

The Third Division consisted of the regular members and in addition Referee **Lamont** E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Seaboard System Railroad

STATEMENT OF CLAIM: "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Seaboard System Railroad (formerly the **L&N** Railroad Company):

(a) **Carrier** failed to provide sufficient evidence to support its suspension of Signal Maintainer H. E. Winestead who was disciplined by being suspended for thirty days from December 16, 1983 to January 14, 1984.

(b) Carrier should be required to clear Mr. Winestead of all charges, that his personnel record be cleared of the incident and that he be reimbursed for all pay and benefits lost during his suspension. Carrier file 15-55 (84-8)**R.**"

FINDINGS:

The Third 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 employees 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 waived right of appearance at hearing thereon.

Claimant has been employed by the Carrier since 1974, beginning **as** an Assistant Signalman. At the time this claim **arose**, he was classified **as** a Signal Maintainer and assigned to a territory including Cave City, Kentucky.

At approximately 8:00 A.M. on October 22, 1983, while proceeding southbound on the Carrier's tracks. Train #289 entered the siding in the vicinity of cave city. As the train approached the siding, all indications were that the electric switch controlling traffic at the north end of the siding **was** properly thrown to divert the train onto the siding. Twelve **cars** of Train #289 proceeded onto the siding, but the **rear** wheels of the thirteenth car split the switch. As a result, that car and the two **cars** behind it derailed.

Immediately after the derailment, Carrier personnel went to the scene to investigate. Claimant, who was responsible for maintenance of the switch, was summoned to the scene. From their inspection at the scene, the Carrier's officials determined that the switch at the north end of the siding was out of adjustment, so that the switch points were gapped when throw" in the direction to divert southbound traffic onto the siding. They further determined that the gapping of the switch points had caused or contributed to the derailment of Train #289.

By letter dated October 26, 1983, Claimant was instructed to report to the Carrier's offices at Louisville, Kentucky on November 8, 1983:

"for an investigation to determine your responsibility, if any, in connection with [the] power operated switch at North End of Cave City siding being out of adjustment thereby contributing to derailment of Train #289 on October 22, 1983, at approximately 8:00 a.m."

Mr. G. F. Vaughn, Trainmaster, presided at that investigation. Mr. R. W. Smith, the Carrier's Signal Supervisor, gave evidence concerning his inspection of the site and the subject switch after the derailment occurred. The investigation was recessed to November 28, 1983, in order to obtain the testimony of Mr. R. J. Boles, Division Engineer, who had conducted an inspection of the switch in the company of Claimant before Smith arrived. Claimant also gave his evidence on November 28.

After the investigation was closed, the Carrier determined that Claimant had failed to properly adjust the switch in question, and that his failure contributed to the derailment. Claimant was so informed in a letter from the Carrier's Assistant Superintendent dated and acknowledged December 5, 1983. That letter assessed Claimant a suspension of 30 actual days, to be served from December 16, 1983 to January 14, 1984. The Organization timely appealed this suspension, the dispute was progressed between the parties in the proper manner without resolution, and it now comes before this Board.

The Organization claims that the Carrier conducted an unfair and prejudicial investigation leading to Claimant's suspension, and that the Carrier failed in that investigation to satisfy its burden of proving that Claimant's suspension was warranted. Under all the circumstances disclosed in the record, the Board must reject these contentions.

The Organization makes three assertions in support of its claim that the investigation was unfair and prejudicial.

First, the Organization argues that the Carrier had improperly prejudged Claimant's fault before the Hearing on the property. According to the Organization, this is evidenced by the phrasing of the Carrier's October 26, 1983 notice of investigation, which stated that the purpose of the Hearing was

to determine Claimant's responsibility "in connection with [the] power operated switch . . . being out of adjustment thereby contributing to [the] derailment" This language, according to the Organization, reveals that the Carrier had predetermined that the switch in fact had been out of adjustment causing the accident, thus leaving no question as to Claimant's fault since he **was** indisputably responsible for the adjustment of all switches in his territory.

