

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24725
Docket Number MW-24624

George V. Boyle, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Kansas City Southern Railway Company

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

(1) The ten (10) days of suspension imposed upon Foreman H. L. Swinney for alleged responsibility 'in connection with use of torch to enlarge holes in Main Line rail at Mile Post 549.3' was arbitrary, capricious, unwarranted and on the basis of unproven charges (Carrier's File 013.31-246).

(2) The claimant's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: The Claimant, an employe with twelve (12) years service, was the foreman of a section gang which had repaired a stripped joint on the main line at Mile Post 549.3. This work was performed on December 22, 1980. This was new track that had been laid in August 1980 and no other repair work had been done in that area during the interim.

Subsequently, on December 25, 1980, a broken rail was reported in that area which was attributed to the rail holes being enlarged with a cutting torch. Rule 546 states "Rails must not be punched or holes formed with a cutting torch, but must be drilled."

After proper notification and hearing, the Claimant was held responsible for breach of the rules and suspended for ten (10) days.

The Organization, on behalf of the Claimant, assert that the Carrier did not present credible, competent testimony or evidence to hold the Claimant liable and thus by failing to meet the burden of proof their decision must be reversed.

The Board holds to the contrary.

Testimony was elicited that the Claimant and his gang were the only crew to perform any work in that area since the track was laid between August and December. Moreover, further testimony showed that when the initial work was done no holes were enlarged with a cutting torch but the broken rail exhibited holes enlarged by cutting torch. Also Roadmaster R. F. House testified that, after inspecting the broken rail he concluded that the holes were "fresh burned ... you could tell it was freshly done."

To conclude that the Claimant was responsible for this violation of the rules is not gratuitous assumption, surmise or conjecture. The conclusion is based upon probative, circumstantial evidence which does not require an eye witness account to prove that he and no other should be held liable.

Nevertheless and despite the judgment of guilt, a ten day suspension seems excessive in light of the record of the Claimant and thus the Board will reduce the penalty to a five (5) day suspension.

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 Employees involved in this dispute are respectively Carrier and Employees 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

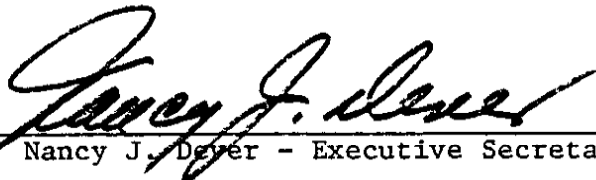
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of March, 1984.

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