertion, intemperance, immorality, insubordination, incompetence, willful neglect, inexcusable violation of rules resulting in endangering or destroying Company property, jeopardizing the safety of employees or public, making false statements, or concealing facts concerning matters under investigation will, as heretofore, subject the offender to summary dismissal.

An accumulation of ninety (90) demerits will be taken as evidence that the employee is not rendering satisfactory service and suspension from duty will follow the actual notice of the entry of the ninetieth or more demerit, at which time the entire record will be reviewed and such further action taken as the circumstances warrant. If on appeal of a demerit entry it should be determined that the demerits were not justified, reducing the total below ninety, the provisions of this rule will apply.”

At all times relevant to this dispute, the Claimant was employed as a Trackman, having been first hired on April 7, 1998. On July 6, 2010, the Claimant signed a Notice of Discipline in connection with an incident that occurred on July 2. The Notice of Discipline stated:

"I, Tracy McClary, accept responsibility for the infraction listed below:

Absent without permission (AWOP) - failure to report to duty on July 2, 2010, without prior approval. This is in addition to being (AWOP) on May 25, 2010, and upon returning to work received verbal counseling to protect my assignment at all times unless approved by my track supervisor or track foreman while working as trackman on Ft. Lauderdale Section and I waive my rights to a formal investigation.

I understand that my service record will be assessed 15 demerits.

By accepting this discipline, I am waiving my right of appeal."

Prior to the issuance of this discipline, the Claimant had accumulated 85 demerits, all of which were assessed through the waiver of investigation process. Thus, this discipline entry resulted in the Claimant having 100 demerits. This invoked the provisions of the second paragraph of Rule 12 (x). Consequently, Chief Engineer R. B. Stevens, by letter dated July 8, 2010, directed the Claimant "to attend a Formal Hearing for the purpose of reviewing [his] entire Service Record." That Hearing was conducted on August 17, 2010. It was undisputed at the Hearing that the Claimant had accumulated 100 demerits and none had been appealed. On September 1, 2010 Stevens wrote to the Claimant to advise him that "it was determined that the entries of discipline were correct and evidenced that [his] services have not been satisfactory." The letter further informed the Claimant that he was dismissed effective immediately.

The Organization appealed the Claimant's dismissal, arguing that Agreement due process had not been adhered to and that the Carrier had failed to prove that any of the demerits on the Claimant's record were sustainable. The following

paragraph from the Organization's letter of appeal is the sum and substance of its position taken on the property:

"From the outset, we vehemently take exception to the conducting of this hearing absent the carrier allowing full disclosure of the facts of this case. This within itself is a grave miscarriage of justice. Had the carrier pursued the facts of the present case of demerits, it would have been clear that Mr. McClary is innocent of any wrong doing. On the date of the alleged incident, Mr. McClary called in and was unable to reach his supervisor to advise that he was unavailable for service. He therefore left a message advising of his situation and unavailability. In the past the carrier has consistently allowed employees to leave messages for absence which they were not penalized for. As set forth in the carrier's own past and accepted practice, Mr. McClary protected his assignment. More specific details of this case could have been addressed had the carrier taken the time to review the case prior to and on the date of the hearing. Vice Chairman Glisson attempted to address the case details on the date of the hearing and was denied. There can be no doubt that the carrier was predetermined to find guilt where there was no guilt to be found."

The Board finds the Organization's position to be erroneous for several reasons. First, it is evident that the practice on this property has been to limit the Hearing pursuant to Rule 12 (x) to an examination of whether the employee's record reflects the correct number of demerits, and has taken into consideration the possibility of demerits being cancelled by maintaining a clear record. This conclusion was reached by Public Law Board No. 6991 involving this Carrier and the United Transportation Union. That Board, interpreting the same Rule, held:

"Contentions of the Organization that Claimant had been denied the right to a fair and impartial hearing are found to be without merit. A right did not exist at the administrative hearing to essentially reopen past disciplinary hearings or signed waivers on charges that had led to previously assessed demerits. The purpose of the administrative hearing was to review and verify the numerical

existence of demerits leading to the accumulation of Claimant's one hundred two (102) demerits. It was not to consider argument involving past investigative hearing or waivers of a hearing that attached to past demerits. Moreover, by his own admission, Claimant acknowledged the record of demerits to be as listed on his service record."

As in that case, the Claimant acknowledged that his record showed that he had accumulated 100 demerits. Additionally, the 15 demerits he received that resulted in his having more than 90 demerits were the result of his waiving an investigation. As noted above, he had accepted responsibility for his violation and agreed that he waived his right of appeal. It would be improper for the Board, given the clear and unambiguous language of the waiver, to consider the merits underlying the discipline. We would be asserting jurisdiction over an issue the parties have agreed could not be placed before us. Even if the discipline had been subject to appeal, the Hearing record indicates that he had not called in to report his absence until the following morning.

We note from the Claimant's service record that this is the third time he has been dismissed by the Carrier. In September 2002 he was dismissed for being absent without proper authority and insubordination, but was then reinstated on a leniency basis. He was again dismissed in March 2003 after accumulating 111 demerits, mostly for attendance matters. He was reinstated on a leniency basis for a second time approximately three months later. When he was reinstated that time, he was informed "there will be no more leniency granted" should he be again involved in another incident concerning disregard of Company Rules and instructions. Since his return to work, most of his discipline entries have been attendance related. The Carrier has asserted that it has had a practice across craft lines that the accumulation of 90 or more demerits results in dismissal. We have seen no evidence to the contrary. Under the circumstances, we do not find that the Carrier's decision to dismiss the Claimant was arbitrary or capricious. Accordingly, the claim must be denied.

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of September 2013.