

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13477

Docket No. 13389

99-2-98-2-79

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(Brotherhood Railway Carmen Division
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Delaware and Hudson Railway Company

STATEMENT OF CLAIM:

“Claim of the Committee of the Union that:

1. That the Delaware and Hudson Railway Company violated the terms of our current agreement, in particular Rule 26.1 when they arbitrarily assessed Edward Nobles with twenty (20) demerits as a result of an investigation held on September 23, 1997.
2. That accordingly the Delaware and Hudson Railway Company be ordered to remove the discipline and all related correspondence from the record and file of Carman Edward Nobles.”

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.

Following an Investigation held on September 23 and by letter dated October 9, 1997, the Claimant was found guilty and assessed 20 demerits under the following charge:

“Non-compliance with DHC 1000, Parts: 1.1, 1.11, 4.1 and the CFR 49 Parts 200-399, Section 218.27 (b), of Subpart B, Blue Signal Protection of Workers, for failure to properly line #1 Switch in East Binghamton Yard on August 18, 1997 at approximately 0300 hours, while you were employed as a Carman, working train #555.”

Rule 26.7 provides, in part, as follows:

“If the accused employee desires other witnesses on his behalf he shall arrange for their presence”

As a procedural matter, the Organization finds fault with the conduct of the Hearing because a requested witness was not present. This prospective witness was assigned to work with the Claimant at the time of the incident. The Organization raised this point at the outset of the Hearing as well as during the claim handling procedure.

Citing Rule 26.7, the Hearing Officer noted that it was up to the Claimant to “arrange for [the] presence of witnesses” in his defense. The Board notes, however, that the Local Chairman wrote to the Manager, Car Equipment two weeks prior to the Hearing, requesting the presence of this witness. Since the witness is an active employee under the Carrier's direction, the Carrier was then logically required to make the witness available, or at least advise the Local Chairman that this would not be done.

During the Hearing, there was discussion that this witness would simply testify as to where the Claimant was assigned at the time of the incident, and the Carrier conceded as to such location. Nevertheless, it is not possible to foresee what testimony would have been available from the witness. As a result, the Organization was denied a “fair and impartial” Hearing, as required by Rule 26.

The Organization also points out that the charge referred to the Claimant as “working train #555.” The record shows that this was not accurate. Thus, the charge itself failed to be precise as to the alleged misconduct of the Claimant.

As to the merits of the matter, the Claimant and his working partner (the requested witness) were performing service on 2 Running Track, Train P3. As he was returning to the shop to obtain a piece of equipment, the Claimant was advised by the Yardmaster that "Track 1 was ready to work." On his way back to his assignment on Track 2, the Claimant threw the switch on Track 1, presumably locking it, preparatory to later work on Track 1.

As it turns out, the Track 1 switch had been previously locked, and the Claimant had actually unlocked the switch. This is admitted by the Claimant.

Following this, a yard engine ran through the switch. This was, of course, a potentially serious occurrence, but here there were no adverse consequences.

The most serious of the charges against the Claimant was his alleged violation of Blue Signal Protection of Workers under Section 218.27(b). This Section, however, refers to workers "on, under or between rolling equipment on track other than main track." The facts show that this is not applicable to the Claimant, because the Carrier conceded that he was not working on Track 1.

In sum, the Claimant is found to have improperly lined a switch for a track on which he was not working. This offense may well have warranted disciplinary action, but the Board is not sufficiently informed to determine what penalty might have been warranted.

Based on the defective charge, the absence of an obviously pertinent witness, and the application of an inappropriate Rule, the Board necessarily concludes that the 20-demerit penalty is without support.

AWARD

Claim sustained.

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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 December 1999.