

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Soo Line Railroad Company

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

(1) The twenty (20) working days' suspension assessed to Messrs. L. Nemec and A. Sundem for alleged responsibility in connection with the open switch incident on the House Track at Lake Bronson, Minnesota on October 19, 1987 was arbitrary, capricious and in violation of the Agreement (System File R540 #1490/800-16-A-87).

(2) The records of Messrs. L. Nemec and A. Sundem shall be cleared of the charges and they shall each be compensated for all wage and benefit loss suffered including overtime, vacation and fringe benefits."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This claim concerns the twenty working day suspensions given to Claimants in connection with an accident on the House Track at Lake Bronson, Minnesota, in which a utility tamper was destroyed in a collision with an Extra Train. On October 20, 1987, the Regional Engineer wrote identical letters to the Claimants concerning this incident:

"At the close of work on October 19, 1987, the Utility Tamper #667927 was parked on the House Track at Lake Bronson, Minnesota. The main track switch was not restored to its normal position for mainline movement. As a result, Train Extra #950-East came in on the House Track and destroyed the Utility Tamper.

Due to your failure to restore the main track switch to its normal position per General Code of Operating Rule 1040-B, you are immediately suspended from service of the Soo Line Railroad.

Per existing Agreement with Maintenance Employees, you are entitled to a hearing, if you so desire. I suggest you contact your Union Representative for advice on protection of your rights."

On October 30, 1987, the Regional Engineer informed each of the Claimants that "your discipline is twenty (20) working days off from work and you may return to work on November 17, 1987 if a position is available." The Hearing in this matter was held on February 23, 1988. On March 3, 1988, Carrier confirmed the discipline.

The appeal has two components, which the Board will address separately. The Organization initially contends that the Carrier did not follow the requirements of Rule 20(b) when it initially scheduled the Hearing for November 18, 1987, which was more than ten days after the Organization requested a Hearing. In this regard, the Organization relies on Awards from this Board and from the First Division sustaining claims when the Carrier did not implement the contractual time schedules for setting hearing dates. In addition, the Organization asserts that the delay in the Hearing until February 23, 1988, prejudiced the Claimants, and that they did not receive the fair and impartial Hearing guaranteed by the contract. The Organization further maintains that the Claimants were denied their contractual right to perform work during the time they were withheld from service.

The Board has carefully considered the evidence in the record and arguments of the Parties on these threshold due process issues. The Board finds that the Organization waived the contractual time limit for setting the Hearing.

As concerns the merits of the claim the Extra Train Engineer testified at the Investigation that the main line west switch was in line for the house track when he arrived at Lake Bronson at about 5:45 P.M. on October 19, 1987. He further testified that he was not advised that he would be going into the house track. The Extra Train collided with the utility tamper on which Claimants had worked on that day, and which they had stored on the house track before leaving that area.

The Board agrees with the Organization that the Carrier's evidence was circumstantial in nature, since it is undisputed that no individual other than the Claimants were present when they left the area. However, the Board has frequently stressed that discipline can properly be based on circumstantial evidence, as long as that evidence is "substantial." As the Board explained in Third Division Award 25942:

"Substantial evidence, as understood clearly in this industry, has been defined as such 'relevant evidence as a reasonable mind might accept as adequate to support a conclusion' (Consol. Ed. vs. Labor Board 305 U.S. 197, 229). In this Board's judgment, there exists sufficient probative evidence, albeit circumstantial, to reach a conclusion of guilt in the [relevant] violations The use of circumstantial evidence by this Board is consistent with numerous other Awards in this Division ... (citations omitted)."

In another Award, this Board noted that circumstantial evidence "can be more probative than direct testimony where the direction and weight of the evidence all point inescapably to the conclusion that Claimant in fact committed the acts or violations of which he stands accused." See Third Division Awards 26435, 25599.

The Board concludes that substantial evidence in the record supports the Carrier's findings, and that the record demonstrates that the discipline given the Claimants was not arbitrary or capricious.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1992.