

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32006
Docket No. MW-32408
97-3-95-3-276**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (time held out of service from May 19, 1994 through and including June 23, 1994) imposed on Machine Operator A. L. Sowards for alleged violation of S7C Safety Rules and Procedures of the Maintenance of Way Department, Rule Number 3202 (A) and (B), General Rule Number 8 and NORAC Operating Rule Number 801 in connection with the damage to #21 Switch on May 18, 1994 and the subsequent derailment of Train TV 9, resulting in damage to facilities and equipment and causing train delays, was an abuse of the Carrier's discretion, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System Docket MW-3366-D).**
- (2) As a consequence of the violation referred to in Part (1) above, Machine Operator A. L. Sowards' record shall be cleared of the charges leveled against him and he shall be compensated for all lost wages with benefits and credits resulting therefrom."**

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.

On May 18, 1994, Claimant was operating a ballast regulator when the brakes failed and he ran thru a switch. Approximately an hour and a half later, a train passed over the switch and derailed. Claimant was withheld from service on May 19, 1994. On May 27, 1994, Claimant was notified to report for a hearing on June 6, 1994, in connection with his alleged violation of S7C Safety Rules and Procedures of the Maintenance of Way Department, Rule Number 3202 (A) and (B), General Rule Number 8 and NORAC Operating Rule Number 801. The hearing was held as scheduled. On June 17, 1994, Claimant was notified that he had been found guilty of the charges and that he was assessed a suspension equal to time held out of service through June 23, 1994.

The Organization raises several procedural objections. The Organization also argues that Carrier failed to prove the offenses charged. Carrier contends that it afforded Claimant a fair hearing and proved the charges by substantial evidence.

The Board has reviewed the record carefully. We are not persuaded by the Organization's procedural arguments. Accordingly, we turn to the merits of the claim.

The record raises three factual issues: Whether Claimant should have repaired the ballast regulator's brakes himself, whether Claimant should have taken steps to ensure that the brakes were repaired, and whether Claimant caused the derailment.

Claimant was employed as a Class II Machine Operator. The Supervisor-Work Equipment testified that Operators are expected to make running repairs as necessary. He further testified that the brakes only needed an adjustment which, in his opinion, Operators were capable of performing. However, the Assistant Supervisor of Track Production testified that it was the Machinists, rather than the Operators who made adjustments to the brakes. He further testified that he instructed the Machinist to make

the adjustments that were needed in the instant case. He explained that, at one time, Operators made the adjustments, but that this was on less complicated machines. The Foreman also testified that Machinists always adjusted the brakes.

The record further shows that Claimant reported problems with the brakes to the Machinist. The Machinist failed to make the repairs because he forget, not because he believed them to be Claimant's responsibility. Upon consideration of the entire record, we find that Carrier failed to prove that Claimant was responsible for making the adjustments to the brakes.

Claimant reported the brake problems to the Machinist on May 11, 1994. The Machinist was deeply involved in repairing two severe oil leaks on the same piece of equipment and forgot about the brakes. The Machinist testified that Claimant assisted in the repair of the oil leaks. This raises an inference that Claimant was aware that the brakes had not been repaired.

Claimant was evasive in his testimony concerning his knowledge that the brakes were still in need of repairs. Claimant testified that the brakes worked properly when the ballast regulator was run in working gear. However, he never maintained that they worked properly in travel gear, which he was in at the time he ran through the switch. He maintained that he was surprised that he could not stop the machine when traveling at five miles per hour, but his evasion of the question concerning his knowledge of the continuing need for repairs further supports the findings that he knew the brake repairs had not been performed and that he did nothing to see to it that the repairs were made. As Operator, Claimant was responsible for the safe operation of the machine. We find that Carrier proved that he failed in this regard by failing to notify the appropriate individuals to have the brakes repaired.

The question remains, whether Carrier proved that Claimant's failure to take action to have the brakes repaired caused the derailment. The Track Engineer testified that, after the derailment, he inspected the switch and found that the switch point was gaping, the spindle was twisted, and the rod was bent. From this he concluded that the derailment was caused by a run-thru switch. He checked with the Yardmaster and learned that the ballast regulator was the last move through the switch before the derailment.

The Track Engineer's findings support an inference that Claimant's running thru the switch caused the derailment. Standing alone, this inference may provide substantial evidence of the charge. However, all direct evidence in the record contradicts this inference. The Foreman testified that he tested the switch after the run-thru and found it working properly. The Assistant Supervisor corroborated that the Foreman reported to him that he had thrown the switch both ways, there were good points and there was tension on the lever. He further indicated that it was common for a switch to be run-thru and not result in a need for repairs. Furthermore, a written statement from an Operator who was operating another ballast regulator behind Claimant's indicated that when he got to the switch, after Claimant had run-thru it, the switch was lined straight for him to pass. Based on this record, we are unable to say that Carrier proved by substantial evidence that Claimant's running-thru the switch caused the derailment.

The penalty imposed was based on a finding that Claimant caused the derailment. Such an offense was more serious than the offense which Carrier proved, i.e., that Claimant failed to follow through to ensure that the brakes on the ballast regulator were repaired. Accordingly, we will reduce the suspension to ten days. Carrier shall compensate Claimant for all wage loss in excess of a ten day suspension.

AWARD

Claim sustained in accordance with the Findings.

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 Third Division

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