NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24452

THIRD DIVISION

Docket Number ID-23869

T. Page Sharp, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Burlington Northern Inc.

STATEMENT OF CLAIM: "Claim of the American 'Brain Dispatchers Association that:

(a) Burlington Northern Inc. (hereinafter referred to as "the Carrier") violated the current Agreement (effective on consummation of merger of Burlington Northern Inc. on March 3, 1970) between the parties, Article 24 thereof in particular, when the Carrier suspended extra train dispatcher M. E. Jones (hereinafter referred to as "the Claimant") from the service of the Carrier for a period of ten (10) days effective 12:01 A.M., March 12, 1979 to and including 11:59 P.M., March 21, 1979, without pay and when the Carrier made an entry of these charges on the Claimant's personal record. The record, including the transcript of the investigation, fails to support the discipline assessment made by the Carrier and/or establish guilt on the part of the Claimant. Therefore, the imposition of discipline was arbitrary, capricious, unwarranted and an abuse of managerial discretion.

(b) The Carrier shall now be required to compensate the Claimant for the wags loss suffered by him in accordance with Article 24(e) and to clear the Claimant's personal record of the charges which allegedly provided the basis for said action.'

OPINION OF BOARD: On February 5, 1979 a westbound freight train, No. 85, and its trailing section were near Benz, Montana when the forward section experienced locomotive problems. The two sections were joined at Benz. At Forsyth the decision was made to move all the power to the front and consolidate the two sections.

When the two-section train arrived at Forsyth Yard it was separated so that the forward section was west of the east switch and the trailing section was east of the switch, both sections on the main line track. The east switch was a dual control switch within CTC territory. The train movements over this switch are authorized by block signal indications controlled by the Train Dispatcher at Glendive.

Because of ice it was necessary for the crew to obtain permission to manually operate the switch so that the power from the trailing section could enter the siding track into Forsyth Yard. This they did, and the crew proceeded to take the power through the yard, onto the main line, and then backed this power up to and coupled with the power of the forward section. After this was done it was necessary to couple the sections. Because the trailing section was on the east side of the east switch on the main line it was necessary to

back the forward section through a red block. The Claimant supposedly had restored power to the east switch and lined it with the main line.

After the coupling was completed, the consolidated units were pulled westward over the east switch at which time some of the train went down the main line and the remainder of the train traveled down the siding track and derailed. Rather extensive property damage resulted.

Eight employes were given identical notices to attend an investigation. This notice stated:

> "Attend investigation in the Public Library at Forsyth, Montana at 1:00 PM, February 14, 1979 for the purpose of ascertaining the facts and determing (sic) your reponsibility (sic) in connection with the derailment of Train 85 at the East Switch, Forsyth, Montana, at approximately 6:15 AM, February 5, 1979.
>
> Arrange for representative and/or witnesses if desired, in accordance with governing provisions of prevailing schedule rules.
>
> Please acknowledge receipt by affixing your signature in the space provided on copy of this letter."

There was much uncertainty at the investigation as to the proximate cause of the derailment. It was prwad that the east switch had been aligned into the Forsyth Yard causing the trailing section to follow that path andderail. There was reasonably conclusive evidence that the alignment of the east switch was the result of a run through.

As a result of the investigation Claimant was given a ten day suspension from service because he was found to have violated Rule 275 of the Consolidated Coda of operating Rules on the day in question.

Rule 275 reads:

> "When a train or engine is stopped by a signal governing movement over dual control switches, if no conflicting movement is evident, a member of the craw must immediately communicate with control operator and be governed by his instructions. Such instructions must include information as to the route to be used. The instructions must be repeated to the control operator.
>
> "Control operator may authorize movement over dual control switches at restricted speed, if control machine indicates that the dual control switches are lined and locked for the route to be used.

"If control machine does not indicate that the dual control switches are lined and locked for the route to be used, the control operator will instruct the member of the crew to operate the switches to be used by hand as provided in Rule 275 (A) and proceed at restricted speed."

Claimant was found to have not complied with the mandates of Rule 275. There is substantial evidence in the record to establish that Claimant so violated the Rule. This Board agrees with the long-standing decisions in this and other Divisions that the decision below is not to be upset by this Board substituting its judgment for that of the hearing officer if there is substantial evidence in the record, no matter how controverted, to establish a violation. See Second Division Awards 8201, 7473, 8023; Third Division Awards 21.290, 21236, 21241, 21342, 21442.

However, the inquiry of this Board does notendhere. The next issue to be decided is whether the violation of Rule 275 is conclusive as to a violation of the charges against Claimant. Nowhere in the long transcript is the cause of derailment established. The best evidence would indicate that the switch was run through and when the consolidated train was moved in a westward direction the part of the train that had been on the east side of east switch proceeded down the aiding because of the misaligned switch. There is nothing in the record that establishes how the run through was done or who was responsible. Although it is admitted that Rule 275 was violated it is clear that only one route, the main line, was to be utilized and the only evidence in the record establishes that the speed actually traveled was restricted speed or slower. The only responsibility for Claimant as to the derailment in this instance could only have occurred because of a violation of the last paragraph of Rule 275. If the control machine showed that the dual control switch was not lined and locked for the main line and Claimant allowed the move to proceed, his inaction could definitely be a causal factor in the derailment. However, in the record the testimony of Claimant was that the control machine indicated that the switch was lined for the main line as it should have been for the move. This was supported by the testimony of Brakeman Tait that he observed the switch points and that they were lined for the movement. Based upon this uncontroverted testimony this Board must conclude that the latter mandate of Rule 275 was not violated.

This Board does not condone violations of safety rules. Even if a violation had occurred and nothing consequential had resulted, Claimant could nevertheless have beencharged and disciplined accordingly. But in the facts of the instant case Claimant was only charged with possible responsibility for the derailment. Nowhere in the transcript is it established that the inactions of) Claimant had anything to do with the derailment. The Carrier did not sustain its burden of proof to show that Claimant shared some responsibility for the derailment. The findings of the hearing officer must establish a violation of the charges. See Awards 14120, 14339, 14778, 16587, 19962, 20686 and many others.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 Mvision

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of June 1983.

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