

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 14092  
Docket No. 13966  
14-2-NRAB-00002-130016

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(International Brotherhood of Electrical Workers  
**PARTIES TO DISPUTE:** (  
(BNSF Railway Company

**STATEMENT OF CLAIM:**

- “1. That in violation of the governing Agreement, Rule 40 in particular, the BNSF Railway Company, as a result of an investigation held on September 7, 2012 in Chicago, Illinois, Electrician Jose L. (Luis) Vizcaino was issued excessive and arbitrary discipline, a Level S, thirty day record suspension.
2. That accordingly, and as a result of the arbitrary, unjust and excessive discipline assessed Electrician Jose L. Vizcaino, this Honorable Board overturn the guilty decision rendered by BNSF, and further order that the BNSF Railway Company remove all record of the charge and discipline assessed from Electrician Vizcaino’s personal record.”

**FINDINGS:**

The Second 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.

While serving as a ground man protecting the movement of four locomotives at the Carrier's Corwith Diesel Facility in Chicago, Illinois, on July 2, 2012, Claimant Vizcaino, who had approximately 20 years of service at the time, shared responsibility for ensuring that all tracks were clear and switches properly aligned for his operator's movement. The Carrier asserts that he failed to remain alert and attentive at all times, and rather than guiding the movement safely, the Claimant signaled operator Roberts to roll through a misaligned switch, resulting in extensive damage to the switch. Based upon the record compiled at a formal Investigation of the "run through switch" held on September 7, 2012, the Carrier concluded there was substantial evidence establishing that the Claimant had violated Mechanical Safety Rule (MSR) 1.2.2 Alert and Attentive, MSR 10.2.1 Moving, and MSR 13.7 Operating Switches and Derails. The propriety of the 30-day record suspension and 36-month review period that ensued is now before the Board for final evaluation after proper claim handling on the property failed to produce a satisfactory resolution of the matter.

According to the Carrier, the documentary evidence and testimony received on September 7, 2012, establish conclusively that the only way the extensive damage to switch 674 could have occurred is by the force of a locomotive rolling through it when it sat lined against the movement. Thus, on questioning, Mechanical Foreman Don Halpaus indicated that he had spoken with the maintenance-of-way gang called out to make repairs on the switch, which was effectively destroyed, and was informed that ". . . the only way that housing could have got blown apart is if the . . . switch had not been properly lined . . . ."

That position was reinforced by the testimony of Mechanical Foreman II Rocky Oshel, who stated that he had not observed the incident, but had seen prior run through switches, and that switch 674 was of a newer design type manufactured to "blow up" when breached so as to prevent any attempt at relining with the possibility of a gapped switch point. With the switch itself breaking, and not merely the rod connecting it to the switch point, Oshel testified that it is now possible to determine exactly what action triggered the damage. According to Oshel, the most likely scenario here was that when the operator on the north end asked for the move, the Claimant on the south end failed to walk down to the back end to line up the switch. When they shoved south, the lead locomotive ran through the switch. Had the switch been already broken, Oshel states, and had the Claimant been

positioned where he should have been, he would have seen the damage before the movement. By application of basic logic, the Carrier urges, and upon an objective reading of the evidence at the Hearing, the accident occurred because someone acted negligently.

The Organization objects to the Carrier's failure to provide the maintenance-of-way employees who were questioned about the switch. It further contends that the Carrier's appraisal of the facts was made by a one-year Supervisor, unfairly and irrationally overriding the uncontradicted testimony of the 20-year Claimant who stated that he had inspected the switch and observed it to be lined correctly as he stood near it prior to the move. As Claimant Vizcaino testified:

“. . . when I walked through, I saw the switch laying out in the right of way, so I didn't bother to throw it again so made sure everything was okay. The switch was lined up for us, so I assumed that there was nothing wrong with it.”

Lastly, the Carrier never rebutted the Organization's evidence of prior stress cracks and damage in the switch, evident from its pictures of the scene depicting rust and the absence of any lubrication on the switch. Thus, the Carrier's own predicate – one critical element of the “res ipsa” theory is that “. . . the instrument of harm was under the control of one party . . .” – defeats its case here. For the foregoing reasons, the Organization asserts that the switch was plainly defective, and it was that fact, not the Claimant's negligence, that caused the mishap.

There is some force, we believe, in the Organization's contention that the process would have benefited from direct input by the maintenance-of-way crew. Nonetheless, there has been no showing on this record of any evidence refuting the hearsay testimony of Mechanical Foreman Halpaus on causation issues. Nor was his own testimony on direct examination concerning probable cause in any way rebutted. Most significantly in our view, however, is the record evidence establishing that just prior to the movement of the Claimant's locomotives, four other consists had passed through switch 674 without incident. Thus, the position of the switch point was, in the judgment of all who viewed it except the Claimant, consistent with damage resulting from being improperly lined for the movement. And, as the Carrier points out, if that reasonable conclusion were to be somehow

flawed, the Claimant offers no explanation for how he could have stood next to the switch, as he asserts, without observing that it was damaged so badly that it was in an inoperable condition.

The Hearing Officer involved assessed the credibility of all witnesses, observing both demeanor and the plausibility of their explanations regarding causation. Those conclusions are binding on the Board unless patently unjust, unreasonable or so patently mistaken as to be arbitrary. For those reasons, the Board must deny the claim.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division**

Dated at Chicago, Illinois, this 17th day of December 2014.