

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33026
Docket No. MW-34096
99-3-97-3-637**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc. (former Baltimore &
(Ohio Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The ten (10) day calendar suspension assessed Foreman T. L. White for his alleged failure to comply with engineering procedure Bulletin R-2 and EDMR-2002 was without just and sufficient cause [System File B-D-1754/12(96-1232) BOR].**
- (2) Foreman T. L. White shall now be compensated for all wage loss suffered and his record shall be cleared of the charges leveled against him.”**

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 employee 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 were given due notice of hearing thereon.

On June 14, 1996 the Claimant was inspecting track, following Train Q317. At Milepost 213.8 he noticed a 2 1/4 inch surface deviation. He also noticed fresh wheel marks on the ties, indicating that there may have been a derailment. He radioed the Engineer to stop the train. Inspection revealed that one car had derailed at Milepost 213.7.

On June 20, the Carrier instructed the Claimant to attend an Investigation on June 28, 1996. The notice charged him with failure to comply with Bulletin R-2 and EDMR-2002. The Investigation was held, as scheduled. On July 17, 1996, Carrier notified the Claimant that he had been found guilty of the charge and was suspended for ten days.

This dispute turns on whether the Carrier proved the Claimant's responsibility by substantial evidence. The fact of a derailment does not, by itself, establish Claimant's culpability. The Carrier had the burden to prove by substantial evidence that there was a track defect that the Claimant should have discovered prior to the derailment.

The record contains no evidence of a track defect that the Claimant failed to discover prior to the derailment. The derailment itself is not evidence of a defect that the Claimant should have discovered in his prior inspection of that portion of the track. The derailment occurred at Milepost 213.7, and the surface defect occurred at Milepost 213.8. The train whose car derailed was traveling toward Milepost 213.8. In other words, the car derailed prior to hitting the defective track.

Furthermore, the record established that the area around the track was prone to track problems due to settling of the ground beneath the tracks. The Roadmaster testified that it was possible that the track area could "be OK for normal speed one day, and out of service conditions the next day." On the record developed, one may speculate that there was a defect that the Claimant should have discovered during a prior inspection, but there is no proof of such a defect.

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of January 1999.