

Award No. 5
Case No. 7

PUBLIC LAW BOARD NO. 2699

PARTIES Brotherhood of Maintenance of Way Employees
TO
DISPUTE: and
Union Pacific Railroad Company

STATEMENT Claim in behalf of Sectionman C. B. Pond,
OF CLAIM: Wyoming Division, for removal of discipline
and pay for time lost as a consequence of
his suspension and subsequent removal from
service on July 30, 1979, account the over-
accumulation of demerits.

FINDINGS: By reason of the Agreement entered into by and between
the parties on August 31, 1978, and upon all the
evidence and the whole record, the Board finds that the parties
are employees and carrier respectively as defined in the Railway
Labor Act, as amended, and that it has jurisdiction.

On June 25, 1979, Roadmaster W. O. Sheets assessed
thirty (30) demerits on Claimant's personal record for arriving
late for work and for idly sitting on a rail. On June 28, 1979
Roadmaster Sheets assessed additional thirty (30) demerits on
Claimant's personal record for insubordination by refusing to
comply with his foreman's instructions to help another employee
load ties.

Rule 48(i) provides that an accumulation of ninety (90)
demerits subjects an employee to dismissal. Such an employee cannot
waive his right to a formal hearing. With the assessment of a
total of sixty (60) demerits on June 25 and June 28, 1979, Claimant
had accumulated one hundred five (105) demerits. Accordingly, on
June 28, 1979 the Division Engineer wrote the Claimant that an
investigation and a hearing into the charges and proposed
disciplines as stated in Mr. Sheets's letters was scheduled for
July 10, 1979. In a letter dated July 30, 1979, the Division

Engineer affirmed the assessment of thirty (30) demerits for the incident of June 20, 1979, as contained in Mr. Sheets's letter of June 25, 1979, and he also affirmed the additional assessment of thirty (30) demerits for the incident of June 27, 1979 as contained in Mr. Sheets's letter of June 28, 1979. Since by these demerits assessments the Claimant had accumulated one hundred five (105) demerits, the Division Engineer dismissed him from service.

Employees contend that the Carrier violated Rule 48(i) when the Roadmaster and not the Division Engineer assessed the demerits for the incidents on June 20, 1979 and on June 27, 1979. In each case the letter advising the Claimant of the demerits is signed by the Roadmaster. Further, say the Employees, "even had the employee accepted the waiver, they would have been improperly assessed".

True, only the Division Engineer may assess demerits. And this Board has so construed Rule 48(i). But while the original assessments were made by the Roadmaster, those assessments were affirmed by the Division Engineer before the investigation was conducted. Not only did the Division Engineer confirm the two separate demerits assessments, he also suspended the Claimant and scheduled the investigation hearing. And he also assessed identical demerits after the conclusion of the investigation. For all intents and purposes of Rule 48(i), the Division Engineer assessed the demerits.

Further, this issue was never raised on the property. It was first urged by the Employees in its submission to this Board.

For these reasons, the Board finds that the Carrier did not violate Rule 48(i).

Employees next urge that the Claimant was improperly suspended under Rule 48(o) because neither of the charges brought against the Claimant met the condition that suspension pending a hearing may be made only when "serious and/or flagrant violation of Company rules or instructions are apparent". Claimant was suspended only because the assessment of the sixty (60) demerits increased the total demerits accumulated by him to one hundred five (105) which automatically calls for his dismissal. That is an apparent serious violation of Carrier's rules and instructions.

In Award No. 5 of Public Law Board No. 2267, involving the same parties and the same Rule 48(c), that Board said that "the condition of being 'apparent' requires the physical existence of such facts and circumstances as would lead a reasonable and responsible supervisory officer sincerely, in good faith, to believe that serious and/or flagrant violation of Company rules or instructions have been or may be committed". The Division Engineer, a responsible supervisory officer, acted sincerely and in good faith when he suspended the Claimant.

Employee's additional contention that the Carrier prejudged the Claimant's guilt before the investigation hearing is not supported by the record. Claimant had a fair and an impartial hearing. He had every opportunity to present such relevant evidence as he felt necessary.

That Claimant reported late for work on June 20, 1979 is undisputed. Claimant testified that he was ten minutes late because he had trouble with a horse he was feeding. His supervisor testified that the Claimant was about fifteen minutes late and he gave no explanation. At no time did Claimant call Carrier to report that he would be late.

Also on June 20, 1979, at around 4:00 P.M. Claimant was observed sitting on the north rail on the main line. When asked by his supervisor why he was sitting on the rail, Claimant did not know. So testified his supervisor. Again, Claimant did not deny this. His only retort was that other employees were also sitting on the rail. There is no corroborative evidence of this.

On June 27, 1979, Claimant was working in Section 2111, which consisted of four Sectionmen and a foreman. Their foreman instructed them to load heavy, oak ties. Two men were assigned in front of the truck, one man in the back end of the truck and Claimant on the truck. Because the man at the rear of the truck was having trouble, the foreman instructed the Claimant to get off the truck and help the man at the rear of the truck. Claimant refused three such directions. Claimant testified that the foreman did direct him to get off the truck and to help the man at the rear end of the truck and he "replied nothing". When the

foreman asked him again, Claimant said, "well I was doing more good on top pulling them in than I would be pushing the ties", and when the foreman asked him the third time, the Claimant again said nothing. This is the Claimant's testimony.

