

Award No. 4876

Docket No. MW-4862

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Peter M. Kelliher, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

SEABOARD AIR LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier improperly disciplined Section Foreman C. L. Winstead on account of the derailment of Train No. 27 at 20.5 Milepost, Richmond Sub-division, on February 8, 1949;

(2) That Section Foreman C. L. Winstead be reimbursed for all wages lost by him as a result of this improper discipline, and that his record be cleared of all charges resulting from the derailment referred to in Part 1 of this claim.

EMPLOYEES' STATEMENT OF FACTS: On February 15, 1949, an investigation was held at Raleigh, North Carolina. The purpose of this investigation was to ascertain the facts and place responsibility for cause of derailment of Train No. 27 which occurred on February 8, 1949. Quoted below is a paragraph taken from Page 1 of the investigation transcript:

"At 2:10 P.M., February 8th, 1949, weather clear, temperature 60 degrees, Train 27, Motors 4200-4300, in charge of Conductor A. E. Burden and Engineer W. J. Bryant, Fireman C. E. Wheeler, Brakeman T. P. Jerman, Flagman J. M. Eubanks, handling 50 loads and 7 empties, 2348 tons, derailed at 20.5 Mile Post NP-26374, and MDT-146058 shortly thereafter, and shortly after that 20 other cars. This investigation is to develop the facts and place responsibility for cause of derailment of Train 27 at Mile Post 20.5, Richmond Subdivision, at 2:10 P.M., February 8th, 1949."

On February 26, 1949, Mr. C. L. Winstead, Section Foreman on the Richmond Sub-division, was in receipt of the following letter from C. I. Morton, the Carrier's Superintendent:

"Raleigh, North Carolina,
February 26, 1949.

Mr. C. L. Winstead,
Section Foreman,
130 Leavenworth Street,
Petersburg, Va.

Dear Sir:

This is to advise you that you are hereby given sixty (60) days actual suspension for your responsibility in the derailment of Train

Another significant fact, Mr. Winstead made statement that he had already made run-off for passage of 27 when his lookout man, Scott, warned him of approach of No. 27, but Scott states on Page 48 of the investigation (Carrier's Exhibit "A") in making general statement as to his knowledge concerning accident:

"They had me up on bank where I could see the light or see a train whenever it came by this other mile post towards Petersburg and I guess the bank I was standing on right at that knoll was about 20 feet—I don't know what makes me do it, but I have act of doing it ever since Webster got knocked in the head, that I stand and count cars when they go by. When local went in hole somewhere the light went red and I called to Winstead then that No. 27 was coming 'cause light went red and Mr. Winstead said he was making run-off then, and then he pushed some of the men one way and some the other and I stepped over and said 'Yonder he comes now.' Whenever he came by the motors went over all right and I could not see anything wrong with it and I stood there counting the cars like I usually do, facing north, and what caused me to stop counting the cars was that I saw this car jumping up and down and fire coming from it and I started trying to make them stop because Head Brakeman had stuck his hand out window waving at me and I thought maybe he would see me, and when that wheel started jumping it came down and missed rail on inside and turned crosswise and when it turned crosswise the others started piling up on it and I did not know whether they were loaded with explosives or not and I sold out."

From this the Carrier feels there is a clear cut indication that actually No. 27 slipped up on these forces and proper run-off had not been made and undoubtedly this is the true cause of this derailment. Laborer Scott, the Carrier feels, actually came nearer to giving a full and correct version as to the movement of No. 27. In other words, we are constrained to believe that the forces were not ready for No. 27. Particular attention is directed to that part of the statement: "Mr. Winstead said he was making run-off and then he pushed some of the men one way and some the other and I stepped over and said 'Yonder he comes now.'" In other words, the Carrier reiterates that the forces were not ready for No. 27 and when No. 27 slipped up on them and Scott gave the notice of the approach of the train it was necessary to get the men out of the way to avoid their being struck by this train. With respect to Scott's claim that he thought Brakeman Jerman could see him and take action on his (Scott's) stop signal, Jerman because of the 4 degree curve could only see Scott for a distance of 4 or 5 car lengths. Therefore the signal claimed to have been given could not have been acted upon.

