

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24039
Docket Number MN-24118

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employees
(
(The Kansas City Southern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The five (5) days of suspension imposed upon Section Foreman H. L. **Swinney** for allegedly '**having** left track unsafe on February 13, 1980' was without just and sufficient cause and on the basis of unproven charges (Carrier's File 013.31-226).

(2) The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including all overtime worked by Section **Gang** 055 from May 26 through **May** 30, 1980, both dates inclusive."

OPINION OF BOARD: Claimant herein, a foreman, was found guilty of leaving track in an unsafe condition on February 13, 1980 and was assessed a five day suspension, following an **investigation**. Carrier avers that the evidence indicated Claimant's responsibility for the **unsafe** condition and that the discipline was fully warranted. Petitioner denies that there was any significant evidence to establish Claimant's guilt and prays that the Claim be sustained.

A careful study of the transcript of the investigation leaves the Board with an impression of confusion on the **part** of the Carrier with respect to the facts. There apparently were two gangs working on the track **in** question on **February 3th**; further Claimant and his crew were called off work on the particular piece of track **after** about an hour's work and were assigned to another track. Although there is no doubt **that** the loose bolts and an unsafe condition existed, the evidence does not indicate who was responsible for the condition in the first instance. The **Roadmaster**, Claimant's **supervisor**, testified that Claimant had performed work on the switch in question:

'Yes, I **am** positive that he had **started** work on the switch I don't **know** how much work he had performed on the switch but he had started work **on** the switch."

Claimant, and both members of his **crew** for the day in dispute, testified that no bolts were loosened while they worked on the track. No evidence was presented with respect to the work of the second gang for that **day**. Claimant and his gang stated that they had merely cleaned out the dirt around the switch in initial preparation for changing the track when they were reassigned. There was further confused testimony with respect to a subsequent inspection of the particular track.---/

4 The Board is constrained to conclude that there was no clear or convincing evidence adduced at the investigation to establish **Claimant's culpability** for the incident.' Hence, **Carrier has not borne its burden of proof** which is the **fundamental** requirement in disciplinary situations. The Claim must be sustained.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the **parties** waived oral hearing;

That the Carrier and the **Employee** involved in this dispute are respectively Carrier and **Employee** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the **Adjustment** Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of November 1982.

