

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37275
Docket No. MW-38040
04-3-03-3-494**

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline imposed upon Mr. W. H. Cummings, Jr. [ten (10) days actual suspension] for alleged failure to perform duties as basic track foreman on Monday, August 19, 2002 while working on the Berkshire Sub at Chester Yard near Mile Post QB 126.0 (Track 4) at approximately 1400 hours allegedly left a switch lined improperly resulting in the derailment of two (2) cars on Train B73020 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [Carrier's File 12 (02-0850) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, the discipline shall be removed from Mr. W. H. Cummings, Jr. record and he shall be compensated for all lost time.”

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.

The Claimant, a Track Foreman with more than 25 years' seniority, was the employee in charge ("EIC") at Chester Yard in Western Massachusetts, on August 19, 2002. At that time, the Claimant's duties included drilling and lagging down to Milepost 117.

Track 4 at Chester Yard had been spiked and locked for about one year, during which time it had been used for Maintenance of Way equipment and had been out of service for transportation. On August 19, 2002 the Claimant was responsible for piloting certain equipment, which had been tied up on Track 4 for a week or two, to Milepost 117. While the Claimant was at Milepost 117, others had moved the equipment to the derail at the end of the yard. When he arrived at Chester Yard, he unlocked the main line switch and the derail, enabling the equipment to be moved onto the main line and then locked them again.

When asked at the Hearing whether he had left the switch to Track 4 improperly lined, the Claimant replied that he did not know:

"I might have but I didn't look at it. I just didn't think to go back to check to see if it was locked. I just did the main line and the derail. That's where the equipment was sitting when it pulled into Chester Yard and I got them out and got them down and got them to CP123 and I put them in Huntington Yard where the tractor trailer was waiting to load them."

Two days later, on August 21, 2002 two loaded gondola cars derailed on the west switch, which was spiked and locked for Track 4. The west switch had a

private lock, the key for which only a few people, including the Claimant and other Foremen had.

By letter dated September 26, the Carrier notified the Claimant of an Investigation on November 13, 2002 to determine the facts relating to his alleged involvement in leaving a switch lined improperly resulting in the derailment of two cars, in violation of NORAC Operating Rule, General Rules B, N, S and Rule 132. Following the Hearing held on November 13, the Carrier sent the Claimant a letter dated November 27, 2002 advising him that he would be issued a ten-day actual suspension for leaving a switch lined improperly resulting in the derailment of two cars. Following the Organization's appeal of the discipline, the Carrier denied the appeal.

The Organization contends that the Carrier, which failed to present any firsthand evidence that the Claimant was remiss in his duties, was unable to meet its burden of proof that discipline was warranted. The Claimant's own testimony, however, showed that he failed to carry out his duties, as required of the EIC. Thus, the Claimant candidly testified, in response to a question whether he had left the switch to Track 4 improperly lined:

"I might have but I didn't look at it. I just didn't think to go back to check to see if it was locked. I just did the main line and the derail."

Because it was the Claimant's responsibility as EIC to ensure that Track 4 had been locked, his admitted failure to do so was in derogation of his duty to do so, resulting in the derailment of two rail cars two days later.

No more persuasive is the Organization's argument that employees in addition to the Claimant had access to the key to the switch in question. The fact of the matter is that the Claimant, as the EIC, failed to check to see that Track 4 had been locked. Likewise, the fact that other employees might have contributed to the derailment through their negligence does not diminish the Claimant's responsibility to have ensured that Track 4 was locked and lined for Track 6.

Moreover, because of the seriousness of the accident resulting from the Claimant's failure to carry out his responsibilities, the Board finds that a ten-day actual suspension was not unduly harsh or excessive.

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 5th day of November 2004.