However, Rule 55 of the controlling Agreement provides that the Carrier's notice of **investigation** in such an instance must advise the subject employee "of the charge or charges **against** him," so that he will know what he must defend against. Consequently, a claim of prejudgment cannot be based merely on the fact that the Carrier's notice levels certain accusations. Moreover, the notice in this case expressed that the investigation would determine Claimant's "responsibility, if any." As the Carrier points out, a claim that an employee's fault has been prejudged before the **investigation** into the circumstances must be based on some substantive and credible evidence, and not merely on certain words in a document taken out of context. See, Third Division Award 23344. There is simply no such evidence in this case.

Second, the Organization contends that the investigation prejudiced Claimant's interests when it **was** recessed from November 8, 1983 to November 28, 1983, in order to obtain the attendance and testimony of R. J. Boles. The **Organization** suggests that this recess afforded the Carrier the opportunity to school Boles so that his testimony would support the Carrier's position.

At the time the Hearing **was** recessed, the **Organization** asked the Hearing Officer to prevent the transcript which had been made up to that point from being reviewed by other Carrier officials before the Hearing resumed. The Hearing Officer stated that he would do so. There is again no evidence that the continuance of the Hearing **in** fact resulted in any improprieties or in any way prejudiced Claimant's rights. The evidence gathered at the initial session indicated that Boles was a material witness, so that the Interests of fairness and thoroughness of the investigation were served by procuring his testimony. Claimant himself did not testify until after the investigation was resumed on November 28. Hence, the Board must **reject** this assertion of prejudice **as** well.

Third, the Organization argues that the Carrier should have preserved and produced tape recordings of all communications occurring on the morning of the derailment involving the Carrier's dispatcher at Louisville who controlled the switch in question. But the Carrier normally preserves such tapes for only 30 days after the dates they are recorded, and these tapes were not requested by the Organization until the Hearing on November 28, 1983, which **was** more than 30 days after the derailment on October 22. Consequently, when the **Organization** asked for them, the Carrier reported that the tapes from the date of the derailment no longer existed.

The Organization suggests that the Carrier's failure on its own initiative to preserve the tapes from the date of the derailment supports an inference that they might disclose evidence harmful to the Carrier's position as to Claimant's fault in the incident. However, the conduct of the Louisville dispatcher in this incident does not appear to ever have been suspected, so it is not obviously suspicious that the tapes were not preserved. In addition, the Organization fails to specify what important evidence the tapes might have contained. Absent evidence that the tapes had important relevance to this dispute, the Board cannot infer anything from their routine destruction.

In support of its contention that the Carrier failed to establish Claimant's fault justifying his 30-day suspension, the Organization observes that the evidence against him is entirely circumstantial. There were no eyewitnesses to the derailment, and there is no first-hand evidence that the derailment resulted from an improper adjustment to the switch in question.

However, circumstantial evidence can be sufficient to determine the cause of a derailment and whether a particular employee was at least contributorily at fault. Third Division Award 14066. In addition, this fairly can be determined by an after-the-fact investigation if there is evidence to support the Hearing Officer's conclusions. See, Third Division Awards 17163, 17492.

The evidence in this case establishes that on October 18, 1983, four days before the derailment, the Carrier's Louisville dispatcher reported that the switch in question would not give a proper indication on his panel when it was thrown in the direction which would allow southbound traffic onto the Cave City siding. Accordingly, Claimant was called to make repairs to the switch, and reported that he did so on that date. Claimant testified that he had to increase the switch's pressure in the reverse direction to enable it to properly lock up in that direction. Claimant testified without contradiction that, after he adjusted the switch on October 18, he asked the dispatcher to throw it in both directions and that it operated correctly.

After those repairs, the next train to pass over the switch was a northbound freight train on October 21. That train passed through without incident. There is testimony, however, that as it passed, the indicator lights pertaining to the switch blinked at the dispatcher's location, but that this fact was not then reported by the dispatcher.

