

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13397
Docket No. 13320
99-2-98-2-4

The Second Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

(Brotherhood Railway Carmen, Division of
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the Committee of the Union that:

1. That the Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 13 when they arbitrarily assessed Carman Wayne E. Johnston with a five (5) calendar day suspension as a result of an investigation held on March 20, 1997.
2. That, accordingly, the Springfield Terminal Railway Company be ordered to compensate Carman Wayne E. Johnston in the amount of eight (8) hours pay for each workday he was withheld from service, commencing April 7, 1997 through and including April 11, 1997.”

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.

Claimant and his working partner (see Second Division Award 13398) were repairing cars shunted to the repair (rip) track. Both worked on Car LVRC 6003.

After repairing the car, both agreed the car was ready to be placed in service. The car was then moved four tracks away by using a trackmobil, and was placed with other cars that had been repaired.

On March 14, a freight crew stopped to pick up only those repaired cars that were destined to points the freight was headed. The freight crew at some point in handling, noticed that on LVRC 6003, a part of a brake shoe was missing and rejected the car, delaying the freight train approximately 15 minutes.

The Carrier, after inspecting the defective brake shoe, was of the opinion that this was something either Carman repairing LVRC 6003 on March 10 should have seen, and cited both employees for an Investigation on the charge of:

“ . . . Improperly performing Carman’s duties at Waterville, Maine on March 10, 1997 on Car LVRC 6003 causing unnecessary delay to train POSD13 on March 14, 1997. . . .”

Rather than holding one Investigation, Carrier scheduled each separately, following which each employee was assessed a five calendar day suspension.

Reading and comparing both transcripts, other than the order of appearance of the witnesses, they are practically the same and this Board chooses to adjudicate both as one case.

When working the rip track, the Carmen have the obligation not only to correct the exact problem that caused the car to be set out for repairs, but also to inspect the car completely for any other defects that may have been overlooked. They inspect the wheels and mark as to which have been heat treated. In doing this inspection, they are very close to the brake shoes, and the inference is that they should have noticed the brake shoe with the missing parts.

Claimant in this case said he could not recall if he had inspected the shoes on this car, but the Claimant in Award 13398 stated emphatically that he had. It also developed that between the two there was mutual trust and when one said he did something, the other accepted the word on face value.

The Carrier's position is that the brake shoe reflected, in their opinion, that the broken edges of the shoe were old, that dirt had accumulated on the back plate of the composite shoe, thus the missing parts of the shoe found on March 14 by the train crew should have been noted by either Carman.

In disciplinary cases, the burden of proof to establish culpability for the charges assessed rests solely upon the Carrier's shoulders. In fact, it has been established that such proof must meet a substantial evidence criteria.

In this case, there was a great deal of discussion about the track condition, and about cars frozen in ice that required a more severe jolt than ordinary to break loose. This defense, however, lacked one salient fact, and that was the condition of the track on March 10 when the trackmobil moved the car. It is unknown if the car was frozen in ice.

The defense also elicited testimony that cracks in a brake shoe, of and by themselves, do not call for condemnation of the shoe. It is only when sections of the composite break loose leaving a gap more than 3/8 inch deep.

Testimony also developed that the cracked composite could be held in place. Furthermore, there was also testimony that a hard jolt or a setting of the brake could cause the broken pieces to fall off.

When the defense was searching for facts concerning the movement of the car, their requested witness was not made available as the Carrier believed the defense had ample time between the notice and the Investigation to request the witness, and since they did not, the request was refused.

It was developed that the car in question was seven deep on a track of 14 cars, with the head five cars being held onto and set back on the track as they were destined to travel in a direction other than the freight was headed.

Discussion was held as to when the Trainman may have discovered the defect on the car. None of the Supervisors at the Investigation could say for sure, but the Carman witness who ultimately changed out the brake shoe stated he used to be a Trainman, and it was his experience that the train would be inspected while air was being set, not when the cars were first picked up. With no rebuttal, this is accepted as fact by this Board. The same witness also testified there was mud on the wheels themselves indicating they had been moved through or had sat in mud, and the weather could very well have been a combination of freeze-thaw. The Board realizes this is just speculation on its part, but not more so than the Carrier has done in this instance. The Board does respect the testimony of the Carrier witnesses as to the age of the crack and the dirt on the plate, but it weighs that testimony against that elicited by the defense that the shoe could have been cracked but with no pieces missing when viewed by Claimant and then jarred loose somewhere between the time it was moved from the rip until set in the train. It is difficult to accept that two veteran Carmen, with 30 years experience each, would miss a brake shoe with chunks missing only to be discovered by a Trainman whose main interest is moving cars.

The claim will be sustained, the record will be cleared and the Claimant paid for all time lost. The Carrier failed to furnish substantial evidence of Claimant's culpability for the charges assessed.

One other note, there was discussion concerning the Carrier introducing Claimant's past record in the trial transcript. The Carrier did advise Claimant in its notice of charges of its intent to do so, and did at the conclusion read into the record Claimant's disciplinary record with the disclaimer the record would be given consideration only if Claimant was found guilty. This is sufficient, and is accepted as being unprejudicial to the rights of the accused, but in both instances the Hearing Officer asked of the Manager of Car Maintenance:

"Have you had any incidents such as this in the past with (Claimant)?"

The above question was objected to by the defense. The Board finds such questioning can lead to a reversal of the disciplinary process as it does infer that because of the Claimant's past, he now is in the predicament that he is. This question should not have been asked. Of an by itself, it is not enough to invalidate the disciplinary process, but in other cases, it could be the one factor that would weigh heavily on a Board's decision.

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 12th day of April 1999.