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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 9487
Docket No. 6271
2-N&W-CM-'73

The Second Division consisted of the regular members and in addition Referee Irving T. Bergman when award was rendered.

Parties to Dispute: System Federation No. 16, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)

Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That the Carrier violated the Agreement of September 1, 1949, as subsequently amended when on January 15, 1971, Car Repairer B. L. Williams was given a formal investigation for charges that were not specific, resulting in unreasonable and capricious assessment and a thirty-day (30) record suspension against his service record.

2. That the investigation was improperly arrived at and represents unjust treatment within the meaning of Rule No. 37 of the controlling agreement.

3. That because of such violation and capricious action, Carrier be ordered to remove such thirty-day (30) record suspension from the said employe's service 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 employe or employes involved in this dispute are respectively carrier and employe 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 for thirteen years prior to a derailment on December 25, 1970. He had been a car repairer for seven years. There is no evidence that he had been charged with or disciplined for faulty work prior to December 25.

He was assigned on the third shift December 24, to the Portlock Yard to perform carman's duties in connection with the working of a consist. He inspected approximately fifty rock cars walking from the head end, crossing over and walking the other side back to the head end. The consist was pulled out of track 15, doubled back to track 8, pulled out another consist and was made solid on track 1. There were one hundred and sixty eight cars in the total consist which was spotted on track 1 at 5:30 A. M. Claimant was then

assigned to work from the head end back for about one half the cars. The work was completed at 6:20 A.M. At approximately 12:10 P.M. on December 25, the train departed. As the train was leaving the yard, the General Yard Master was asked by the engineer and brakeman to watch for brakes sticking as the train rolled by. He thought he saw a door down at about the fifteenth car and radioed the engineer to stop. The door was not down. The yardmaster then radioed the engineer to proceed. As the train rolled by, he continued to observe the balance of the train but did not see any doors down on any car. At 12:40 P.M., twenty five to thirty miles away, a car derailed at a switch and sideswiped a train proceeding in the opposite direction. This caused damage to 22 cars in the westbound train and 24 cars in the eastbound train resulting in total damage estimated at $160,000.00.

On inspection at the wreck site, it was determined that the thirtieth car from the head end of the westbound train had fouled the switch and derailed by reason of a dropped door. This was one of the cars in the consist worked by the claimant at the Portlock Yard.

The next morning, December 26, inspection was made by various supervisors to determine the first evidence of the hopper car door being open. There were signs in the Portlock Yard starting several hundred feet west of the yard office and about 70 feet east of the North Hump crossover that, "an object had dropped." These marks extended to the North Hump crossover and for a distance beyond. At this point there was evidence of dragging equipment. The signs were also evident at the third switch and approaching the Portlock crossing. One of the supervisors referred to the evidence as, "indications of something dragging."

The arguments of the parties are obvious. Aside from the protest that the notice of hearing was not specific and that the claimant was prejudged, the Organization contends that the evidence is circumstantial and does not present the degree of proof required to justify the finding that the claimant should have seen that the hopper door was down on the thirtieth car from the head end of the train. The Carrier insists that the evidence is convincing and conclusive that the hopper car door was down from the beginning and that the claimant should have seen it when he inspected the cars.

We find that the notice was sufficient. The Organization representative in obtaining a postponement of the hearing date made no complaint and apparently understood the charge sufficiently to prepare for it. This is evident from the testimony. Also, claimant stated at the inception of the hearing that he was ready to proceed and that he was represented. We find that claimant was not prejudged and that the hearing was conducted fairly.

This case must rest on the premise that the evidence reasonably led to the decision reached or that it did not.

We have reviewed the many prior Awards submitted by the Carrier's representative, twenty nine in all, and the Awards referred to in the Carrier's submission. We are aware that the judgement of the hearing officer will not be questioned unless it is arbitrary or capricious, and that circumstantial evidence must be relied upon at times when no other proof is available. We are also aware that the carrier is not required to prove its case beyond a reasonable doubt or by a preponderance of the evidence. The acceptable test is the presence of substantial evidence to justify the result. This is set forth in Second Division Award No. 6419 wherein is stated the definition by the United States Supreme Court in Consolidated Edison vs Labor Board 305 U.S. 197, 229, that: "Substantial evidence - - - means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The responsibility for safe operation is so great that carriers are under a duty to ascertain the cause of accidents so that they may be prevented in the future. In the individual case, however, a distinction should be made between the cause and the wrongdoer, if any. The testimony of the hearing has been read carefully to see if the conclusion reached was the only conclusion to be reached, and if it was supported by adequate evidence.

Several questions remain unanswered in the testimony. There is no evidence that the indications of "something" dragging or the "object" dropped were necessarily the hopper car door. The assumption was evidently made because a dropped car door caused the accident. There is no testimony that the same tracks were examined prior to December 25, and that these signs or indications were not present. The Yardmaster observed the cars as they rolled by him. Although he was looking for brake malfunction, he thought he saw a dropped car door. After he checked that out,would he not have continued to be aware of a dropped car door when he radioed the go ahead to the engineer and continued to observe the train as it went by him? The witnesses did not rule out the possibility that the wreck train may have contributed to the signs observed after it had passed the tracks. The testimony developed that there is a way to secure a hopper car door from dropping but there was not testimony to show that the wheel for this purpose, in the car, was investigated for its condition. Claimant was not assigned to secure the doors. If one was loose enough to drop in transit, he would not know it. Is it reasonable to assume that the door was down during all of the movement in the Portlock Yard while the consist was being made up? Would the car have derailed while passing over switches in the yard if the door was down at that point?

With these questions unanswered, must a reasonable person accept the evidence as adequate to support the conclusion reached in this case? It may be that the Awards cited in Second Division Award 6419 may be appropriate, to wit: " - - - the evidence at least must have sufficient substance to support a reasonable inference of fact as distinguished from a possibility or an unsupported probability", First Division Award No. 12952.

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Bearing in mind also the testimony that parts of the car door were found in the west switch at Juniper twenty five miles away where it struck the switch (Exhibit F, P.4), but none were found at switches in the yard, the circumstances do not provide a supported probability. Inferences, assumptions or surmises are not sufficient. We do not find that the circumstances of this case convincingly (as claimed by the carrier) support the conclusion that the hopper car door was down so that the claimant should have seen it when he made his inspection.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. C. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of May, 1973.