

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION**

Award No. 13478

Docket No. 13390

99-2-98-2-80

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx 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 John Kinsey with twenty (20) demerits as a result of an investigation held on October 2, 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 John Kinsey.”

**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 October 2, 1997 and by letter dated October 22, 1997, the Claimant was assessed a disciplinary penalty of 20 demerits under the following charge:

**“Failure to comply with Rules 1.1, 1.11, 4.1, 7.1, 7.2, 7.3, and 7.5 of the D&H Employee Safety Code and Policy (DHC-1000), effective July 1992, while you were employed as Carman, 0700 hours, Kenwood Yard, on September 3, 1997, at 1215 hours, in the vicinity of the Track #6 switch, which resulted in a personal injury.”**

During the claim handling procedure, the Carrier reduced the initial 20-demerit penalty to ten demerits.

In the course of his assignment on September 3, 1997, the Claimant threw a switch (misidentified in the Charge as “Track #6 switch”). He experienced difficulty in doing so and stated he felt a pain in his shoulder during this action. The Claimant followed the specified procedure and reported his pain to his immediate supervisor. No medical attention was required, and there was no lost time.

Upon investigation, the Carrier determined that the Claimant had improperly exerted too much effort in throwing the switch, thus causing the shoulder pain. The record shows that the Claimant had thrown the same switch in the opposite direction moments before the incident under review. Later inspection of the switch showed that some minor repair was required. Contrary to the Carrier’s allegation, the Board finds nothing in the record to indicate that the Claimant should have been aware that the switch was defective. Despite the Claimant’s alleged unsafe practice, the Manager of Car Equipment nevertheless tested the switch by successfully throwing it himself.

Part of the Carrier’s reasoning in assessing the penalty concerned the Claimant’s accident record. While it listed a substantial number of injuries, the record covers a period of 30 years’ service. Further, except for one previous incident on June 15, 1997, there were no reported injuries in the previous ten years. Progressive discipline for an accident-prone employee is frequently warranted. The Claimant’s record, however, shows only one previous injury in the previous decade. Such a record cannot justify a conclusion that the Claimant was accident-prone.

**In sum, there is no evidence of anything other than an employee who perhaps exerted too much effort in getting the task done and then, as required, promptly reported his shoulder pain. The Carrier failed to provide substantial evidence in support of the discipline that followed.**

**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 December 1999.**