

Award No. 14066
Docket No. MW-15167

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Murray M. Rohman, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
(Western Lines)**

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

(1) The dismissal of Section Foreman Clarence Myers, effective with the close of work on October 6, 1961, was without just and sufficient cause and on the basis of unproven and disproven charges. (Carrier's File 130-187-18)

(2) Mr. Clarence Myers be reinstated to the position of Section Foreman with seniority, vacation and all other rights unimpaired and that he be reimbursed for the earnings lost subsequent to October 6, 1961.

NOTE: This Division has recommended that only one party submit the transcript as a part of the record in cases of this kind and has suggested that the Carrier will ordinarily be the party submitting the transcript. Because the Carrier, presumably, has the master sheets available for ready duplication, the Employees will not submit the transcript, but will expect the Carrier to submit a true transcript as part of its submission for the record in this case.

OPINION OF BOARD: Claimant Myers was a Section Foreman at the time of the incident which gave rise to the instant dispute. His seniority in this position dates from September 28, 1946 until his removal from service on October 6, 1961. A brief summary of the facts indicates that on September 18, 1961, the Claimant was in charge of a gang of laborers who were engaged in routine track maintenance work. This included grinding switch points and other rail work at the junction with the main line of industrial trackage serving a grain elevator on Carrier's Slaton Division near Doud, Texas.

The gang worked the west switch lead, completing its work about noon. A westbound train had cleared and was scheduled to return the same eve-

ning. After passage of the west train, the Claimant and the gang of laborers ground the head off the rails where the points of the switch at the west end of the Carlisle track fit against the main track. During the course of such work, the switch was opened and closed several times by the Claimant, who was the only one in this group who controlled the key to the switch lock. At approximately 10:30 P.M. on September 18, 1961, the eastbound train operated by the same crew who had earlier operated the west train, approached the switch at about 45 M.P.H. At this juncture both Diesel units and the first twenty cars were derailed, presumably, by a cocked switch.

Investigation into the matter was conducted on October 6, and pursuant to the testimony adduced at the hearing, the Claimant was dismissed from service for violating the Carrier's safety rules by reason of neglecting to properly line and lock the switch in question.

Two basic issues are presented in this dispute, namely, whether the derailment was caused by a partially open switch and whether Claimant neglected to properly line and lock said switch. There is conflicting testimony in regard to both of these areas.

The Petitioner's basis for contending that the derailment was caused by factors other than the cocked switch is predicated on Section Foreman Witherspoon's testimony. Upon arriving at the scene to clear the wreck he noticed one wheel broken through the center, on the ninth car from the engine. However, the fact that two Diesel units and eight other cars preceded the car with the burst wheel would eliminate this factor as the proximate cause of the derailment. There is sufficient credible testimony based upon the physical evidence to warrant the conclusion that the wreck was caused by a cocked switch, to wit: the engine was lined into the siding and stayed lined to the extent that nineteen cars trailed in behind it. Further examination of the switch revealed that one rod was slightly bent on the right side near the heel block, whereas the left side of the switch was perfect, permitting the switch to be operable after the derailment.

The second phase is much more troublesome, i.e., whether the cocked switch is directly attributable to the Claimant's failure to properly line and lock it. The testimony of the engine and train crews is in direct conflict with that of Claimant Myers and his gang. Engineer Bridges on approaching the switch noticed it was cocked and applied emergency brakes, but not in time to prevent derailment. Brakeman Ray and Hoover saw switch was open. Conductor Clark, after derailment, observed lever was sticking straight out and it was right on the edge of the slot with the lock hanging down.

On the other hand, Claimant Myers and his gang ground the rail at the switch in question from 12:30 to 1:00 P.M. on that day. In the course of this work it was necessary to open and close the switch several times. However, the Claimant testified that he definitely remembered locking switch and pulling the chain to determine that it was securely locked. Although none of the other laborers in the crew had a key to the lock, all three members of the gang testified that they observed the Claimant line and lock the switch.

The record also established that the lock on this switch was new and had not been tampered with; there were no other rail movements in the area; the area was isolated and not frequented by strangers; and that the Claimant presumably was the last person to touch the switch.

The question before this Board is whether or not the Carrier has met the burden of proof required in this instance. It is recognized that the evidence upon which the Claimant was terminated is circumstantial. This, in and of itself, would be insufficient to grant the Organization's claim. Except for the denial by the Claimant and his gang, the evidence is rather convincing that the Claimant was the last person to use the switch, and that a cocked switch caused the derailment.

We are aware of the high degree of care under which a Carrier is required to operate concerning matters of safety. In order to exercise this duty, it must insist that its employes faithfully and carefully execute the responsibilities which devolve upon them. It cannot leave anything to chance or permit the slightest neglect. It is, therefore, the considered opinion of this Board that despite the protestations of denial by the Claimant, the preponderance of credible testimony supports its action.

It is unfortunate that in matters of this kind where the livelihood of an employe is at stake, that he should be terminated on this type of proof. It cannot be gainsaid, however, that the investigation was fairly and impartially conducted and that all other contingencies were dealt with and ruled out. In the final analysis, it was the Claimant who was the last one to operate the switch. Under the circumstances indicated herein, it must be fairly conclusively presumed that he failed to exercise the degree of care required in the performance of his duties.

Despite the consistent denial of neglect by the Claimant and his gang, this Division will not lightly set aside a disciplinary action in the absence of a clear showing that such was motivated by bad faith, or was arbitrary, capricious or discriminatory. Perhaps we would have assessed a lesser penalty in view of the disputed testimony; nevertheless, we cannot find any basis for setting aside the discipline imposed.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of December 1965.