SUMMARY: We can not get away from the undisputed fact that the testimony of Engineer Bryant, Fireman Wheeler, Brakeman Jerman and also Conductor J. J. Collier who was deadheading on the motor of No. 27, that there was a rough place in the track and the first 2 cars that derailed No. 27's train (NP 27374 and MDT 146058) derailed immediately following the point where the surfacing had been stopped by Section Foreman Winstead and his forces and the further fact that from a careful inspection made of these 2 cars following the derailment nothing mechanically was found wrong with these cars and additionally from an inspection of the track back of the derailment there were no signs of any marks having been made to indicate that there had been equipment dragging therefore in view of these facts as related above the Carrier feels that the discipline applied should not be disturbed and request your Honorable Board to deny the claim in its entirety.

(Exhibits not reproduced).

OPINION OF BOARD: The claim is that the Carrier improperly disciplined C. L. Winstead on account of the derailment of Train No. 27 on February 8, 1949. It is not within the scope of the Board's authority to herein determine the cause of the derailment. It is the duty of the Board to merely

determine whether the claimant was properly disciplined and in doing so the Board must inquire as to whether any act or omission on his part was the proximate cause of the derailment.

The train was late and was losing time. There is testimony to the effect that the train was "a hard pulling train." The train crew noticed a soft spot where the section gang had been working, but the engineer stated that he made no attempt to slow the train down because he did not think it was necessary.

The record discloses that the Carrier's principal charge is that "Section Foreman Winstead is definitely responsible for the cause of this derailment due to not providing run-off and not having proper run-off failed to afford proper flag protection for No. 27 for normal allowed speed at the location of the derailment."

The Carrier contended that "the accident was caused by an improper track condition where the run-off was being prepared and no doubt the track had not been properly filled in to give it necessary strength and support to carry the train over it."

The Board must find that these specific allegations are not supported by the evidence. Roadmaster Burrs, an official of the Carrier, observed the run-off within a few hours after the derailment and examined the scene carefully. He stated that on the work that was being done a slow order was not required. He testified that he had occasion to observe the run-off in question and that it "looked all right to me." He did not have any opinion as to what caused the derailment but considered it unusual that it was derailed to the inside of the curve. The Carrier relied upon statements made by some members of the train crew that the jolt in the track was unusual and inferred therefrom that this was due to an improper run-off. It gave no weight to the direct evidence of the Roadmaster that he observed the run-off to be "all right."

In examining the testimony in full of Brakeman Jerman, it is noted that while he testified that the jolt was unusual, he agreed that he received similar jolts from other parts of the railroad, and Engineer Bryant recalled that the run-off was "just normal." While the Carrier raised the matter of the organization's failure to progress the appeal under Rule 6, it appears from the record that the then Director of Personnel, Mr. H. A. Benton, acknowledged that the organization may have requested a letter of decision from him and that "he did not desire to take advantage of any misunderstanding. The Carrier's representatives at the hearing before the Board did not urge Rule 6 as barring the claim.

The following language of Award No. 3859 is applicable:

"Since the evidence adduced does not sustain the charge, the discipline imposed by dismissing Claimant was unreasonable and arbitrary."

The principle announced in Award No. 4427 is that:

"Disciplinary action cannot be sustained on speculative evidence. The evidence must have such weight and credibility that reasonable minds could accept it as true. The evidence in this case does not even preponderate in support of the charges made."

The First Division in Award 12952, also a derailment case, stated:

"It must be true that the evidence at least must have sufficient substance to support a reasonable inference of fact as distinguished from a possibility or an unsupported probability."

Accordingly, the claim must be sustained.

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 Employes involved in this dispute are respectively carrier and employes 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 violated.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of June, 1950.