

The Second Division consisted of the regular members and in addition Referee Jonathan Klein when award was rendered.

Parties to Dispute: ( Brotherhood Railway Carmen of the United States and Canada  
( Belt Railway Company of Chicago

Dispute: Claim of Employees:

1. That, as a result of an investigation held on December 11, 1981, postponed and continued on January 29, 1982, Carmen T. O'Dowd, G. Wakefield, E. Watson, J. Drish and J. Christensen were each assessed a fifteen (15) day actual suspension from service. Suspensions were effective February 6, 1982 through February 20, 1982 inclusive. Said suspensions of the above-named Carmen are arbitrary, capricious, unjust, unreasonable and in violation of Rule 20 of the current working Agreement.
2. That The Belt Railway Company of Chicago be ordered to remove the discipline from each Carmen's personal record and compensate them for all wage losses, plus interest at the current rate, sustained account of the fifteen (15) day suspension.

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 employes 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.

On November 19, 1981, the Claimants, T. O'Dowd, G. Wakefield, E. Watson, J. Drish and J. Christensen had all worked their regular assignments of coupling, air testing and inspecting a Conrail train with 113 cars. The train departed the Clearing East Yard on November 20, 1981. On December 7, 1981, Carrier's assistant superintendent was informed that the train of 113 cars had arrived at Conrail's Elkhart, Indiana yard with two (2) cars in the consist in violation of federal regulations, to wit: the 35th car from the head end (U.T.L.X. 75121) was a placarded tank car loaded with acid, and the 36th car (W.S.O.R. 5681) was a shiftable load of steel pipe casings. As a result of a formal investigation and hearing, Claimants were each assessed on February 6, 1982 a fifteen (15) day actual suspension from service.

The Organization asserts that the condition charged (placing a shiftable load of steel casings next to a placarded tank car of acid) was not proved by Carrier, claiming there was no evidence that the tank car was placarded. The Carrier contends that not only did it meet its burden of proof, but that the claims are barred, and must be dismissed as untimely.

This Board is most reluctant to prevent consideration of the merits of a claim on the basis of a procedural technicality. In the instant case, the Carrier would submit that Claimants' appeal was initially filed in violation of Article V of the controlling agreement which provides in part:

"(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based."

The letter dated February 19, 1982 of the local chairman initiating the appeal is stamped received by Carrier on May 28, 1982. This Board need not address the sufficiency of the presentation of these claims, as a careful review of the record indicates that the chief operating officer designated to handle such disputes addressed the merits of the claims without mention of the timeliness issue. While two previous responses by Carrier's representatives in the handling of the claim raised the issue of timeliness, the response by Carrier's last officer in the appeal process waived this issue.

Proceeding to the merits of the claims, the Board is of the considered opinion that Organization's vigorous assertion that Carrier failed to meet its burden of proof must fail. The question which must be decided is the propriety of the conclusion reached after the formal hearing as to whether the circumstantial evidence is sufficient to establish the charge: i.e., that the fact that Claimants failed to comply with the rules is more probable than any other allegation of fact. The issue of whether the two cars in question were improperly assembled and inspected by Claimants as charged, must be the most natural inference from the established facts. Carrier's Rule 113 provides that:

"Employees whose duties or employment are affected by Federal, State or Municipal laws, or the regulations of the Bureau of Explosives must familiarize themselves generally with all requirements thereof and conform to them."

Bureau of Explosives Pamphlet No. 20 titled "Hazardous Material Regulations Excerpted for Railroad Employees," Rule 174.92 states:

"Separating loaded, placarded tank cars other than cars placarded combustible from other cars in trains. (a.) In moving or standing train a loaded placarded tank car, other than one placarded 'combustible,' may not be placed next to:

\* \* \*

Item 6 thereof reads:

(6.) An open-top car when any of the loadings protrudes beyond the car ends or when any of the lading extending above the car ends is liable to shift so as to protrude beyond the car ends."

The facts established at the investigation consisted of the following:

1. That Claimants knew, or should have known of Rule 174.97.
2. That Claimants' responsibilities included insuring that no open shiftable loads were placed next to a hazardous, placarded tank car.
3. That Carrier's outbound train list placed a gondola car, W.S.O.R. 5681, containing a load of steel casings next to car U.T.L.X. 75121, a tank car load of corrosive acid.
4. That the waybill for tank car, U.T.L.X. 75121, indicated said car contained methacrylic acid and was placarded corrosive.
5. That on the same date that the Conrail train was assembled and inspected by Claimants, the gondola car W.S.O.R. 5681 was repaired due to "Pipe Shifted."
6. That if the tank car was not placarded, the Claimants would not have known that it contained hazardous material.
7. That when the train at issue arrived in Elkhart, Indiana, the tank car, U.T.L.X. 75121 was placarded and positioned directly next to car W.S.O.R. 5681, containing a load of shiftable pipe, i.e., pipe which extended over the top of the gondola car.
8. That none of the Claimants observed the tank car and gondola car next to one another.

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While it is the Board's opinion that direct evidence is preferable to circumstantial evidence, in this particular case, the circumstantial evidence has been sufficiently established, and the reasonable inferences which follow lead to the probable conclusion that Claimants failed to perform their duties as charged. The Board further finds that the discipline assessed was neither arbitrary, unreasonable, nor capricious.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of August 1984.