

PUBLIC LAW BOARD NO. 1844

AWARD NO. 31

CASE NO. 36

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Track Foreman D. L. Switzer, effective on February 25, 1977, was without just and sufficient cause and based upon unproven charges.
- (2) Mr. Switzer be reinstated with all rights unimpaired and paid for all time lost because of the violation referred to within Part (1) hereof.

OPINION OF BOARD:

Claimant entered Carrier's service in 1948 and was promoted to Foreman in 1956. Track Foreman Switzer was dismissed from service effective February 25, 1977 following a hearing and investigation into charges reading as follows:

Your violation of Rule 1241 on Monday, January 31, 1977, between Elkton and Taopi, Minnesota as prescribed in Rules of Engineering Department, C&NW Railway Company as follows:

Sec. Foreman must carefully inspect rail for defects or breaks and remove all defective rail as soon as possible.

On Monday, January 31, 1977, Claimant and his crew were performing track work on the Oelwein Subdivision of Carrier's Central Division. A defective rail with a head and web separation was found. In replacing

that defective rail Claimant had to cut the replacement rail to the proper length. As replacement rail he used a piece of rail which had been removed from the track about one week earlier due to a bolt hole defect. Claimant began to cut the replacement rail to the proper length using an abrasive saw to cut off the end with the bolt hole defect. The saw did not work properly and Claimant finished the cut with a cutting torch. Engineering Department Rules permit cutting rails with a cutting torch but only for use on side track or in yards or for temporary cuts on main lines. Temporary replacements of rail in such situations must be accompanied by a ten-mile per hour slow order. Claimant finished the cutting job with the torch and installed the replacement rail. He did not notice any defects and did not put a ten-mile per hour slow order over the rail. The next day, February 1, 1977, a train proceeded over the replaced rail at timetable speed and derailed a unit and fifteen cars.

Evidence adduced at the hearing showed that the derailment was caused because the replacement rail had a vertical split head. It is apparent from the hearing record that the split head was not evident at the time of installation by looking down on the ball of the rail but was detectable by close examination of the torch cut end. Following the derailment the vertical split head in the replacement rail was plainly visible.

A careful review of the record in our judgment supports Carrier's conclusion that Claimant did not give the replacement rail the kind of thorough inspection required by Rule 1241. Specifically, the record persuades us that he examined the rail by looking down on the ball of the rail but did not thoroughly inspect the ends, especially the torch cut end. We should point out that we do not find convincing the suggestion of Carrier that the torch cutting caused the defect; but we are persuaded that Claimant failed to make the kind of thorough inspection which might have found the defect.

Although not specifically charged with same, Claimant admitted at the hearing that he violated another rule by not putting a ten-mile per hour slow order on the section of main line replaced by the torch cut rail. We cannot concur with the Organizations's position that Claimant's due process rights were violated when he was found guilty of violating that rule as well as Rule 1241. Claimant freely admitted the slow order transgression and his culpability thereunder is so interwoven with the failure to properly inspect the rail that we cannot concur in the Organization's view that the hearing amounted to a "fishing expedition." Additionally, we note that Claimant's admissions are reiterated by the Organization in appeal letters on the property reading in pertinent part as follows:

Mr. Switzer used poor judgment when he failed to place a 10 mile per hour speed restriction on this section of track. This is the only violation for which he could have been charged.

Dismissal of a 29 year employee might well be deemed excessive discipline. But shortly after he was terminated Claimant took his Railroad Retirement Annuity, effective April 1, 1977. By that action he rendered the claim for reinstatement moot and the claim for compensation for all time lost was limited to the period February 25, 1977 to March 31, 1977, the last day before his Annuity became effective. In effect Claimant's retirement makes this a de facto suspension of 35 days without pay rather than a dismissal. We cannot find that a suspension of 35 days is arbitrary, unreasonable or capricious given the proven violation of work rules. Accordingly, the discipline assessed is reduced for the record to a 35-day suspension.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein;

and


3. that the dismissal was excessive.

AWARD

Claim sustained to the extent indicated in the opinion.


Dana E. Eischen, Chairman


H. G. Harper, Employee Member


R. W. Schmiede, Carrier Member

Dated: December 6, 1978