

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: ( System Federation No. 76, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Carmen)  
( Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. Freight Car Repairman D. D. McAtee was unjustly assessed ten (10) days deferred suspension on April 6, 1977.
2. Freight Car Repairman D. D. McAtee was erroneously charged with his responsibility in connection with injury incurred by Mr. J. D. Adkins on March 1, 1977.
3. That the Chicago and North Western Transportation Company be ordered to remove the ten (10) days deferred suspension from Freight Car Repairman D. D. McAtee's file.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Claimant was assessed a ten-day deferred suspension upon the Carrier's determination that he had responsibility "in connection with injury incurred by Mr. J. D. Adkins at the Council Bluffs repair track at 10:45 a.m. on March 1, 1977, while you were operating a fork lift".

There is no dispute that the fork lift truck operated by the Claimant did strike Adkins, causing him injury. Claimant was operating the fork lift in reverse direction, carrying an iron rod. He claimed that the fork lift "swerved" and that he took preventive action so that Adkins was not hit by the rod and that he also "yelled" at Adkins to warn him. Although the rod did not strike Adkins, the fork lift itself did so, pinning him underneath the truck. Claimant admits that he did not blow the horn on the truck as a warning.

Principal defense of the Claimant and the Organization is that the brakes on the fork lift were defective. The record shows considerable dispute as to whether or not the brakes were properly operative at the time of the accident. The record shows, however, that the Claimant was able to operate the brakes and that, if he was aware of any brake deficiencies, he was in a position to take necessary precautions in operating the vehicle.

There is no finding of deliberate misconduct on the part of the Claimant. On the other hand, the penalty levied by the Carrier (a ten-day deferred suspension) was of a moderate nature. The Board sees no basis on which to disturb the penalty.

The Organization raised a number of procedural objections to the conduct of the investigative hearing. The hearing was exhaustive in nature, and the Board finds no substance to the objections, and there was full opportunity for the Claimant's defense to be made.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of March, 1979.