

PUBLIC LAW BOARD NUMBER 3530

Award Number: 65

Case Number: 65

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM

Machine Operator, D. R. Hall, Rt. 1, Box 189, LaCrosse, VA 23950, and J. K. King, Rt. 2, Box 139, Kenbridge, VA 23944 were assessed a 30 day suspension for allegedly leaving House Track Switch open resulting in Extra 541 East running through the switch and causing a derailment. Claim was filed in accordance with Railway Labor Act and agreement provisions. Employees request pay for the 30 days with seniority and vacation rights unimpaired.

FINDINGS

Claimants were employed with Carrier as Machine Operators. By letter dated December 17, 1984, the Claimants were notified of their removal from service pending investigation for their responsibility for negligently failing to close a switch on December 14, 1984. An investigation was held on December 28, 1984. By letter dated January 16, 1985, the Claimants were suspended for 30 days.

The issue to be decided in this dispute is whether the Claimants were disciplined for just cause under the Agreement.

The position of the Organization is that Carrier failed in all respects to show that either of the Claimants was negligent.

The Organization contends that the testimony of the Claimants established that they locked the switch in question and further that they double checked to ensure that it was locked. The Organization further cites testimony at the hearing indicating that two employees had previously lost switch keys in that area and that therefore anyone could have subsequently unlocked the switch, and that they were not responsible for the ensuing damage to the switch.

The position of the Carrier is that the Claimants were properly disciplined for negligently failing to lock the switch in question.

Initially, Carrier contends that substantial evidence was produced at the investigation regarding the Claimants' responsibility. Carrier cites the fact that the Claimants were the last employees to use the switch prior to the mishap and that this fact alone creates a presumption that they were responsible for failing to lock the switch. Carrier further cites the testimony of Claimant Hall that he did not actually physically check to ensure that the switch was locked. Carrier additionally cites the testimony of Claimant King and argues that his testimony regarding the locking of the switch lacks credibility and is

inconsistent with the facts presented. Carrier concludes that in light of the Claimants' negligence and the potentially dangerous situation that it created, the discipline imposed was entirely warranted.

After review of the record, the Board finds that the claim must be denied.

It is not the purpose of this Board to rehear an investigation that Carrier held but only to determine if the discipline imposed was arbitrary, capricious or an abuse of discretion.

The present dispute involves circumstantial evidence and the determination of credibility. It is a well established principle that Carrier may weigh evidence and determine issues of credibility so long as it does not abuse its discretion in doing so. It is also a well established principle that a charge against an employee may be sustained on the basis of circumstantial evidence, so long as that evidence is substantial and supportive of the charge. We find that substantial evidence exists to sustain the charge against the Claimants. It is unrefuted that the Claimants were the last employees to officially use the switch prior to the mishap and that the switch was in fact unlocked at that time. Further, we find no evidence of an intervening cause. The fact that keys to the switch may have been lost in no way establishes a possible intervening cause, particularly since no

motive has been established for an employee finding a key to unlock the switch. Absent evidence of an intervening cause, we find that Carrier did not abuse its discretion in determining that the testimony of the Claimants failed to establish their lack of culpability regarding the incident. We therefore find that Carrier adequately sustained the charges against the Claimants and that the discipline imposed was reasonable under the circumstances.

AWARD

Claim denied.

Nicholas Puma
Neutral Member
J. C. Lyons
Carrier Member
Bruce S. Hall
Organization Member

DATE: 1-29-58