

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37654
Docket No. MW-38196
05-3-04-3-118**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Texas Mexican Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline [sixty (60) day suspension, subsequently reduced to thirty (30) actual days] imposed upon Mr. L. H. Serna, Jr. for alleged violation of Rules 1.0, 1.1.1, 1.1.2, 1.4 and On Track Safety Roadway Worker Rules 22.1 and 30.3.1, in connection with alleged negligence in responsibilities of properly lining the west switch at Benavides, Texas and allegedly causing GBNMX Train to run through the west end switch, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File EPTM-03-90/237).**
- (2) As a consequence of the violation referred to in Part (1) above, the charges and discipline shall now be removed from Mr. L. H. Serna's record and he shall be compensated for all lost wages beginning June 22 through July 28, 2003."**

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 the time of the incident on June 22, 2003, the Claimant held seniority within the Maintenance of Way and Structures Department dating from June 19, 1978. He was assigned as a Bridge and Building Foreman, a position he had held for approximately ten years and was performing flagging duties for a private contractor.

On June 22, 2003, the Claimant was working on his Sunday rest day with an outside contractor. The contractor was performing main line rail relay work, and the Claimant was responsible for providing flag protection and track and time protection while occupying the main line. The contractor was gathering up cars of material from a Team Track at Benavides (approximately Mile Post 92) to be taken to a siding at Berry (approximately Mile Post 88.3). It is undisputed that the Claimant was the only employee in the area, and the only employee with a switch key needed to open or close a main line switch.

The Claimant had secured track authority between Mile Post 93 and Mile Post 88 to allow for the gathering of material cars from the Team Track and hauling to Berry. The contractor, operating a Brandt Truck, switched out his material cars from the Team Track, set them to the main line and departed for the siding at Berry. The Claimant was responsible for coupling up the cars and closing the switch to the Team Track upon completion of the work. Operating Rules require such switches to be relined for the main line after use. The Claimant relinquished his authority to occupy the main line at about 8:30 A.M. He drove his personal truck on the highway alongside the Brandt Truck to monitor its operation between Benavides and Berry. The Claimant indicated that he heard an approaching train by radio and he ensured that the Brandt Truck and its cars were cleared in the siding at Berry to allow for the passage of the oncoming train.

When Train GBNMX arrived at the west end of the Benavides Team Track, it ran through the switch at that location because it had not been properly lined for the main line after use. The switch and switch stand sustained some damage.

By letter dated June 22, 2003, the Carrier notified the Claimant that he was suspended indefinitely. He then requested a formal Hearing that took place on July 25, 2003. In a letter dated August 1, 2003, the Claimant was notified that "... it has been determined that you were negligent in your responsibilities of properly lining the west switch at Benavides, Texas causing GBNMX train to run through the west end switch. The facts also show that you were the last one to operate that switch before the train arrived. . . ." For this transgression, the Claimant was suspended for 30 days.

The Organization claims that the discipline imposed upon the Claimant was unwarranted, harsh and excessive. It contends that the burden of proof in a discipline matter such as this is on the Carrier and that burden of proof has not been met. While the Organization concedes that the Claimant was involved in said incident, it is the Organization's position that the incident was not caused by him. The Claimant testified at the Investigation that he took all proper steps regarding the switch. According to the Organization, the Carrier should now be required to clear the Claimant's record of any mention of the incident and to compensate him for all of his lost wages.

Conversely, the Carrier takes the position that it met its burden of proof. The Claimant was afforded a fair and impartial Investigation in accordance with the requirements of the Agreement. The Carrier considers the Claimant guilty as charged. According to the Carrier, a review of the transcript developed during the Investigation makes it clear that the Claimant was responsible for the incident and therefore violated the relevant Rules.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the

affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166.)

In the event of a credibility conflict, the Hearing Officer is charged with making credibility determinations, as is the case in the instant matter. Unless it can be shown that the Hearing Officer's determination is arbitrary or capricious, the Board may not substitute its judgment:

"In adopting the system of investigations and discipline prevalent in the railroad industry, the parties have accepted the long-standing practice that the hearing officer, not the Board, is charged with evaluating the evidence and testimony presented at the investigation. It is the hearing officer who makes the determinations regarding the credibility of witnesses. The Board may overturn such a determination only when the record shows the hearing officer acted in an arbitrary and capricious manner."

See Special Board of Adjustment No. 910, Award 763.

The Board finds substantial evidence in the record to uphold the Carrier's position. The Carrier proved that on June 22, 2003, the Claimant was the last known person to operate the switch; improper lining of the switch led to the accident. While there is admittedly a conflict in the testimony between the parties, the Board cannot find that the Hearing Officer's determination was arbitrary or capricious and the Board will not overturn such determination.

Further, we find that the 30-day suspension was reasonable. We will not disturb it.

AWARD

Claim denied.

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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 7th day of December 2005.