

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 33434  
Docket No. MW-34147  
99-3-97-3-692**

**The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.**

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(CSX Transportation, Inc.**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

**(1) The discipline (10 day suspension) imposed upon Assistant Foreman J. A. Miller for his alleged incompetency, performing poor quality work and failure to properly direct the employees under his supervision as the assistant foreman on the 5XT3 Team was without just and sufficient cause and on the basis of unproven charges [System File S-TC-2175/12 (96-1315) CSX].**

**(2) The Claimant’s record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.”**

**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.**

As of the date of the incident in question, the Carrier had employed Claimant for a period of approximately 20 years without any prior discipline. At the time of the incident, Claimant was an Assistant Foreman.

The facts in this case are relatively straightforward. On July 22, 1996, Claimant was the Assistant Foreman regularly assigned to SPG Gang 5XT3, a combination tie/surfacing gang, working on the Plymouth Subdivision. This gang had 60 members. One half of the gang was assigned to perform tie extraction/installation work. The other half was assigned to perform track surfacing work behind the tie gang. The Claimant was one of five Assistant Foremen assigned to the gang. His duties involved overseeing the work of 10-15 employees assigned to the rear portion of the tie or timbering gang. These employees included five spiker Machine Operators.

On July 22, 1996, the gang was proceeding along without incident when the last spiker machine No. 5 blew a hose and soaked Operator M. White with hydraulic oil. White was taken back to the gang lodging facility to clean up. At this time, Claimant decided to assume the operation of spiker machine No. 5. At approximately this time, the Operator of spiker machine No. 1 came upon a kinked portion of track at milepost 67.6. He was unsuccessful in realigning the track prior to spiking down the new ties. His gauging buggy kept jumping out of the track. He continued past milepost 67.6 and continued spiking work.

Shortly thereafter, Assistant Foreman D. Landis, who had been overseeing the work of the TR10 Tie Injector Operators started walking track toward the spiker machines. When he arrived at spiker machine No. 1, he was informed that the track at milepost 67.6 was still kinked and not spiked. Landis informed Brewer that Brewer was to continue working and Landis would "handle the situation." Machine Operator K. M. Ward, who was operating the No. 2 spiker machine, also leapfrogged milepost 67.6. Later, Landis informed Ward and Brewer to move back to milepost 67.6 and realign and spike the track.

At this time, Claimant was still operating spiker machine No. 5. He knew nothing of the problem at milepost 67.6. He continued to work until the end of his shift. At approximately 5:30 P.M., the Roadmaster conducted a walking inspection of the track area. At milepost 67.6, he found that the track gage was 58 inches, one and one-half inch wider than the acceptable limit of 56 ½ inches. The Roadmaster contacted Supervisor of Gangs B. E. Foutch, who confirmed the wide gage.

By letter dated August 1, 1996, Claimant was instructed to attend an Investigation on August 8, charged with incompetency, performing poor quality work and failure to properly direct the employees under his supervision as the Assistant Foreman on the 5XT3 team. After one postponement, the Investigation took place on September 4, 1996. As a result of the Investigation, on September 24, 1996, Claimant was suspended for 10 days from September 30, until October 11, returning to work on October 14, 1996.

The Organization claims that the suspension was unjust. The Carrier found the Claimant guilty of incompetency, performing poor quality work and failure to properly direct the employees under his supervision as the Assistant Foreman on the 5XT3 team allegedly because the track gage that was under his supervision was too wide. According to the Organization, the Carrier failed to establish that the Claimant was responsible for the wide gage. According to the Organization, after Assistant Foreman Landis was informed of the problem, it was his responsibility to correct the problem. Further, the Claimant was never informed of the problem, so he was unable to remedy it. While Landis had ample opportunity to notify Claimant of the problem, he failed to do so. In sum, once Landis was made aware of the problem, it became his responsibility to resolve the problem. It was no longer Claimant's responsibility.

Conversely, the Carrier claims that Claimant was responsible for the wide gage. First, Claimant did not act appropriately by taking over spiker machine No. 5 and not paying proper attention to his ultimate responsibilities as an Assistant Foreman. According to the Carrier, the Claimant was ultimately responsible for the gaging of the track and that his "direct responsibility was to ensure that all track work performed ahead of him was properly completed according to CSX standards."

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord to what we might or might not have done had it been ours to determine, but to pass upon the question whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166).

We reviewed the facts of the instant situation. There is no question that the Claimant in this matter acted with very good intentions when he took on the task of operating spiker machine No. 5. There is no question that he was not obligated to do this, but wanted to complete the work that day. However, based on the record in this case, Claimant was ultimately responsible for the gage of the track at milepost 67.6 that day. He admitted as much at the Investigation:

**"Ludwig:**     Okay, and nobody had indicated to you that there was this spot requiring gage that had been skipped or needed to be gaged?

**Miller:**       No sir.

**Ludwig:**       Nevertheless as assistant foreman of this part of the operation is that not in fact your responsibility for that area?

**Miller:**       Yes sir.

\* \* \*

**Ludwig:**       Mr. Brewer was in fact responsible for gaging that spot under your supervision, was he not?

**Miller:**       Yes sir.

**Ludwig:**       Once that spot was skipped did he not have a responsibility to inform you of that, so that you could in fact make the necessary arrangements and perform your duties as necessary?

**Miller:**       Yes sir, but he informed Danny Landis.

\* \* \*

**Albers:** Would it also be Mr. Landis' responsibility since he knew about the wide gage to handle the situation?

**Foutch:** No sir, not necessarily, it would be his responsibility to inform Mr. Miller of what he had."

After reviewing the transcript as well as the positions of the parties, the Board rules that there was substantial evidence to sustain the Carrier's position in this matter. While we agree with the Organization that the Claimant was certainly performing work that was above and beyond what was required of him as an Assistant Foreman, it was established at the Investigation that one of Claimant's primary responsibilities was to insure that all gaging within his area of responsibility were properly performed. Here, Claimant admitted that he lost his focus when he began to work on spiker machine No. 5. This took away from his performance as an Assistant Foreman. While Landis was informed that the track was gaged too wide at milepost 67.6, it was not his responsibility to insure that this area of track was gaged properly. It was the Claimant's. Thus, it was Claimant's responsibility to take the necessary actions to insure that the track was gaged properly. However, he did not do so and thus was guilty of incompetency, performing poor quality work and failure to properly direct the employees under his supervision as the Assistant Foreman on the 5XT3 team.

With regard to the penalty, the Board finds that a 10-day suspension is not unreasonable under the circumstances of this case. As noted above, we are not warranted in disturbing the Carrier's penalty unless we can say it clearly appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of discretion. We cannot say that any of these factors are present (See Third Division Award 29484 where a Foreman was disqualified as a Foreman for almost three years due to a similar transgression).

Thus, based upon the entire record, the Board finds that there is substantial evidence to support the Carrier's position. When the Claimant did not detect the problem with the gage at milepost 67.6, Claimant was guilty of incompetency, performing poor quality work and failure to properly direct the employees under his supervision as the Assistant Foreman on the 5XT3 team. Thus, the Board upholds the 10-day suspension imposed upon Claimant.

**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 23rd day of August 1999.**