

****CORRECTED****

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37452
Docket No. TD-38000
05-3-03-3-437**

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

PARTIES TO DISPUTE: (American Train Dispatchers Association
(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

“This is an appeal of Charging Officer, J. E. Bendall, Manager Operations Administration, decision dated November 8, 2002 to assess 15 days suspension to Train Dispatcher William H. Branch, Jr. as a result of the formal investigation that was held on October 29, 2002.

In summary, the charges brought against the Claimant were never proven, and the safety of the crews involved was never compromised. It is the position of the Organization that the discipline assessed the Claimant was excessive and should be overturned, the Claimant reinstated with full compensation for all time lost as a result of these charges and his record cleared of any mention of these charges.”

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.

The record in this dispute is quite unusual in that it shows the discipline in question was based on suspected Rule violations that were conclusively disproved during the Investigation.

According to the notice of charges, the Investigation was convened to determine the Claimant's "... responsibility, if any, in connection with your alleged failure to protect the safe passage of trains by instructing the crew on K869, engine no. CP 9011, to open a switch and leave it lined reverse in the face of the conflicting movement of L161, engine no. CSXT 7562, in the vicinity of Central Avenue, at or about 4:30 AM, September 30, 2002, and your alleged failure to cancel a Form D written in error. ..."

During the Investigation, the Carrier's witness, who was its Rules expert, conceded that no Rule was violated when the Claimant gave the switch lining instructions in the manner he did. It was also conceded that the Claimant did, indeed, cancel the Form D in question contrary to the allegations of the charge notice.

At the very end of the Investigation, the Carrier's Rules expert noted that the Claimant's conversation with the crew on K869 constituted a technical violation of NORAC Rule 713. The Rule governs the sequence of events to be followed when Dispatchers give verbal authority to foul or occupy track when a conflicting movement is in the vicinity. The Rule requires the Dispatcher to withhold verbal permission until after the crew reports back that the conflicting movement has passed their location. The Claimant's technical violation occurred because he told the crew of K869 that they had permission to enter the main line once the conflicting movement had passed their location.

The record also shows that the crew of K869 never did enter the main line and, indeed, could not have done so without further Dispatcher involvement. Thus, while the Claimant technically violated Rule 713, the record does not show that operational safety was adversely impacted.

Nonetheless, the Carrier official who issued the notice of discipline wrote that the Claimant violated Rule 713 by virtue of the two unproven charges that pertained to the switch lining and the Form D. This official, who was not present at the Investigation, wrote as follows:

“ . . . [Claimant violated] NORAC Operating Rule 713, by instructing the crew on K869, engine no. CP 9011, to open a switch and leave it lined reverse in the face of the conflicting movement of L161, engine no. CSXT 7562, in the vicinity of Central Avenue, at or about 4:30 AM, September 30, 2002, and your alleged failure to cancel a Form D written in error. . . .”

Although the Organization repeatedly pointed out the Carrier's error during the appeal process on the property, the penultimate paragraph of its final two denials shows that the Carrier continued to predicate its discipline on the erroneous belief that Rule 713 had been violated on the basis of the two charges that had not, in fact, been proven.

Given the foregoing circumstances, we are compelled to find that the Carrier's basis for assessing serious discipline is unsupported by substantial evidence in the record. That said, however, we cannot overlook the violation, albeit a technical one, of Rule 713. As a result, the Claimant's 15-day suspension must be overturned and he must be made whole for all losses. For the Rule 713 violation, the Carrier may discipline the Claimant in the form of a written reprimand. The Claimant's work records must be modified accordingly.

AWARD

Claim sustained in accordance with the Findings.

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 22nd day of March, 2005.