

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 25977
Docket No. 45930
04-1-02-1-M-2112

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

(Brotherhood of Locomotive Engineers

PARTIES TO DISPUTE: (

(Kansas City Southern Railway Company

STATEMENT OF CLAIM:

“Claim of MidSouth Rail Engineer Al Spivey for removal of fifteen (15) days suspension assessed on October 16, 2001 with all notations of discipline expunged from his personal work record and compensation for all time lost, including time attending the investigation in connection with the alleged violation of the Kansas City Southern General Code of Operating Rules 7.1, 8.9.2 and the Kansas City Southern Railway Company Air Brake and Train Handling Rule 104.1 Item 2 in connection with a derailment that occurred at Shreveport Yard at approximately 0040 hours on August 25, 2001 while serving as Engineer of Job 34.”

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.

The Claimant Al Spivey is employed by the Carrier as an Engineer in Shreveport, Louisiana. The Claimant went on duty at 4:00 P.M. on Yard Assignment Job 34. At about 12:40 A.M. on August 25, the crew derailed five cars. The crew consisted of the Claimant Engineer Spivey, Conductor F. D. Chandler, and Brakeman C. C. Lawrence, Jr.

On August 29, 2001, the following Notice of Investigation was sent to each crew member:

"August 29, 2001

A. Spivey	F. D. Chandler	C. C. Lawrence, Jr.
Engineer	Conductor	Brakeman
200 Ridge Field Dr.	518 Northpark Dr.	2511 Plantation
Bossier City, LA	Bossier City, LA	Bossier City, LA

Arrange to be present in the Conference Room, KCS Office Building, 4601 Shreveport-Blanchard Highway, Shreveport, Louisiana at 1100 hours September 5, 2001, for a Formal Hearing to ascertain the facts and determine your responsibility, if any, in connection with a derailment that occurred at Shreveport Yard while you were serving as crew members of Job 34 on August 25, 2001 at approximately 0400 hours.

The Carrier will have as witness(es), Dennis Edwards, Trainmaster and additional witnesses may be called. If you desire representatives and/or witnesses, you may make arrangements in accordance with your applicable schedule of agreement.

Respectfully,
J.D. Freeman
Investigating Officer

cc: A.R. Aycock, Local Chairman, BLE
R.W. Snow, Local Chairman, UTU
Dennis Edwards, Witness
Human Resources"

The Hearing was postponed a number of times and was ultimately held on October 8, 2001. As a result of the Hearing, the Claimant was found guilty of violating numerous operating and train handling Rules and received the following letter:

**"A. Spivey
Engineer
200 Ridge Field Dr.
Bossier City, LA 71111**

Referencing the investigation that was held in the 1st Floor Conference Room, KCS General Office Building, 4601 Shreveport-Blanchard Hwy, Shreveport, LA, at 1300 hours, October 8, 2001, to ascertain the facts and determine your responsibility, if any, in connection with a derailment that occurred at Shreveport Yard while you were serving as crew members of Job 34 on August 25, 2001 at approximately 0400 hours.

After thorough review of the transcript of this investigation, I find that you were in violation of Kansas City Southern Railway Company General Code of Operating Rules 7.1, 8.9.2 and Kansas City Southern Railway Air Brake Systems & Train Handling Rule 104.1, Item 2.

Accordingly, for your violation of the above mentioned rules, you are hereby issued a 15 day suspension to commence on Thursday, November 1, 2001 continuing through and including Thursday, November 15, 2001.

Respectfully,
J. D. Freeman,
Investigating Officer

cc: R.D. Venditti, Director, Human Resources
M. Malone, Labor Relations
R.G. Guy, Director, Crew Management
Dennis Edwards, Trainmaster

A.R. Aycock, Local Chairman, BLE
Human Resources"

The Board reviewed the documents in the record and the transcript of the hearing in considerable detail. As a result of that review the Board has concluded that the hearing in this matter contained many procedural shortcomings and that the transcript contained a considerable number of factual mistakes, as well as confusing and contradictory testimony. The proceedings in this matter also produced a surprising result.

At the outset of this discussion, the Board points out that it does not adopt the Union's view of this case that the switch in question somehow failed and caused the five cars to derail. The Board adopts the position that the Claimant operated Job 34 South on Hollywood 1 MT through the spring switch that was lined against it. It was lined to the tail track . . . and Job 34 stopped with a car straddling the switch. Since the spring switch returned to its original position, it meant that the front wheels (north end) of a car were on Hollywood 1 and the rear wheels (south end) were on Hollywood 1 with the switch lined to direct those wheels (when the train moved north) on to the tail track. This meant that the car in question (the first car to derail) ended up on two different tracks causing rails to bend and to turn over and the car to derail. When Job 34 moved in the opposite direction, four more cars derailed. The derail was discovered when the Claimant could not move his train to recouple with cars he had set aside. The Board has concluded that this is the only logical explanation for the cause of this derailment.

As pointed out above, the Board observed that a number of procedural shortcomings were present in this case. Witnesses were called by the Carrier who could be categorized as surprise witnesses. People were not called as witnesses who should have been (e.g., the Yardmasters involved). Confusing and conflicting testimony was contained in the record concerning North and South Movement of Job 34 and the position that the tail track switch was in when Job 34 began its movement to set out a bad order car. It would also be expected that the tapes of the conversations between the Yardmaster and the Engine Crew operating in the yard that used Hollywood 1 and the tail track would be available at the Hearing. They were not.

While there are a number of other aspects of the handling of this case that can be seriously questioned, the Board sees no benefit in doing so at this time. One

interesting point, however, that is difficult to explain is that the Carrier's major witness, Dennis Edwards, the Terminal Director in Shreveport Yard, testified that when he arrived at the site of the derailment (the first the Carrier official to arrive), the switch in question was lined for Hollywood 1, just as the Union and the Claimant testified.

While the Board concludes that the train crew here was involved in a derailment, the record lacks the evidence to place the blame for this derailment solely on Engineer Spivey. Since the Carrier has chosen not to discipline the other crew members of Job 34 or suggest that other employees (Yardmasters or members of other crews operating in the area) may have had some involvement in how the tail track switch was set when Job 34 went through, it has placed the blame for the derailment solely on the Claimant.

The record of this case is not so clear and precise that it can support a conclusion that the Claimant is solely responsible for the August 25, 2001, derailment. The Board, therefore, has concluded that the Carrier can make its point in this instance with a Letter of Warning to the Claimant. In light of the Carrier's failure to find any other employee responsible for any part of the derailment, the Board considers the penalty of a 15-day Suspension, to be arbitrary. The Board directs that the Claimant's record be changed to reflect a Letter of Warning. He shall be made whole for all lost time and benefits.

AWARD

Claim sustained in accordance with the Findings.

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 10th day of March 2004.