

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13358

Docket No. 13242

99-2-97-2-9

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Sheet Metal Workers International Association
(CSX Transportation, Inc. (former Chesapeake and
(Ohio Railway Company)

STATEMENT OF CLAIM:

- "1. That under the current agreement, Sheet Metal Worker D. L. Plybon was unjustly issued discipline of a five workday actual suspension when he was found guilty of a 'workmanship error involving relocation of a DBI magnet valve during application of a train control modification on Locomotive CSXT 6221', as the result of a hearing held on Thursday, April 11, 1996.**
- 2. That accordingly, CSX Transportation, Inc., be required to expunge Mr. Plybon's record of any and all mention of this matter, and make him whole for all money, benefits and time which he may have lost as a result."**

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.

By letter dated March 27, 1996 Claimant was requested to attend an Investigation on charges concerning a workmanship error involving the relocation of the DBI magnet valve during a train control modification on locomotive CSXT 6221 on March 13, 1996 at the Huntington Locomotive Shop. W. M. Fuqua, the Electrician responsible for the air brake test on that locomotive that night, was also charged with performing a defective calendar inspection. A joint Investigation was held on April 11, 1996, after which both Claimant and Fuqua were found guilty of the charges.

A review of the Investigation transcript and the record on the property reveals that Carrier's charges were primarily based upon the fact that locomotive CSXT 6221 was found to have a braking problem in Richmond, Virginia, on March 19, 1996, the cause of which was discovered when it was sent for repairs to Carrier's Cumberland, Maryland, facility on March 20, 1996. Cumberland Production Manager Wetmore testified that the locomotive in question had a mispiped DBI valve, resulting in it having no brakes in both the automatic and emergency mode, but not affecting the brakes in the independent mode. Claimant had been assigned to re-pipe the DBI magnet valve on that unit on the second shift on March 13, 1996 at the Huntington Locomotive Shop. Claimant was unable to testify to exactly what way the wires were configured when he completed the assignment, and noted that it was the first time he had performed such piping. Wetmore could not state for certain that the problem with the brakes occurred prior to the locomotive leaving the Huntington Locomotive Shop on March 13, 1996, and was unable to explain how the locomotive could have operated for four days in that condition without the braking problem being discovered.

The record reflects that after Claimant performed his assignment, Fuqua did an air test of the unit as part of his calendar day inspection. He testified that this included a test of the automatic and emergency braking systems, and that he found nothing wrong with the brakes on that unit. Thereafter, a further extensive test on the train control modification was run by another Electrician, who testified that if the DBI valve was not piped up he could not have gotten the application to run the appropriate test. Both Electricians signed off as having completed the tests without finding any defects. The unit was then cleared by the Hostlers, who were also required to run an air brake test before moving the locomotive.

It appears that after leaving the Huntington Locomotive Shop, unit 6221 went to Russell, Kentucky, and Clifton Forge, Virginia, where calendar day inspections would have also been run. Blum, Assistant Superintendent of Air Brakes, testified that it was

hard for him to believe that the unit went for four days with various air tests being run on it and that this type of problem was not discovered, because it caused no automatic and emergency brake functioning. The calendar day reports for the period March 15-19 indicate that a problem did develop with the brakes on unit 6221, but no records, including the Cumberland repair documents, state that the problem was with the DBI valve piping, rather than the train control valve, which Wetmore testified was a separate and unrelated valve.

Carrier argues that there is substantial evidence in the record to support its conclusion that Claimant was guilty of improperly piping the DBI magnet valve, the problem found necessitating repairs at Cumberland, and that Claimant admittedly was unfamiliar with the test but did not ask for any help. It notes that because it also found the subsequent inspection faulty, it cannot be relied upon as proof that the repair was performed properly. Carrier contends that this type of circumstantial evidence has been held to satisfy its burden of proof in discipline cases, citing First Division Awards 20063, 19451, 13142; Second Division Award 6419; and Public Law Board No. 999, Award 2. Carrier argues that it is not for the Board to substitute its judgment for that of management with respect to the appropriate penalty, which it argues was lenient in this case, relying on Second Division Award 1323.

The Organization contends that Carrier failed to meet its burden of proving that Claimant was responsible for the braking problems on unit 6221, because the record revealed numerous subsequent air tests having been performed not detecting any problem, the passage of four days between when Claimant worked on the unit and its being found defectively piped, and the nature of the braking problem which all witnesses agreed should have been detected earlier. The Organization argues that Carrier failed to prove any causal nexus between Claimant's job performance on March 13 and the repairs performed on March 20, and asserts that Carrier did not meet the requisite substantial evidence test, citing Second Division Awards 13261, 13260, 13089, 11626, 11566 and 7237.

While the Board is cognizant of the fact that Carrier is entitled to rely upon circumstantial evidence to support disciplinary action, such evidence must be found to be clear and convincing and to meet the substantial evidence test. See Second Division Award 13089. A careful review of the record convinces the Board that the circumstantial evidence presented - that Claimant was assigned to re-pipe the DBI magnet valve, he had never done it before and was unfamiliar with it, and it was found

to be improperly piped at Cumberland - is insufficient to support a finding of substantial evidence of Claimant's culpability. There is no question that Claimant's evidence was the most damaging because, unlike the charged Electrician, he could not state with certainty that he performed the assigned task properly. However, with the lengthy passage of time between Claimant's servicing and discovery of the problem and repeated air brake tests being performed in the interim, even Carrier's witnesses could not explain how this type of defect could have gone unnoticed while the unit was in operation. Two Electricians at the Huntington Locomotive Shop testified specifically that they applied the automatic braking system to perform the requisite air tests on the unit before releasing it, and that the unit showed no problem. There is no dispute that had Claimant mispiped the DBI valve as it was later found in Cumberland, the automatic and emergency braking systems would have failed to function at all. Even if one Electrician is found to have improperly inspected the unit, subsequent inspections at both Huntington, West Virginia, and Russell, Kentucky, show no defects noted.

Under the particular circumstances existing in this case, we are unable to conclude that Carrier met its burden of proving the charges against the Claimant.

AWARD

Claim sustained.

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 Second Division**

Dated at Chicago, Illinois, this 20th day of January 1999.