

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

Parties to Dispute: (Brotherhood Railway Carmen of the
(United States and Canada - A.F.L. - C.I.O.
(Washington Terminal Company, Washington, D.C.

Dispute: Claim of Employees:

1. That the Washington Terminal Company violated the controlling agreement when they unjustly suspended car repairman M.H. McMillan as a result of investigation held on May 19, 1982.

2. That accordingly the Washington Terminal Company be ordered to reinstate M.H. McMillan with compensation for his net wage loss, seniority and vacation rights unimpaired, and made whole any loss due to health and welfare benefits not continued.

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.

Claimant M.H. McMillan was employed at the Washington Terminal Company in Washington, D.C. when the incident in question occurred. On February 4, 1982, Claimant ignited an oxygen-acetylene torch held by a co-worker with a striker and received serious burns to his hand from bursting flame. On May 7, 1982, Claimant received notice to appear at a formal hearing on May 19th for investigation of alleged violations of General Safety Rules S-33 on the proper use of equipment and S-38 on the use of protective clothing. By letter of June 8, 1982 Carrier informed the Claimant of a one (1) day suspension assessed for a finding of guilt. That suspension was held in abeyance pending further appeal. On January 4, 1983, the Carrier dropped that part of the charge dealing with protective clothing (Rule S-38), but did not disturb the discipline imposed "because of the seriousness of the Safety Rule S-33 violation" which reads as follows:

"Inspect tools, machinery and equipment before using. The use of such items, if defective, is prohibited."

A complete review of the record shows that the Claimant was not using the acetylene torch at the time the incident occurred. He was neither holding, or preparing to use the torch in the course of his duties. The torch was in the possession of a co-worker and by Claimant's testimony he believed that there had already been a prior inspection of the equipment by the employee who had set it up, held it in hand and was ready to do the burning. The record shows that the torch proved defective and the Claimant was injured. However, an injury does not substantiate that the Claimant is guilty of violating a safety rule (see Second Division Award 6306).

General Safety Rule S-33 is specific to use. Nowhere in the evidence is it substantiated that the Claimant used or even held the defective torch. The equipment in the Claimant's hand was a striker and not a torch. Rule S-33 is clear as to inspection before use and requires the user to make the proper inspection. The Claimant was not in any manner whatsoever the user of the acetylene torch.

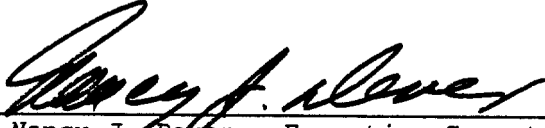
The role of this Board in its appellate function in discipline cases is in part, to determine if the Carrier has met the test of substantial evidence in its finding of guilt. In the present case, this Board finds no probative evidence in the record on which to support the discipline. While we are not anxious to substitute our judgment for that of the Carrier, in the case at hand we must sustain the claim. The ruling is consistent with similar Awards by this Board (Second Division Awards 4977, 8292, 9476). As such, Claimant should be reinstated with seniority and vacation rights unimpaired and compensated for his net wage loss from his one (1) day suspension. This Board lacks the authority to make whole any loss due to health and welfare benefits and therefore denies that part of the claim (See Second Division Awards 3833, 8236, 8696).

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of March 1985.