

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 26062
Docket No. 45986
04-1-03-1-C-4792

The First Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(Canadian National Railway (Illinois Central)

STATEMENT OF CLAIM:

“Claim of CN/IC Engineer R. E. Harrell, Sr. for reinstatement to service with seniority and vacation rights unimpaired, all notations of discipline assessed on April 30, 2003 expunged from his personal work record and compensation for all time lost as a result of same, including the loss of earnings due to attending the investigation until the date he resumes service, plus out of pocket expenses for health and welfare and any other benefits which would be provided to him as a CN/IC Locomotive Engineer for the alleged violation of CN/IC Operating Rules A and 520 in connection with his alleged responsibility in the collision between assignments R 91971 and R 92671 in A Yard, Memphis, TN at approximately 11:20 hours on Thursday, April 3, 2003 while working as Engineer on R 91971.”

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 were given due notice of hearing thereon.

On April 24, 2003, the Claimant and Conductor J. R. Marchisio, Brakeman, C. J. Arnold, and Brakeman Trainee V. B. Simmons, comprising the crew of assignment R 91971 (RJY-17), attended a formal Investigation along with the crew members of assignment R 92971 (RJY-30) to develop the facts and determine responsibility in connection with a collision involving their trains, on April 3, 2003, in the Carrier's A Yard located in Memphis, Tennessee. Subsequent to the Investigation, by letter dated April 30, 2003, the Claimant was notified that he was dismissed from service with the Carrier, and that his engineer certification was revoked pursuant to 49 CFR Part 240.117(e)(2).

During the on-property appeal conferences conducted by the parties with regard to this matter, the Organization asserted that the discipline of permanent dismissal assessed against the Claimant was excessive. The Organization furthermore requested that the Claimant be restored to service with seniority and vacation rights unimpaired; the discipline be removed from the Claimant's record; he be paid for all time lost, including time for attending the Investigation; and be reimbursed for his out-of-pocket health and welfare expenses. In addition, the Organization argued for the reinstatement of the Claimant's engineer certification. Unable to resolve this dispute on the property, the parties agreed to submit this matter to the Board for final and binding resolution.

The Carrier's arguments in support of its finding of guilt and assessment of discipline were based on three contentions. First, in the Carrier's view, substantial probative evidence of the Claimant's responsibility for the collision was developed in the Investigation record. Second, the Carrier's handling of this matter was procedurally sound in all respects. Third, the penalty of dismissal was commensurate with the serious nature of the proven offense, which involved "severe" equipment damage and personal injury.

The Organization reminded the Board that at the time of the incident, the Claimant had over 34 years of service with this Carrier. In response, the Carrier argued the Claimant's personnel record spanning his career reflected numerous injuries, a lengthy period of disqualification as a Conductor, and five disciplinary incidents including a 60-day suspension in 2002.

The Board observes that the Carrier essentially has treated this incident as a "last straw" situation, and is cognizant of the Carrier's stated position that it alone possessed the right to extend leniency to the Claimant. However, given, in the Carrier's opinion, the seriousness of the offense, the quality of the proofs, and the Claimant's poor record, the Carrier was unwilling to extend leniency to the Claimant.

The Board has carefully considered the parties' respective positions in light of the evidence of record. Initially, the Board acknowledges the Carrier's well-settled argument that leniency is a managerial prerogative and is not an option available to the Board. However, the Board responds that when the assessment of discipline is found to have been arbitrary or capricious, the Board retains the right to modify the discipline to an appropriate level in keeping with the well-honed principles of progressive and corrective discipline.

After close examination of the entire record, the Board finds substantial probative evidence of the Claimant's violation of Operating Rule A and Rule 520. According to those Rules, the Claimant was responsible for the safe movement of his train, R 91971 (RJY-17), and for operating his train within the A Yard in a manner that would have allowed him to stop his train within one-half of the range of vision short of the switch, which he ran through despite its alignment against his movement. The Board does note the Organization's position that the incident might have been preventable if the Claimant had been notified of crew RJY-30's simultaneous movements within the Claimant's A Yard work limits. However, the fact remains that, at the time of the incident, the Claimant was at the controls of Locomotive IC 1498, when he struck the last car of RJY-30's cut with his lead locomotive unit.

In sum, the Board finds that the facts and circumstances captured in detail in well over 300 pages of transcript testimony established that while the Claimant was primarily responsible for the incident, the penalty of dismissal was overly harsh. Yet, as the Carrier has pointed out, the Claimant's 34-year service record was not without significant blemish. Thus, given the record as a whole, the Board directs the Carrier to remove the discipline of dismissal from the Claimant's record. All time withheld from service shall be considered a period of actual suspension and the Claimant is not entitled to back pay or any other compensation claimed herein.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 24th day of November 2004.