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**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25001

Docket No. 44680

99-1-97-1-U-1997

The First Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim in behalf of Engineer S. A. Tomter, Union Pacific Railroad former Chicago and North Western Transportation Company, for compensation for all lost time including time spent at the investigation and that this incident be removed from claimant’s personal record when claimant was investigated on the following charge:

‘Your responsibility for derailment and resulting damage to ETTX 860386, ETTX 904029 and ETTX 852482 on March 8, 1997, at approximately 2330 hours on March 8, 1997 in the Proviso Yard while you were employed as a crew member on NPPRCR-07, on duty March 8, 1997 at Clinton, Iowa.’”

FINDINGS:

The First 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.

Claimant was notified and an Investigation held to determine alleged responsibility for a derailment and car damage on March 8, 1997 in Proviso Yard. Following the Investigation, Claimant received notification that he had been found guilty as charged and assessed a Level 2 Discipline.

The Organization alleges that there was no proof in the record that the Claimant's actions caused the derailment and damage to cars. The Claimant had stopped his train to await the actions of his Conductor in aligning switches. The Claimant started his train to follow the conductor and shortly thereafter noticed two tri-levels loaded with automobiles laying on their sides with two other cars derailed. The Organization argues that the Carrier's allegation of violation of Rule 32.3 has not been proven.

The Carrier maintains that the derailment, which ultimately damaged three of the cars, was the responsibility of the Claimant. The Carrier argued on property that the evidence against the Claimant was "compelling" and that he had been properly found guilty and progressively disciplined.

A careful review of the testimony indicates that the Carrier called two witnesses to testify to Claimant's alleged violation of Rule 32.3 (Slack in Train) which states that: "The engineer is responsible for properly controlling the slack in the train." The Manager of Terminal Operations (MTO) prepared a derailment report stating that the Claimant "used excessive independent [brake] causing lead four cars in train to derail." He testified that in his evaluation the cause of the train derailment "was train handling." The Manager of Operating Practices (MOP) interpreted the event recorder tapes and similarly testified. It was his view that the cause was Claimant's excessive use of the independent brake leading to a buff force derailment. Against such testimony, the Claimant denies violation and states that he properly controlled the slack in his train.

To meet its burden of proof the Carrier must supply sufficient probative evidence that would sustain such conclusion. There were no witnesses to the actual derailment. The Claimant was moving what the Carrier witness defined as "a very hard train to run" at night down a backwards S curve. A buff force derailment caused by slack coming from the train was not proven. The MTO did not testify that the evidence he reviewed at the scene demonstrated said cause. In fact, he could not say which wheels went on the ground first or how far they were dragged. He did not inspect the wheels and never got a report on the status of the wheels. His testimony on the condition of the

tracks or on whether the remaining cars were stretched out or bunched is lacking. The MOP who reviewed the event recorder tapes and testified that the derailment was, in his mind, caused by the use of independent brakes, made numerous points. As this Board reads the testimony, the speed in the yard was ten miles per hour. Claimant, who was going five miles per hour, was attempting to slow his train. The Carrier must show that the Claimant's train handling caused the derailment. The problem is that even the MOP's testimony fails to prove that the cause was slack coming from the train rather than other factors. The MOP admits he had not investigated train derailments of this type, had no idea if the trains brakes were functioning properly, nor did he investigate the train after the incident to determine if the remaining cars were stretched out. In fact, he testified that by the time he returned, the rear end of the train had been removed.

There is in this record insufficient probative evidence to reasonably conclude that the Claimant's actions were the cause of the derailment. The Claimant testified that he properly controlled slack and further stated:

By every indication that I was taught, from the experience of the people that taught me, when slack runs in, you'll feel it... feel like somebody just pushed you from behind. And at no time, did I ever feel slack run in on me, or a big push from behind when I was on the working lead.

The Board notes several alternative plausible explanations for the derailment. The search of the record fails to find any evidence from those mechanical or track personnel who actually worked the derailment. We cannot find proof from this record of a clear nexus between the independent brake, slack and the derailment. We have carefully considered whether based on this circumstantial proof everything points to the Claimant. We conclude that there is insufficient proof of a factual nature to demonstrate that the Claimant created slack, that the derailment was directly the result of slack coming from the train, or that his use of the independent brake and sixty pounds of pressure caused the derailment. There were other "reasonable explanations" that, had they been explored, could have been shown causative (First Division Award 24254). The Claim must be sustained.

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AWARD

Claim sustained.

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 First Division

Dated at Chicago, Illinois, this 2nd day of June 1999.