

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35029  
Docket No. TD-34947  
00-3-98-3-689**

**The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.**

**(American Train Dispatchers Department/  
International Brotherhood of Locomotive Engineers  
PARTIES TO DISPUTE: (  
(CSX Transportation, Inc.**

**STATEMENT OF CLAIM:**

**"This will serve as an appeal to CSXT Transportation ('Carrier or CSXT') decision and discipline assessed Train Dispatcher C.E. Mattox, ID 155747, as result of formal investigation conducted on October 7, 1997, concerning notice of charges dated September 30, 1997.**

**The Organization hereby requests that you reconsideration of the discipline assessed Train Dispatcher Mattox, that his record be cleared of all charges and compensated for all time lost."**

**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.**

At all material times herein the Claimant was employed as a Train Dispatcher in the Carrier's Centralized Train Dispatching Center in Jacksonville, Florida, and was so employed on September 29, 1997, the day in question. On that day a signal was cleared for Train K65029 to enter a section of track on which a block had been placed giving Rule 704 track authority to a Welder. After the matter was reported, the Carrier examined its Computer Assisted Dispatching System (CADS) to determine whether the systems had malfunctioned and determined that it had not. After an Investigation it concluded that the Claimant was responsible and suspended him for 20 days.

The Organization attacks the suspension on both substantive and procedural grounds. First, it argues that the Carrier proved only that the CADS did not malfunction, but did not prove that the Claimant erred. Second, and related to this argument, the Organization contends that the Carrier did not provide the Claimant a fair and impartial Hearing because it did not, despite the Organization's request, provide a witness with the requisite technical expertise to testify about CADS. Finally, the Organization argues that the suspension was excessive and inappropriate.

We carefully reviewed the entire record and find that the Organization's arguments are without merit. Although it is literally true that the Carrier proved only that CADS did not malfunction, the inescapable inference that must be drawn from that fact is that the Claimant must have erred. This conclusion or inference is in order because the record establishes that the signal could have been cleared only if CADS or the Claimant did so. It is indeed correct, as the Organization argues, that this evidence is circumstantial in nature, but that fact alone does not mean that it must be rejected and, if it is indeed substantial, it will carry the day. (See, e.g., Third Division Award 26135.) Thus, once the Carrier proved that CADS did not err, it met its prima facie burden of proof that the Claimant was culpable.

At this point the burden shifted to the Organization to rebut that prima facie case and it is at this point that the Organization's procedural argument comes into play. Here the Organization contends that it was unable to rebut the Carrier's prima facie case because the Carrier did not provide, despite its request, a witness or witnesses that possessed sufficient expertise to testify about CADS. The record reflects however, that two witnesses testified on this point and that apparently the Organization was dissatisfied with those witnesses. Thus, the Carrier did indeed present technical witnesses to testify about CADS. Therefore, the cases cited by the Organization are distinguishable. If the Organization does not share the Carrier's view of the

competency of those witnesses, it has two choices. First, it can positively identify those individuals whom it believes would be better able to address the issue. Here, the Organization did not exercise that option. Instead, it asserted that its initial request was not granted. That argument was contradicted however by the presence of the two witnesses called by the Carrier. It further maintained that "it is evident that the fault lies within the . . . signal system." That argument was contradicted however by the Carrier's post-incident review of CADS. Alternatively, the Organization argued that the record developed on the property does not meet the Carrier's ultimate burden to establish substantial evidence of the Claimant's guilt. As noted above, we do not share its view in this regard and further find that the Carrier's post-incident review of the matter shifted the burden back to the Organization, a burden that it did not meet. In fact, the decision of Public Law Board No. 5998 in Award 7 demonstrates just this point. In that Award the evidence that a signal system had not malfunctioned was rejected when the record, unlike the record in the instant case, demonstrated that the system was fairly new and that there had been system problems and reports.

The final argument is that the 20-day suspension assessed herein was excessive and punitive. We do not agree. When a train is permitted to enter a section of track on which a block has been placed there is grave concern for the safety and well-being of individuals. The record reflects that despite that grave concern the Carrier took into account the fact that the Claimant had a clean record and, therefore, issued the suspension in lieu of more serious discipline. We do not believe that on the basis of this record we are in any position to disturb that judgment.

**AWARD**

**Claim denied.**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

**Dated at Chicago, Illinois, this 25th day of October, 2000.**

**Labor Member's Dissent**  
**To Third Division Award No. 35029**  
**Docket No. TD-34947**  
**(Referee Robert Perkovich)**

In discipline cases, the burden of proof is on the Carrier. However, it would seem that Majority reversed that standard in this case. That is -- the Organization and/or the Claimant had the burden of proving the Claimant innocent.

The Majority states that the Organization "argues that the Carrier proved only that the CADS did not malfunction, but did not prove that the Claimant erred". The Organization never made any such argument. In fact, the Organization argued the opposite. The claimant didn't err - the CADS System did. This argument was based directly on the testimony provided by the Carrier witnesses.

On the day in question the Claimant was working the "AA dispatching desk". The Claimant issued Rule 704 track authority to a Welder after properly applying the track blocking devices. Subsequently, a signal (No. 4) was cleared into the protected track and a train entered the Welder's limits. Even though the Majority states that "the Carrier examined its Computer Assisted Dispatching System (CADS) to determine whether the systems had malfunctioned and determined that it had not", the testimony provided at the Hearing by the Carrier's witnesses contradicts this theory.

Part of the testimony conveyed by Carrier witness (Supervisor of Signals) Fender at the Hearing involved the signal log (tr.@ Exhibit I) of the CADS events at the time of the incident. When asked "what is this signal log or what information does it provide?" Fender testified, "indications and controls that are sent and received by the CAD System to and from the field locations" (tr.@ p.16). Mr. Fender also testified that the signal log identified who or what initiated the control sent. The control was sent out at 11:45:19 for the No. 4 signal to clear into the Welder's protected limits. When questioned by the Claimant's representative concerning all of this, Fender testified:

"What control was sent out?

No. 4 signal clear by system.

By the system?

Yes sir.

Why did it send out a signal request for a signal?

I can't answer that.

...

What was the request for the signal to clear for?

I can't answer that.

Was the track in automatic?

I do not know.

**Labor Member's Dissent**  
**To Third Division Award No. 35029**  
**Docket No. TD-34947**  
**(Referee Robert Perkovich)**

At 11:45:19 it was initiated by the system?

That's correct.

...

...My biggest thing is that signal was not initiated by the AA console.

The No. 4 signal at location 1916, no sir.

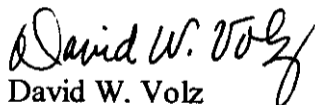
It was not initiated by the AA console.

That's correct." (tr.@ p. 35-36)

Clearly, in view of this testimony and evidence it was the CADS System that was at fault and not the Claimant. In lieu of considering the actual Hearing testimony the Majority chose to accept the Carrier's unproven (and given this testimony, incorrect) assertions that the CADS System did not malfunction.

In its submission, the Carrier stated, "It was determined that claimant must have given Train K650 (juice train) from Rockport authorization (clear signal) to enter Welder Smith's 704 limits prior to the release of that authority by Welder Smith". The Carrier didn't state that the Claimant "gave" the train a signal, but rather "must have given". Even the Carrier had doubts and chose to base its finding of guilt on assumption and not the facts. The Majority incorrectly followed the same course.

I dissent.

  
David W. Volz  
Labor Member