

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD
COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Delaware, Lackawanna & Western Railroad that:

1. The Carrier acted in a capricious and arbitrary manner when, on September 22, 1944, it assessed the record of Towerman J. H. Morris, Denville, New Jersey, with fifteen demerits in connection with the derailment of Western Union Track Car 542 at interlocking switch 39 in the Denville Interlocking Plant on September 15, 1944, and

2. As the testimony submitted at the hearing held September 19, 1944, had it been correctly and fully transcribed by the Carrier, clearly proved that Towerman Morris was not at fault, the fifteen demerits improperly assessed Morris shall be erased and his record cleared of fault in connection with the derailment.

OPINION OF BOARD: Claimant was regularly assigned as towerman at Denville, New Jersey, on September 15, 1944. About 7:20 A. M. on that day, Western Union Telegraph Company Track Car No. 542, while crossing over Switch 39 from Track 2 to Track 1, was derailed causing serious injury to one of the employees on the car. The derailment was due to the throwing of Switch 39 by Claimant while the track car was crossing or about to cross the switch. Investigation was held and Claimant's personal record was assessed fifteen demerits for violation of operating rules. The Organization claims that no basis existed for the assessment of discipline and, in any event, a fair investigation was not held because the evidence adduced was not wholly contained in the transcript reviewed on appeal.

The record discloses that the track car was on the Westbound Morristown Branch line when the Operator arranged with the Claimant for the latter to line the tracks for a movement onto Track 2, from there to Track 1, through Switch 41. In proceeding over Track 2 to Switch 41, the track car passed over Switch 39. As the track car was crossing or about to cross Switch 39, Claimant says he thought it was over the switch. He, thereupon, threw the switch causing the accident at the switch. Claimant says also that he was looking through a defective window pane which caused him to under-estimate the distance the track car was from the tower. Switch 39 is approximately 700 feet from the tower, a distance within Claimant's vision.

We think Claimant was grossly negligent for several reasons. In the first place, he had known about the defective window pane for two years and had not reported it to the Carrier's supervisory officers. Such a defect, tend-

ing to interfere with Claimant's vision to the extent that he testified, constituted a serious hazard to Carrier's employes and the public generally. Claimant is in no position to excuse the premature throwing of Switch 39 by alleging a safety defect of which he knew and carelessly failed to report. In the second place there was no reason for throwing the switch immediately after the passage of the track car over it as there was no use of Track 2 immediately contemplated. In the third place, there was no reason to throw Switch 39 at all. It was lined for the operation of Trains on Track 2, the normal position of the switch unless a crossover at Switch 39 was involved, which was not the case here. The bad judgment exercised by Claimant in throwing Switch 39 under the circumstances here shown cannot be condoned.

The Organization complains about the sufficiency of the transcript of the investigation. It claims that important evidence was left out to the effect that Claimant saw someone walking by the side of the track car who waved at him, causing him to believe the track car had cleared the switch. The Carrier denies that any pertinent part of the evidence was left out of the transcript. We have examined the evidence alleged to have been left out of the transcript and have concluded that it would not change the result even if it had been contained therein. There is evidence that the only third person involved was a pedestrian who came to the assistance of the two operators of the track car after the accident. It might be said also that Claimant's vision could have been impaired in this instance as it was alleged to have been in estimating the location of the track car in its relation to Switch 39. Claimant has advanced at least three excuses for throwing Switch 39 when he did: He thought the track car was stopped beyond Switch 39. He misjudged the distance because of a defective window pane. He thought he saw a signal indicating a clearance had been had. If he erred in all three respects, we submit that the fact of itself indicates gross carelessness. And, when coupled with the fact that there was no need for throwing the switch at all, we can come to no conclusion other than that Claimant was grossly negligent.

It is the duty of the Carrier to cause all the evidence adduced at an investigation to be incorporated into the transcript for purposes of review. But when the evidence is in conflict with reference thereto and it is shown, as here, that the evidence alleged to have been omitted would not change the result, no prejudice has resulted. The discipline assessed was not excessive and it will not be disturbed.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 22nd day of May, 1947.