

PUBLIC LAW BOARD NO. 5392

PARTIES) BROTHERHOOD OF LOCOMOTIVE ENGINEERS
TO)
DISPUTE) CSX TRANSPORTATION, INC. (FORMER SEABOARD COAST LINE
RAILROAD COMPANY)

STATEMENT OF CLAIM

Claim of Engineer J. W. Davis ID 077580, for reinstatement with clear record and pay for all time lost, including the wage equivalent of fringe benefits and that the FRA Engineer's Certification for Engineer Davis be reestablished showing no record of revocation of Engineer's FRA Certification.

OPINION OF BOARD

Claimant has been in the Carrier's service since August 11, 1981 and has been an Engineer since August 26, 1989. As a result of charges dated February 20, 1992, investigation held February 26, 1992 and by letter dated March 23, 1992, Claimant was dismissed from service stemming from his operation as Engineer on assignment Y15015 on February 15, 1992 when, while operating through the Dirt Road Track, Claimant's train was involved in a collision with Engine 1214 on Job Y103 at Hamlet Yard.

Ordinarily, our function is to examine the record to determine whether the Carrier's disciplinary action was supported by substantial evidence. Although the parties have vigorously ad-

ressed that issue, because of letters written by Claimant, we are unable to perform our ordinary function. In letters written by Claimant dated April 11 and 25, 1992 (Car. Exhs. E and G), Claimant effectively admitted engaging in misconduct and specifically sought leniency from the Carrier:

I have learned from my mistakes. ... I wish that you could show me some mercy ... I need my job and I am asking for any leniency [sic] that you can show me.

* * *

... I would appreciate any leniency [sic] that you could show toward me ... I would appreciate your help because I realized that I made a mistake. I realize that as a team we could have worked better as a team and prevented the derailment. I learned a valuable [sic] lesson in regard to working within the rules and if you will give me a second chance I won't make the same mistake again. ... [F]or some reason I let my guard down and I flirted with disaster. ... I have learned my lesson. ... If there is anyway that you can help me I would appreciate your influence. In return I will do the best of my ability to be a model employee.

It is well-established that it is not this Board's function to dispense leniency. That function belongs to the

Carrier.¹ Given Claimant's clear admission of misconduct and his request for leniency, we have no authority to determine in the ordinary fashion that the decision to impose discipline was improper.

However, although Claimant's requests for leniency deprive this Board of the ability to determine in the usual manner whether discipline was appropriate, the imposition of leniency is nevertheless subject to review by us but under the limited standard of determining whether the Carrier's actions were arbitrary or capricious.²

Managerial action is arbitrary when it is "without consideration and in disregard of facts and circumstances of a case, without rational basis, justification or excuse."³ Here, we are not satisfied that the evidence supports a finding that

the Carrier's actions in determining whether to grant leniency were non-arbitrary. The record shows that the collision involved in this case occurred in Hamlet Yard as a result of non-coordinated movements. Yet, in determining whether or not to grant leniency, the Carrier made Claimant pass a test on road territory (which Claimant did not do to the Carrier's satisfaction). See Division Superintendent Davis' letter of August 28, 1992 (Car. Exh. N):

If you successfully qualify on the road territory between Rocky Mount and Hamlet, North Carolina, you will be reinstated to service on a leniency basis

....

We recognize that there is an overlap of skills between road and yard service. We further recognize that Claimant has performed road service. But, this record nevertheless does not sufficiently explain why a road test was given as the basis for leniency when the collision was a result of movements attached to yard service. We cannot find a rational basis or justification for the type of test that the Carrier used to determine whether to grant leniency.

The Carrier has great discretion in determining the qualifications of its employees and it is not the function of this Board to substitute our judgment for that of the Carrier. But, the basis for the Carrier's decisions must at least be explained. That was not sufficiently done

¹ See e.g., PLB 166, Award 1: Leniency is a matter to be decided by Carrier; and whichever way such decision goes, the Board has no power to change it. A direct request for leniency, like the one here, implies acceptance by Petitioner of Carrier's decision on the merits. The Board may not properly change such a circumstance, especially under the facts of this case, which show that the penalty imposed by Carrier was reasonably related to the seriousness of claimant's offense and to his past performance. Carrier's decision was not arbitrary or an abuse of managerial discretion.

² Again, see PLB 166, Award 1 (determining that "Carrier's decision was not arbitrary or an abuse of managerial discretion.").

³ *South Central Bell Telephone Co.*, 52 LA 1104, 1109 (Platt. 1969).

in this case. We therefore are compelled to find that the Carrier's basis for determining whether or not to grant leniency was arbitrary.⁴

The remedy in this matter shall be limited. Given the context in which this case arises, we can only require that the Carrier make its determination of whether to return Claimant to service through use of reasonable criteria. In this case, we shall permit Claimant's return to service, but only if he satisfactorily demonstrates to the Carrier through a test of his yard abilities that he can safely operate the necessary equipment. Claimant's return to service is further contingent upon his successful completion of all other qualifying requirements, including physical examinations. Given the fact that Claimant has effectively admitted to the charged misconduct as demonstrated by his requests for leniency, should Claimant successfully qualify, reinstatement shall be without loss of seniority or other rights and benefits, but shall be without compensation for time lost.⁵

⁴ The fact that Claimant may have agreed to those terms does not change our conclusion. The terms must nevertheless be reasonable. This is not a case like Award 3 of this Board where the agreed upon imposition of compliance with EAP requirements as a condition precedent to return to service was not unreasonable in light of the demonstrated misconduct by the employee. We cannot say the same in this case.

⁵ The Organization's arguments that Claimant was deprived of a fair hearing are rejected.

AWARD

To the limited extent set forth in the opinion, the claim is sustained.

Edwin H. Benn
Edwin H. Benn
Neutral Member

A. B. Montgomery
A. B. Montgomery
Carrier Member

E. L. Hayden
E. L. Hayden
Organization Member

Jacksonville, Florida

Dated: Jan 18, 1991

Indeed, Claimant admitted that he was given a fair hearing. See Tr. 101:

[Q]. Mr. Davis, do you feel this has been a fair and impartial investigation?

[A]. Yes, sir.