

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5905

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

)
) Case No. 26
)
) Award No. 22
)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

J.F. Ingham ~~B. M. Goodson~~, Carrier Member

Hearing Date: June 25, 2002

STATEMENT OF CLAIM:

1. The discipline [forty(40) demerits and permanent disqualification as Super Truck operator and roadway machine operator] assessed Super Truck Operator A. K. Goodson for his alleged violation of Maintenance of Way Safety Rules 1.6, 1.11, 15.4, 15.16 and 15.20 in connection with the Super Truck striking an electrical pole near the Middle Tower in Kirk Yard on November 27, 2001, was without just and sufficient cause, excessive, arbitrary, and in violation of the Agreement (System File GC-29-01/UM-38-01).
2. As a consequence of the violation referred to in Part (1) above, Super Truck Operator A. K. Goodson shall now "... be compensated for all lost wages due to his removal from service for this alleged incident. We also request that Mr. Goodson's STO and RMO seniority be reinstated immediately and We request that the demerits assessed be greatly reduced."

FINDINGS:

Public Law Board No. 5905, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On November 28, 2001, Carrier notified Claimant to report for an investigation on

December 3, 2001. The investigation concerned Claimant's alleged violations of Safety Rules 1.6, 1.11, 15.4, 15.16 and 15.20 in connection with his alleged striking a utility pole while operating the 442 Super Truck on November 27, 2001. Carrier withheld Claimant from service. The hearing was held as scheduled. On December 4, 2001, Carrier advised Claimant that he had been found guilty of the charge and assessed forty demerits, permanently disqualified as a Super Truck Operator and Roadway Machine Operator and would not be compensated for the time held out of service.

The record reflects that on November 27, 2001, Claimant was operating the 442 Super Truck, in which three other employees were riding. Claimant dropped a book and some papers on the floor of the truck. He picked them up, taking his eyes off the road, and struck the pole, snapping it into two pieces. Claimant admitted his negligence. Thus, there is no question that Carrier proved Claimant's guilt by substantial evidence.

The two key questions are whether Carrier violated the Agreement by withholding Claimant from service and whether the punishment assessed was arbitrary, capricious or excessive. Rule 57(a) provides, in relevant part, "If the offense is considered sufficiently serious, the employee may be suspended pending the hearing and decision." There is no dispute that Carrier considered Claimant's prior record in deciding to withhold Claimant from service pending the hearing. The parties disagree over whether Rule 57(a) allows Carrier to consider an employee's prior record as a basis for withholding the employee from service. The Organization emphasizes that Rule 57(a) speaks of "the offense," and that this specific reference to the offense under investigation limits Carrier to consideration of that offense, without regard to the employee's prior record, in deciding to withhold the employee from service.

We agree with the Organization that the use of the definite article "the" indicates that a decision to withhold an employee from service pending a hearing must be based on the seriousness of the offense under investigation. However, that does not mean that an employee's prior record will always be irrelevant in assessing the seriousness of the offense. To understand why this is so, we must consider the probable purpose behind the provision allowing Carrier to withhold anyone from service pending a hearing.

Rule 57(a) prohibits Carrier from disciplining any employee who has successfully completed a sixty-day probationary period without first affording the employee a fair and impartial hearing. However, Rule 57(a) recognizes that some offenses are sufficiently serious that Carrier should not be required to run the risks involved in keeping the alleged offenders on the job pending the hearing. For example, consider an employee charged with a major theft. Although Carrier may not discipline that employee without first affording him a fair hearing to determine whether the charge can be proven, Carrier need not run the risk of further theft if the employee remains on the job pending the hearing. The employee is also protected because Rule 57(c) requires that if the charge is not sustained, the employee must be reinstated and made whole for lost compensation.

Some offenses, such as theft and physical assault, are probably per se sufficiently serious

to warrant withholding the alleged offender from service pending the hearing. Others, such as tardiness, are probably per se insufficiently serious to warrant withholding the employee from service pending the hearing. The instant case involves the negligent operation of a motor vehicle. We cannot say that negligence is per se sufficiently serious to warrant withholding an employee from service pending the hearing. The employee's prior record may be a relevant factor in evaluating the severity of the alleged offense.

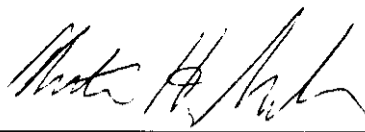
For example, if an alleged act of negligence is charged against an employee of long service with no prior record, the risk to Carrier of retaining the employee in service pending the hearing is likely to be minimal. The offense, even if proved, will likely be an isolated incident and not likely to be repeated. On the other hand, if the employee's record reflects a pattern of similar acts in the past and the consequences of repetition could be severe, the offense may be sufficiently serious to justify withholding the employee from service.

In the instant case, Claimant had accumulated fifty-five demerits at the time of the incident. Fifteen of those demerits resulted from excessive absenteeism. They have no bearing on the severity of an alleged offense of negligent operation of a motor vehicle. Other matters on Claimant's prior record, however, bear directly on the severity of the alleged offense in the instant case. Other discipline assessed Claimant included incidents of a traffic violation, reckless driving, and damaging a Carrier truck. These incidents place the instant charge in context. They demonstrate that the instant charge was not an isolated incident but one which Carrier had reasonable grounds to fear could be repeated if Claimant was not removed from service. Furthermore, Carrier also had reasonable grounds to fear the consequences of a repeat incident. Although no one was injured in the incident under investigation, if the power line supported by the utility pole had fallen, people could have been injured severely or killed. Under the circumstances, we find that the charge was sufficiently serious to warrant withholding Claimant from service.

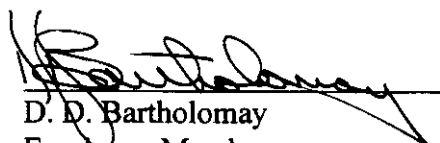
There remains the issue of penalty. The Organization points to examples of other employees who engaged in similar acts of negligence and were not penalized as severely as the Claimant. However, the record does not reflect that any of these other employees were similarly situated to Claimant in terms of length of service and prior record. We are unable to conclude that the penalty of forty demerits was arbitrary, capricious or excessive. Nor can we conclude, in light of Claimant's record of prior driving offenses, that Carrier acted arbitrarily, capriciously or excessively when it permanently disqualified Claimant from STO and RMO positions.

AWARD

Claim denied.



Martin H. Malin, Chairman

~~A. L. Reichle~~ J. F. Ingham
Carrier Member

D. D. Bartholomay
Employee Member

Dated at Chicago, Illinois, October 30, 2002.