The next train to pass over the switch was Train #289, southbound, on October 22. As Train #289 approached the switch, the dispatcher's lights indicated the switch was properly thrown to divert the train onto the siding. As the train proceeded over the switch, the lights began to blink, indicating trouble with the switch, and the dispatcher immediately reported this to R. J. Boles, Division Engineer. Less than five minutes later, before Boles could do anything about it, the train was reported to have derailed.

Boles immediately went to the site of the derailment and met Claimant there. The train had derailed at ~~the~~ the location of the switch at the north end of the siding. Boles and Claimant together inspected the switch, and both testified they found the switch points "gapped," i.e., not properly closed. Boles estimated the gap as one-half inch in width. Claimant testified that this **gapping** resulted ~~from~~ there being insufficient pressure from the switch motor. In that direction, the same problem which he had found four days earlier.

R. W. Smith, the Carrier's Signal Supervisor, arrived at the site within two hours. He observed the same gapping of the switch points as did Boles and Claimant. Smith also observed, as corroborated by Boles and Claimant, that one of the switch points was flattened on the end as the apparent result of having been struck by the flange of one of the train's wheels. The first 12 cars of Train #289 had successfully passed over the switch and moved onto the siding. The front (southernmost) wheels of the 13th car had moved onto the siding, but the rear (northernmost) wheels had split the switch and continued along the main line. This, according to Smith, initiated the derailment.

Smith found that one wheel on the rear truck of the 13th car bore evidence of having struck the switch point. According to Smith, this occurred because the switch point was gapped open, and it permitted the wheel to proceed behind the switch point and continue along the main line. The rear wheels of the 13th car derailed a short distance past the switch, and not in the switch itself.

Claimant's testimony did not take issue with any of these findings, except the conclusion of Smith and Boles that the switch points were gapped before the train entered the switch. The Organization speculates that the gapped condition of the switch might have resulted from damage to the switch caused by the derailment itself. But Smith and Boles stated categorically that there was no evidence to support this supposition. Claimant agreed that nothing about the switch was broken after the derailment. The evidence is uncontradicted that the cars did not derail in the switch, but beyond it. Claimant testified that a basket rod operating the switch appeared bent after the derailment, but he acknowledged that this would occur if a gapped switch point were struck by a wheel, as the evidence indicates happened. The circumstances of the derailment indicate, according to the weight of the evidence, that a wheel striking the open switch point caused the derailment. and not that it occurred because of the derailment.

Claimant also noted that the track bed was graded and/or resurfaced in the vicinity of the **switch** after the derailment. He appears to suggest that this might have been done to correct an instability of the surface under the switch, which might have permitted it to rock as the train passed over, thus causing the derailment. However, Boles testified that the track bed was resurfaced beyond the switch, merely to repair disturbances caused by the derailed cars.

There is simply no evidence to indicate that the derailment resulted from **causes** other than those identified by the Carrier's officials. All the evidence is consistent with and supports the Carrier's conclusions. From all indications, the derailment resulted from a misalignment of the switch, which had been **reported** out of adjustment and presumably repaired by Claimant just four days before the incident. The circumstantial evidence is very **substantial** that Claimant failed to properly repair the switch then, thereby contributing to the derailment.

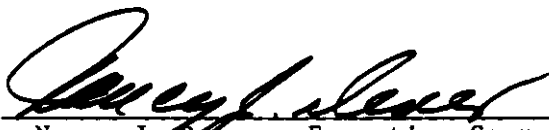
Where misfeasance by an **employee** is properly established by the **Carrier**, as it has been here, the Board may not substitute its judgment for the Carrier's in the matter of the appropriate discipline to be assessed, unless the penalty imposed is so harsh as to be vindictive or in bad faith. Third Division Awards 11324, 9046. In **this case**, a suspension of 30 days does not appear manifestly unreasonable, where the employee's negligence has contributed to a serious accident. This claim must therefore be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated **at** Chicago, Illinois, this 17th day of March 1988.