

NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISIONAward No. 24403  
Docket No. 44106  
94-1-93-1-T-1242

The First Division consisted of the regular members and in addition Referee M. David Vaughn when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers  
(Terminal Railroad Association of St. Louis

STATEMENT OF THE CLAIM:

"This committee asks that you reverse Mr. B. P. Sheeley's decision and allow Mr. [R. L.] Bertke to return to active service with the Company, with his seniority and all rights unimpaired and that he be paid for all time lost.

[Note] Since [the] appeal to the Manager of Labor Relations, the Claimant, Mr. R. L. Bertke has died in an automobile wreck, therefore the claim is for his estate and does not include the request for reinstatement."

FINDINGS:

The First 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 waived right of appearance at hearing thereon.

Claimant was employed by the Carrier as an engineer. On May 24, 1993, he was working a yard assignment at Madison, Illinois. He was instructed to pull a cut of 69 cars from Track 54 up the hill, through the switch and signal, and shove the cut down the west yard lead and over the hump. Claimant attempted to move the entire cut, but was unable to do so on his first attempt.

Claimant was then instructed by his Yardmaster to separate the cut of cars and pull the cars up the hill and over the hump in two halves. The instruction was clear, overheard by three other employees, and was recorded and transcribed.

Claimant did not comply with the instruction and later claimed that he did not hear that part. However, he assured another employee by radio that he would move the cars in one cut; and he again attempted to move the entire cut. He was not able to do so. A delay resulted, the duration of which was disputed: the Organization asserted that the delay was only 11 minutes, while the Carrier asserted it was longer.

Claimant was a long-service employee, with over 30 years of seniority. He had disciplinary actions on his record dating back to 1964, but continued to be employed by the Carrier. He had been dismissed once, in 1985, for mishandling cars, but was reinstated by a Public Law Board, with his 21 months out of service converted to a suspension. Since that time, Claimant had received a number of letters of warning or reprimand, a 15 day suspension (deferred) in 1988, and a "dismissal" for violation of Rule G in October of 1990, from which he was returned to service "pending a negative urine test for drugs", with no indication of having served a suspension. The status of the violation is unclear from the summary information in the record, but the test was apparently negative, since Claimant was returned to service without serving a suspension or being required to obtain treatment.

The Carrier convened an Investigation and, following a hearing, dismissed Claimant from service for insubordination, effective June 11, 1993. This proceeding followed.

As the note to the claim indicates, Claimant was killed in an automobile accident on August 15, 1993. The claim for reversal of the dismissal and for back pay and benefits is pursued on behalf of his estate; the request for reinstatement was withdrawn.

The positions of the parties were set forth in thorough written Submissions. They are briefly summarized as follows:

The Carrier argues that record clearly establishes Claimant's insubordination. It asserts that the duration of the resultant delay is immaterial, the failure to follow orders having been established. It contends that the penalty of dismissal was appropriate, and not arbitrary or excessive, in light of what it describes as Claimant's poor record. The Carrier asserts that it afforded Claimant due process and a fair and impartial Investigation. The Carrier urges, therefore, that the Claim be denied.

The Organization argues that the Carrier violated Claimant's right to a fair hearing by not calling Weir, Claimant's fellow-employee, but introducing a statement from him and by mispunctuating the Yardmaster's question as a statement. The Organization argues that it is unclear when, in the sequence, the instruction was given and that Claimant did not clearly hear the instruction and did not intentionally fail to comply with the Yardmaster's order. It asserts that the penalty of dismissal was unjust and excessive; and it urges that the Claim be sustained.

The Board is not persuaded that the Carrier denied Claimant a fair hearing, since Weir's attendance was not requested by the Organization, his written statement was mere cumulative evidence and the Organization's hearsay objection goes to the weight of the evidence, rather than invalidating the fair hearing. The Board believes the Carrier's failure to furnish the Organization with the tonnage of the cut was of limited relevance to the question whether Claimant defied the Yardmaster's order. The Board is similarly unpersuaded that punctuating the transmission to the effect of what made Claimant think he could get the cut over the hill on a second attempt when he could not do so on the first attempt as a statement, rather than a question, was prejudicial. A reading of the transmittal as a question is clear, as is Claimant's response that he thought he didn't get "a good run at it" the first time.

The Board is persuaded that substantial evidence supports the Carrier's conclusion that the Yardmaster's instruction was transmitted in time for Claimant to comply with it and that Claimant understood, but failed to follow, the Yardmaster's instruction to separate the cut and pull half of them over the hump in two moves, rather than to attempt again to move all 69 cars. The various transmissions indicate no interruptions or inaudibility; and other employees listening to the transmissions heard the entire instruction. The Board is not persuaded that the general discretion that yard engineers possess overrides a specific instruction to the contrary. Claimant violated the order; and was properly subject to discipline.

The Board notes that Claimant was a 30-year employee. He was retained in the Carrier's employ, save for a 1985 dismissal, converted to a 21 month suspension, despite the discipline imposed on him. For the eight years between 1985 and 1993, Claimant received various letters of warning and reprimand, but served no actual suspension. The Board is persuaded that Claimant's more remote discipline is entitled to less weight than his more recent performance and discipline. The 1990 Rule G dismissal did not, for whatever reason, survive; and the Board declines to give it weight. Under such circumstances, the Board is not persuaded that Claimant's record was so poor such that his 30 years of service should be negated by a single instance of insubordination. Without condoning Claimant's failure to follow the Yardmaster's instruction, the Board concludes, under the circumstances, that the penalty of dismissal was arbitrary and excessive.

The Board concludes, instead, that Claimant was properly suspended for a period of 30 days. We further conclude that his death terminated his claim for back pay. However, Claimant's estate is entitled to pay and benefits from the 31st day following his suspension, until his death; and his status should have remained that of an employee as of the time of his death. Claimant's record should be corrected to rescind the dismissal. Benefits due his survivor(s) and/or estate should be the same as due other employees under law and any designations he may have made.

#### AWARD

Claim sustained in accordance with the Findings.

#### ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

Form 1  
Page 5

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NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of First Division

Dated at Chicago, Illinois, this 7th day of November 1994.