Claimant's work record is a checkered one. He was first hired as an Assistant Signalman on December 1, 1972, and he resigned on December 28, 1972 to return to school. He was hired as an extra gang laborer on August 14, 1974, and rehired as an extra gang laborer in January, 1977. He was assessed 45 demerits on June 16, 1977 for walking in front of a moving train and in front of a petti-bone crane, he was dismissed on November 18, 1977, because he failed to shovel off top of ties, his accumulated demerits decreased to 30 on November 16, 1978, to 15 on December 18, 1978 and he was assessed 30 demerits on April 10, 1979, because of a physical altercation with another employe. With that last assessment he had accumulated 45 demerits. The assessment of 30 demerits for the incidents on June 20, 1979 and additional assessment of 30 demerits for the incident on June 27, 1979 brought his accumulated demerits up to a total of 105.

With this kind of a work record and with the evidence before the Board in the two last incidents, the assessment of the 30 demerits on June 25, 1979 and another 30 demerits on June 28, 1979 was proper, reasonable and not excessive.

Because of his youth and his apparent honest testimony in the last investigation, the Carrier, on December 7, 1979, offered to reinstate the Claimant on the basis of seniority with no back pay for lost earnings. This offer was renewed in a letter dated December 20, 1979, in which the Carrier stated that if the Claimant "elects to accept the offer the entire demerit assessment on his record will be considered cleared". This offer was again renewed by the Carrier in letters dated February 12, 1980 and July 21, 1980. Each of these offers was rejected by the Claimant.

The evidence elicited in the investigation clearly establishes Claimant's guilt in each of the incidents that occurred on June 20 and June 27, 1979, that it is apparent from that evidence that the Claimant rejects the authority of his supervisors, that the directions given to the Claimant by his supervisors, however he felt the work could have been performed better in

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another manner, were reasonable and within their scope of authority, that the demerits assessed for those incidents were proper and reasonable. An employee has no right to disobey reasonable directions relating to his employment.


Because of Claimant's youth and because the last incidents occurred a little more than six months after the last demerit assessment, there may be equity to reduce the amount of accumulated demerits so that at the time of his dismissal he might have accumulated less than 90 demerits. The Carrier recognized this when it offered to reinstate the Claimant, to clear his demerits' record, but with no compensation for lost earnings. This offer was first made by the Carrier on December 7, 1979. Had Claimant accepted the offer, his dismissal for all intents and purposes, would have been converted to suspension somewhat less than six months. That would have been a reasonable penalty.

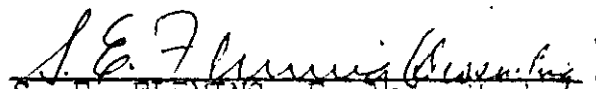
Upon this record, the Board finds that the Claimant, C. B. Pond, shall be reinstated as an employe of the Carrier with full seniority and other contractual rights preserved and unimpaired and with his demerits' record fully cleared, but with no compensation whatsoever for lost earnings or for any other contractual benefits from June 28, 1979 to the date of his reinstatement.

AWARD

Claim sustained in accordance with the findings. Carrier is directed to comply with this award within thirty (30) days from the date hereof.


DAVID DOLNICK, Chairman and Neutral Member


E. R. MYERS, Carrier Member


S. E. FLEMING, Employee Member

DATED: November 5, 1980

EMPLOYEES DISSENT TO:

AWARD NUMBER 5, PUBLIC LAW BOARD 2699

The Majority has arrived at several erroneous conclusions in reaching an improper decision in this case.

First, they correctly state that Rule 48(i) provides that an accumulation of ninety (90) demerits subjects an employee to dismissal. They then proceed to justify the arbitrary assessment of sixty (60) demerits on two incidents, June 25 and 28, 1979, which resulted in Claimant's accumulation of one-hundred-five (105) demerits. This rationale totally ignores two pertinent provisions of Rule 48(i): (1) Under no circumstances can an individual be arbitrarily assessed in excess of ninety (90) demerits without first having been accorded a hearing, and (2) This Rule clearly provides that the proposed assessment of demerits is reserved exclusively to the Division Engineer.


The Majority proposes to justify the second omission by concluding that the Division Engineer affirmed the assessment of the sixty (60) demerits proposed by the Roadmaster in his letters of June 25 and 28, 1979. Assuming arguendo that this procedure was proper, the Majority then proceeds to ignore another pertinent part of Rule 48(i), namely, that demerits cannot be assessed under any circumstances where the employee's personal record would exceed a combined total of ninety (90) demerits thereby subjecting him to dismissal from service.

Having erroneously concluded that Claimant was properly assessed with the sixty (60) additional demerits, the Majority then proceeds to justify Claimant's suspension from service pending hearing. Such action clearly ignores the provisions of Section (o) of Rule 48. This Section provides that an employee may only be suspended pending hearing when serious and/or flagrant violation of Company rules or instructions are apparent. Nothing contained in the record supports such conclusion.

Claimant's suspension and subsequent discharge was improper.

For these reasons we dissent.

Signed:


S. E. Fleming, Employee Member
Public Law Board 2699