

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33230
Docket No. MW-33574
99-3-96-3-992**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Chesapeake &
(Ohio Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The ten (10) day suspension imposed upon Messrs. K. W. Ragland and J. F. Jackson for their alleged failure to perform their duties safely and properly in violation of Rule 602 in connection with a switch being thrown at Rockcastle, Virginia at approximately 10:42 A.M. on November 1, 1995, was extremely harsh [System File C-M-6218/12(96-0110) COS].**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimants shall ‘... be paid from the date they were removed from service with these days being accredited towards vacation and retirement. We also request that this investigation be removed from this record.’”**

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 claim involves Welder J. F. Jackson and Welder Helper K. W. Ragland (Claimants) who were each assessed discipline of ten days actual suspension as a result of an Investigation that was held on December 1, 1995.

On November 1, 1995, Claimants were authorized, by Rule 707, to occupy the main track between Mile Posts CAB 35.0 and CAB 42.2 on Carrier's Rivanna Subdivision. Claimants placed their vehicle on the main track and began posting the requisite advance warning signs and conditional stop signs. At some point, Claimants received a radio transmission from Train U1930 asking permission to come through Claimants' work territory. Claimant Jackson refused the request, but stated that they would "clear up shortly" enabling the train to pass. Claimants testified that during that same interchange the U1930 train crew directed them to "hurry up and get off", which Claimants "construed" to mean "it was coming through Claimants' work limit without permission."

Unable to establish contact with either the train or the Train Dispatcher, Claimants opted to unlock the switch to a spur track at Rockcastle, Virginia, without permission from the Train Dispatcher, to "get the truck into the clear." When the switch was thrown, the track circuitry caused a red stop signal to be displayed to Train U1930. The train had to make an emergency stop, resulting in a 25-minute delay.

On November 7, 1995, Claimants were charged with violating Rule 602 when they "failed to perform their duties safely and properly." The Hearing was conducted on December 1, 1995. Carrier determined that Claimants were guilty as charged and assessed each of them a ten day actual suspension.

The Organization protested the discipline maintaining that, although Claimants admitted that their actions on November 1, 1995 were in violation of Rule 602, they did so because they "clearly believed that their safety was in jeopardy and took necessary measures in accordance with Carrier General Safety Rule No. 1." Further, Claimant Jackson testified that when they arrived at the switch, he unsuccessfully tried to obtain permission from the Dispatcher to throw the switch and enter the siding. However,

when those efforts proved unsuccessful, Claimants determined that throwing the switch was the safest course of action.

Carrier denied the claim asserting that Claimants were afforded a fair and impartial Hearing and that Carrier had sustained its burden of producing "substantial evidence" of their guilt. Therefore, Carrier asserts that the discipline assessed was "fully justified." Specifically, Carrier points to Claimants' testimony in which they acknowledged that they had violated Rule 602 by throwing the switch. With regard to Claimants' contention that they felt they were in "immediate danger," Carrier notes that there was a road crossing that was closer to the Claimants' position than was the spur track, and that if safety was indeed their immediate concern, they should have exited the track at the road crossing, which was more accessible.

At the outset it should be noted that Claimant Jackson accepted a voluntary severance package from Carrier on May 8, 1996. Under the terms of his agreement, Jackson relinquished the right to pursue any and all claims with Carrier. As a result, Jackson is not considered to be a Claimant with regard to this dispute.

Rule 602 provides:

"Engineering department employees must obtain permission of the control station before operating any switch or derail connected with a signal system."

There can be no dispute that on November 1, 1995, Claimant Ragland did violate Rule 602. The question before the Board, therefore, is whether the circumstances that existed on that day justified the decision to throw the switch without obtaining requisite permission to do so.

A review of the record evidence reveals that the closest location for Claimants to exit the track was a crossing located at MP 42.4, which Ragland acknowledged was "in sight." Ragland maintained that they did not opt to use the crossing because they would have been "heading in the direction" of Train U1930. Further, Ragland alleges that the crossing was not well graded and they would be "taking a chance of damaging the truck or getting hung up on the rail."

We do not find that to be an adequate defense in light of the following unrefuted facts. Ragland testified that the train crew informed them that they were "coming to Pemberton," which is located at MP CAB 48.0. In short, the train was over five and one-half miles from Claimants' work authority limits, and over eight miles from Claimants' location when they first established radio contact with the train crew. Even if, arguendo, the crew operating Train U1930 did intend to enter Claimants' work zone without proper authority, there clearly was ample time for Claimant to proceed to the MP 42.4 track crossing and exit in a safe manner. On these facts, the proven violation of Rule 602 was not justified and the disciplinary action must stand.

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 21st day of April 1999.