

PUBLIC LAW BOARD NO. 2960

AWARD NO. 130
CASE NO. 172

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The five (5) day actual suspension and the ten (10) day deferred suspension assessed D. R. Smuck for his alleged responsibility for failure to repair defective rail resulting in a derailment is wholly unjust and improper.
[Organization File 2D-5033; Carrier File 81-85-52-D]
- (2) Claimant shall be allowed the remedy as prescribed in Rule 19(d).

OPINION OF THE BOARD

This Board, upon the whole record and all of the evidence, finds and holds that the Employee and Carrier involved in this dispute are respectively Employee and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

On October 12, 1984 the Carrier directed the following notice to the Claimant:

"You are directed to appear for Formal Investigation as indicated below:

PLACE: Engineering Offices
1937 Hull Avenue
Des Moines, Iowa

TIME: 11:00 A. M.

DATE: Monday, October 15, 1984

CHARGE: Your responsibility for failure to properly repair defective rail on West # 4 Track Switch at West Des Moines, Iowa on October 6, 1984, resulting in derailment on October 9, 1984.

You may be accompanied by an employee and. or representative of your own choosing, subject to provisions of applicable rules in the applicable Schedule, and you may, if you so desire, produce witnesses in your own behalf without expense to the Transportation Company."

Subsequent to the investigation the Claimant was assessed the discipline now on appeal before the board.

The basic facts are not disputed. On October 6, 1984, Claimant was employed as Maintenance Foreman on the Weekend Gang at Short Line Yard in Des Moines, Iowa. The previous day, Assistant Roadmaster Jones told him that his crew should repair a broken rail on No. 4 Track at West Des Moines sometime over the weekend. Under Claimant's supervision, this repair was made on October 6. On October 9, 1984, a derailment occurred at the point where Claimant's crew had repaired the broken rail.

There is also no doubt that the method of repair employed by the Claimant was improper and caused the derailment. The Assistant Roadmaster testified that the cause of the derailment was the fact that two different size rails had been cut in, improper size angle bars were used and the bolt holes had been torch cut. This caused the wheel of the locomotive to climb over the rail. In addition, the Claimant in essence admitted

the repairs were improper. The following testimony is conclusive evidence of this:

"Q. And do you also feel that the repairs that were made at that particular time, for whatever reason, were inadequate for the operations of trains?

A. Yeah. I did not feel good about the repairs that were made at the time."

Instead the Claimant's defense is that -- while he knew the track wasn't repaired properly -- he had not released it for use. Nessecarily, as a defense this would have to mean that the Claimant intended to remedy the improper repairs. If this defense were credible it would absolve the Claimant of responsibility in the incident. However, there is more than a substantial foundation in the record for a finding that this defense is not credible.

The reasons it is not a credible defense include: (1) the fact he had not made any attempt between the 7th and the 9th to properly repair the track, (2) the fact he made no notation on his work report that the track needed further repair, (3) the fact he made no Claim to his supervisor when confronted with the incident that he had not returned the track to service, (4) the fact his initial defense -- according to his supervisor -- was as follows:

"I had a meeting with Mr. Mulvaney and Mr. Smuck at which time I was upset about the derailment and I told them in making repairs like that they should have either made the repairs properly or kept the track out of service. And they said to me, well you know how guys always complain about overtime is the reason we went ahead and fixed it like that."

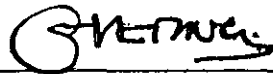
(5) The fact there was an indication the Claimant was simply just in a hurry to fix the rail is evidenced by his testimony as follows:

"Really, you know, it was probably a bad calculation on my part or something, but really didn't know what we getting into out there. We had no idea what was out there, we didn't know where it was. And at that time, the time had been coming close to the end of the day. We was, you know, we used up three hours over there on one lousy broken rail, which I kind of worried about our time consumption out there. Didn't have the proper tools and didn't feel there was time to go get such. So we tried to see what we could do to get by with what we had."

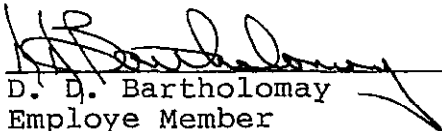
Accordingly, in view of these facts we cannot conclude that a five-day suspension is unreasonable.

AWARD:

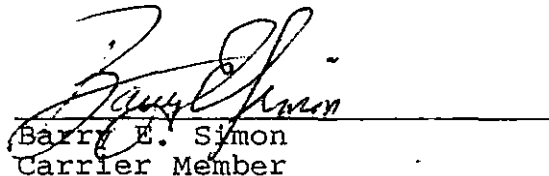
The Claim is denied.



Gil Vernon, Chairman



D. D. Bartholomay
Employee Member



Barry E. Simon
Carrier Member

Dated: July 6, 1988