

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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) day suspension issued to Machine Operator H. Hanson for his '... FAILURE TO RESTORE THE MAIN TRACK SWITCH TO IT'S NORMAL POSITION, PER GENERAL CODE OF OPERATING RULES 104B....' was arbitrary, capricious, excessive and based on unproven charges (System File D625/800-16-A-93).

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

FINDINGS:

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

The carrier or carriers and the employee 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.

Claimant was employed as a ballast regulator operator at the time this dispute arose. On July 11, 1989, Claimant was traveling a ballast regulator on the mainline in an eastward direction toward Minot, North Dakota. At approximately 1:30 P.M., the Claimant was instructed by a Roadmaster to stop at Carpio, North Dakota, a siding along the way to Minot, North Dakota, and perform ground leveling at the west end of the house track. Train crews had reported the ballast along side of the house track was uneven and was creating poor footing. Claimant proceeded into the siding, performed the work as instructed, exited the siding at approximately 2:30 P.M., and proceeded east-bound toward Minot, North Dakota. At approximately 9:00 P.M. of that same day, Train 6022 West made an emergency stop at the west switch in Carpio, and reported that the switch was lined for the siding instead of in the normal mainline position.

By letter of July 14, 1989, the Claimant was assessed a twenty day suspension for his alleged failure to restore the west switch at Carpio, North Dakota, to its normal position. On the following day Claimant requested a Hearing in accordance with Rule 20 of the Agreement between the parties. Hearing was held on July 25, 1989, and the discipline assessed was subsequently upheld. The discipline was appealed and processed up to and including the Carrier's highest appellate officer.

Carrier's assessment of discipline was based upon the fact that Claimant was the only identifiable employee to manipulate the switch at Carpio, North Dakota, prior to the stopping of the west bound freight seven hours later. While there is precedent on this Division for sustaining a discipline based upon circumstantial evidence (See Third Division Awards 29139, 29140, 26435, 25942), in this case, the evidence adduced at the Hearing does not support even a circumstantial case against the Claimant. On the contrary, unrefuted testimony on the record establishes that in order to proceed on the main track once his work was completed, Claimant had moved the switch in question to the proper position before he could proceed east on the main track. It defies credulity to suggest, as Carrier has by implication, that once he had passed the correctly positioned switch, Claimant stopped his machine, dismounted, walked back to the switch and moved it into the position against normal traffic, then remounted his machine and proceeded to Minot, North Dakota. As has been noted in past Awards, "conjecture, supposition and inference...are not sufficient to carry the burden of proof required of Carrier in discipline cases." (Fourth Division Award 3633).

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 25th day of August 1992.