

The Third Division consisted of the regular members and in addition Referee William E. Fredenberger, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The discipline (30 demerits) imposed upon Crane Operator O. Salaiz for allegedly entering onto the property of the Iowa Interstate Railroad in vicinity of the East Joliet Interlocking and moving old and relay rail on November 11, 1987 was arbitrary, capricious and on the basis of unproven charges (System File DJ-7-88/UM-20-88).

(2) The Claimant shall have the discipline (30 demerits) rescinded and his record cleared of all mention of the alleged incident."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

On November 11, 1987, Claimant was working as a crane operator. A B&B Supervisor instructed Claimant to take a payloader to a point where an interchange was being prepared with the Iowa Interstate Railway (IIR) and to make a grade at that point on the Carrier's property in preparation for the Carrier laying track ties and ballast to make the connection. On November 25, 1987, the B&B Supervisor, responding to a complaint from an IIR Foreman, visited the work site. He observed that not only had the area on the Carrier's property been graded but all trees and brush had been removed from between the rails on the IIR property and shoved over a nearby hill. Additionally, old rail which the IIR had unspiked and left in place and new relay rail which the IIR had placed for installation were found with the trees and brush. The B&B Supervisor was required to utilize the services of another crane operator and section laborers to retrieve the rail for IIR so it could continue its work on the connection.

By letter of December 9, 1987, the Carrier notified Claimant to appear for formal Investigation on the charge that while working as a crane operator on November 11, 1987, Claimant without instruction and/or authority entered IIR property and moved old rail and relay rail laid out by and belonging to that Carrier. The Investigation was held on January 29, 1988. By letter of February 3, 1988, the Carrier notified Claimant that the Investigation established his guilt and that he was assessed thirty demerits.

The Organization grieved the discipline. The Carrier denied the grievance. The Organization appealed the denial to the highest officer of the Carrier designated to handle such disputes. However, the dispute remains unresolved, and it is before this Board for final and binding determination.

The Carrier maintains that the evidentiary record fully supports Claimant's guilt. The Carrier emphasizes that the B&B Supervisor observed old rail and new rail as well as trees and shrubs over the side of a hill on IIR property. The Carrier also points to the Supervisor's testimony that there were no trees or shrubs on the Carrier's property which Claimant was to grade. Moreover, urges the Carrier, there is no evidence of any action by any other person on that portion of IIR property between November 11 and November 25, 1987, to whom removal of the rail could have been attributable. Additionally, pointing to Claimant's admission that he took it upon himself to enter IIR property and to remove the trees and shrubs, the Carrier argues that Claimant also must have removed the rail. The Carrier contends that the amount of discipline was fully justified by Claimant's disciplinary record.

The Organization maintains that the Carrier's finding of guilt is based upon conjecture and not fact. While acknowledging that Claimant entered IIR property and removed trees and shrubs, the Organization emphasizes Claimant's testimony that he did not move any rail in the course of that action. The Organization also emphasizes Claimant's testimony that it would have been impossible for him to move the rail to the place where it was observed by the B&B Supervisor without the payload becoming bogged down. In this connection the Organization points out that the Supervisor was not present on November 11 and thus had no direct knowledge of the incident. The Organization also argues that the situation observed by the Supervisor on November 25, 1987, could have been caused by the intervention of others between November 11 and that date. Accordingly, urges the Organization, the Carrier has failed in its burden of proof which makes Claimant's disciplinary record irrelevant.

The Organization further maintains that the discipline assessed Claimant was arbitrary and capricious inasmuch as the record does not reflect how the Carrier arrived at the determination to assess Claimant thirty demerits which placed him within fifteen demerits of being subject to discharge. For that matter, argues the Organization, the Carrier's entire disciplinary system of demerits is open to challenge. The Organization emphasizes that the record does not reflect how the Carrier determined to assess any of the demerits which brought Claimant's record to 85.

We cannot agree with the Organization that the record in this case does not substantiate Claimant's guilt. Trees, brush, old rail and new rail

were found together down the side of a hill on November 25, 1987, after Claimant had been instructed to make a grade with a payloader in that area. Claimant admitted that he took it upon himself to enter IIR property and to remove trees and brush. The record confirms that unspiked old rail and new rail was laying near the trees and brush on IIR property before Claimant removed the trees and brush. While Claimant maintains that he did not move any rail, unchallenged testimony by the B&B Supervisor established that it was quite possible for Claimant to move the rail inadvertently while removing the trees and brush. As for Claimant's contention that he could not have moved the rail without bogging down the payloader, the record is clear that Claimant moved the trees and brush into the same area where the rail was found without such result. It follows that he also could have moved the rail without doing so. The fact that the trees, brush, old rail and new rail were found together down the side of a hill supports the conclusion that they were moved together at the same time. This conclusion strongly militates against any inference that someone other than Claimant moved the rail between November 11 and November 25, 1987. Even though the evidence may be considered circumstantial, the Board many times has accepted such evidence as probative. See Third Division Awards 20781, 22635, 26435, and 26904.

Inasmuch as the record in this case substantiates Claimant's guilt it was proper for the Carrier to consider Claimant's personal record in assessing discipline. That record shows that Claimant previously had been assessed 10, 20 and 25 demerits for rules infractions which occurred between August 18, 1987 and November 16, 1987. We do not agree with the Organization that the Carrier's system of discipline utilizing demerits or any specific assessment of demerits other than the one here at issue is open to examination in this case. Moreover, we note that the number of demerits assessed was progressively larger for each infraction of the Rules. While we are sensitive to the fact that the assessment of 30 demerits in this case brought Claimant's standing to within 15 demerits of the number which would subject him to dismissal, that fact does not render the 30 demerit assessment here at issue arbitrary or capricious. Nor under the circumstances of this case can we find it excessive or harsh.

In the final analysis we find no basis upon which to disturb the discipline in this case.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 18th day of May 1992.