

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29140
Docket No. MW-28695
92-3-89-3-50

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
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(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 Mr. M. Runge for alleged responsibility in connection with the open switch incident at Barrett, Minnesota on October 22, 1987 was arbitrary, capricious and in violation of the Agreement (System File R541 #1488R/800-16-A-88).

(2) The Claimant's record shall be cleared of the charges and he shall 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 employes involved in this dispute are respectively carrier and employes 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 suspension assessed Claimant in connection with an open switch incident at Barrett, Minnesota. On October 23, 1987, the Regional Engineer informed Claimant as follows:

"On October 22, 1987 Number 943S Extra 741 ran into an open switch at the east siding at Barrett, Minnesota. It has been determined that you were the last person to use this turnout before train No. 943S ran into the siding.

Due to your failure to restore the main track switch to its normal position per General Code of Operating Rule 104-B, you are immediately suspended from service with the Soo Line Railroad.

Per existing agreement with Maintenance of Way Employees, you are entitled to a hearing, if you so desire."

On October 30, 1987, the Regional Engineer informed the Claimant that "you will be assessed twenty (20) working days discipline in connection with the open switch incident at Barrett, Mn. on October 22, 1987. You may return to work on 20 November 1987." The Hearing in this matter was held on January 18, 1988, and on January 26, 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 time schedules for setting Hearing dates contained in other Agreements. In addition, the Organization asserts that the delay in the Hearing until January 18, 1988, prejudiced the Claimant, and that he did not receive the fair and impartial Hearing guaranteed by the contract. The Organization further maintains that the Claimant was denied his contractual right to perform work during the time they were withheld from service.

The Carrier contends that the Organization failed to prove its due process allegations. The Carrier argues that the Organization itself waived the contractual ten day time limit within which to schedule the Hearing. In addition, the Carrier maintains that the delay in scheduling the Hearing did not adversely affect the Claimants' rights. According to the Carrier, the Organization never asserted at the Hearing that it did not have sufficient time to prepare for the Hearing or secure witnesses.

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

The Board concludes that the preponderance of the evidence in the record demonstrates that the Carrier did not deprive the Claimant of due process in scheduling the January 18, 1988 Hearing. The Board notes that the Organization did not contend that the Carrier acted improperly in scheduling the Hearing after the 1987 holiday season. The Carrier acted within reason in scheduling the Hearing for that date.

On the merits of the dispute the record demonstrates that Extra Train 741 West arrived at Barrett between 12:00 and 12:30 P.M. on October 22, 1987. The Engineer testified without dispute that he had not been notified that he would be heading into the siding at Barrett, and that his train in fact was forced to enter the siding because the east side switch had been left open.

It is also undisputed that the switch in question was inspected after the incident by the Brakeman of the Extra Train, and was found to be in good working condition. The Section Foreman also testified without contradiction that he inspected the switch when he arrived in Barrett after the incident, and that the switch lock functioned normally and locked the switch. It is also uncontested that Claimant's duties as an inspector included inspecting the switch at Barrett, and that Claimant did, in fact, inspect that switch on October 22, 1987, prior to the time at which the Extra Train went into the siding.

The Board notes that part of the evidence on which the Carrier's finding was based was circumstantial in nature, since no witness saw Claimant operate the switch at Barrett on October 22, 1987. 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 that Claimant left the switch lined for the siding, in violation of the applicable Rules. The Board further concludes that the record demonstrates that the discipline given the Claimant 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.