

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31994
Docket No. MW-32771
97-3-96-3-79**

The Third Division consisted of the regular members and in addition Referee Charles J. Chamberlain when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Kansas City Southern Railway Company (former
(SouthRail Corporation)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The sixty (60) day suspension imposed upon Machine Operator T. L. Woods for alleged violation of MidSouth Corporation Operating Rule 104 because he allegedly '... left the East end switch to #5 improperly line, locked and tagged for a side track instead of the main line on August 3, 1994, at or near Columbus, MS, Tuscaloosa District....' was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [Carrier's File 013.31-498(SR) SRL].**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be '*** made whole in accordance with RULE 33(g).
***'"**

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 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.

This dispute involves an incident where a main line switch was found lined for a side track containing two track machines.

The Claimant, Mr. T. L. Woods, was the operator of one of the machines and the other machine was operated by Mr. A. L. Powe. Both employees were assigned as machine operators on the date the incident occurred.

The record shows that on the afternoon of August 3, 1994, Mr. Powe and Mr. Woods around 2:00 P.M. placed their respective machines in the east end of Track No. 5 where they were going to leave them overnight. Mr. Powe was the first to enter the siding and backed his machine in the siding. Mr. Woods followed with his machine in the siding and stopped to go back to the switch to line it back to a main line position. Mr. Woods then moved his machine back to a position directly in front of Mr. Powe's machine. The record shows that Mr. Woods then asked Mr. Powe for a yellow tag to put on the switch and switch lock which would under Carrier Maintenance of Way rules protect the track machines being stored on Track No. 5.

Mr. Powe and Mr. Woods then were transported back to their personal automobiles by Track Foreman J. Hodges.

At about 2:30 P.M. on August 3, 1994, The Golden Triangle Railroad called the Yard office at Artesia Yard and informed Trainmaster V. N. Bolin that their train had found the east end of No. 5 at Columbus, Mississippi, lined red and locked for No. 5 with a yellow tag. Mr. Bolin then contacted Mr. Kenny Jordan Track Foreman who was working at Artesia Yard and instructed him to go to Columbus, Mississippi, and make an investigation at the site of the switch at the east end of No. 5.

Mr. Jordan did as instructed and found the switch at the east end of No. 5 lined for the siding with the switch locked and yellow tagged.

Following the incident, Mr. Woods and Mr. Powe were advised by letter dated August 16, 1994, to appear for an Investigation on August 23, 1994. The notice read as follows:

"Arrange to attend a formal investigation to be held at 10:00 a.m. August 23, 1994, in the Trainmaster's Office, Artesia, MS, for the purpose of determining your responsibility, if any, in connection with you allegedly leaving the East end switch to #5 improperly lined, locked and tagged for a side track instead of the main line on August 3, 1994, at or near Columbus, MS, Tuscaloosa District, while serving as Machine Operators on Kansas City Southern Railway Co. Maintenance of Way.

You may arrange to bring witnesses and a representative in your behalf as provided in your schedule agreement.

/s/ J.L. Griffin, Trainmaster, Road Foreman of Engines, Newton, MS. Mr. V.N. Bolin - Arrange to attend as witness. Mr. M.E. Jordan - Arrange to attend as witness. Mr. D.H. Cox - Arrange to attend as witness. Other witnesses may be called."

Mr. A. L. Powe waived his right to an Investigation and received a letter of reprimand as discipline.

The Investigation was postponed and subsequently held on September 28, 1994.

Following the Investigation, Mr. T. L. Woods, the Claimant, received a letter dated October 7, 1994, which read as follows:

"October 7, 1994

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

**Mr. T. L. Woods
1010 Longbrook Drive
Jasper, AL 35501**

In reference to the formal hearing held on September 28, 1994, in Artesia, MS.

After reviewing the transcript of testimony given at the hearing held on September 28, 1994, it has been determined that you left the East end switch to #5 improperly line, locked and tagged for a side track instead of

the main line on August 3, 1994, at or near Columbus, MS, Tuscaloosa District, while serving as Machine Operators on Kansas City Southern Railway Co. Maintenance of Way.

For your violation of MidSouth Corporation Operating Rule 104, you are hereby suspended from the services of the Kansas City Southern Railway Co. For a period of sixty (60) days beginning at 12:01 a.m., October 10, 1994 and ending at 11:59 p.m., December 8, 19994.

(Signed) _____
Mr. W. M. Speed"

During the handling of the dispute on the property, the Organization alleged that the Carrier failed to afford the Claimant a fair and impartial Investigation.

Our thorough review of the record in this dispute fails to find any support for the Organization's position in this regard. There is no question as to the purpose of the Investigation. The Investigation was conducted in a manner in which the Claimant and his representatives were afforded ample opportunity to participate and question those in attendance who testified. Additionally, at the close of the Investigation, the Claimant and his representatives stated they had no complaint relative to the manner in which the Investigation was conducted.

While the testimony of the Claimant and Mr. Powe at the Investigation reveals that they were both certain that the switch was properly lined for the main line and yellow tagged to prevent any movement into Track 5 where their track machines were stored, there are certain elements in the transcript testimony that raises questions concerning the accuracy of their testimony. Roadmaster D. H. Cox testified that the Claimant was unsure of what he did or did not do at the time of the incident.

The statement by the Claimant and Mr. Powe given Mr. Cox the following morning on August 4, 1994, reflects uncertainty on the part of the Claimant as he stated he did not remember throwing the switch back to the turn out siding. Mr. Cox's testimony as to what was said by the Claimant the following morning cannot be disregarded as hearsay. Furthermore, there is the question of the time element in this dispute. The Claimant and Mr. Powe placed their track machines on the siding around 2:00 P.M.; at approximately 2:50 P.M. the train involved approached the switch and found it lined against main line traffic and lined for the Track 5 siding. There being no

evidence in the record to show other employees or contractors in the vicinity, no evidence of tampering with the switch lock or yellow tag which was securely locked with the switch in the turn out position, we can only conclude that the Claimant erred in his recollection of the facts as to what transpired in this instance.

Furthermore, we cannot overlook the fact that Mr. Powe who was involved in this incident waived his right to an Investigation and accepted discipline. We find it difficult to conceive that employees would accept discipline of any nature if they were sure they did nothing wrong.

While the Claimant chose to proceed with the Investigation which was his right, we find based on the record before us and the testimony in the transcript that there is no basis for overturning the discipline assessed against the Claimant in this dispute.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of May 1997.