

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26686
Docket Number MW-26478

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Consolidated Rail Corporation

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

(1) The ten (10) days of suspension imposed upon Track Inspector/Foreman J. Price for alleged 'Failure to detect and initiate immediate remedial action' for alleged defects at MP 26.9 and MP 35.7 on February 6, 1984 was without just and sufficient cause and on the basis of unproven charges (System Docket CR-732-D).

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

OPINION OF BOARD: Claimant was a Track Inspector Foreman with 35 years of service. His duties included a weekly inspection of the Cape May Secondary track. On February 6, 1984, Claimant performed his normal duties including the inspection of the Cape May Secondary track and submitted the required inspection reports. On February 14, 1984 four Carrier officials highrailed the Cape May Secondary track and found two serious track defects necessitating taking the tracks in question out of service and making repairs. Subsequently by notice dated March 15, 1984, following a Investigation, Claimant was found guilty of the following charges and was given a fifteen day actual suspensions:

- "A. Failure to detect and initiate immediate remedial action on the out of service defect of 58 5/8' guage at MP 35.7 on the Cape May Secondary Track when you inspected the track on February 6th, 1984.
- B. Failure to detect and initiate immediate remedial action on the out of service defect of 5 3/8" from zero crosslevel for one rail length combined with same rail length hanging completely clear of ties at MP 26.9 on the Cape May Secondary Track, when you inspected this track on February 6th, 1984."

Carrier argues that the serious track conditions observed by the Carrier officials had not been reported by Claimant during his "alleged" inspection some eight days previously. Since Claimant's responsibilities include

inspecting track, reporting defects and ensuring that the defects are repaired, it is evident that he did not properly inspect the track if an inspection took place at all, according to Carrier. It is argued further that according to the Carrier officials making the inspection, the defects clearly must have been present some eight days previously. It is concluded that not only was Claimant properly found guilty of the charges, but that the discipline accorded him was lenient under the circumstances.

The Organization maintains that Carrier has not borne its burden of proof in this matter. It is argued that there is no probative evidence to show that the defects in question were present on February 6, 1984, the date of Claimant's last inspection. In addition, there was testimony by Claimant, who had an unblemished record of 35 years service prior to this incident, that there were poor conditions in the area to start with and with the early thaw and excessive rain in the first part of February many changes could have occurred within a few days of his inspection. This was concurred in at least in part by two Carrier witnesses. It is concluded that the testimony adduced at the Hearing did not justify any discipline whatever.

The Board, after careful analysis of the testimony at the Investigation, believes that there is not substantial evidence to support Carrier's conclusion with regard to Claimant's guilt. Even if Claimant's testimony is totally disregarded, which should not have happened, the Carrier officials who made the inspection some eight days after Claimant's normal inspection, could only speculate as to the existence of the defects on the earlier date. That judgement, which was later, under cross examination, partially qualified, was insufficient to support the charges. There were no facts whatever to support the conclusions reached. In fact, the two key Carrier witnesses agreed that Claimant's version of what probably happened was plausible. The Board concludes that Carrier did not support its conclusion with respect to Claimant's guilt with significant substantial evidence; in short Carrier failed to bear its burden of proof (see Third Division Awards 19853 and 24039). The Claim must be sustained.

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 Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 23rd day of November 1987.