

The Second Division consisted of the regular members and in addition Referee Robert O. Harris when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood Railway Carmen/Division of TCU
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM:

1. That the Missouri Pacific Railroad Company violated Rule 31 of the September 1, 1981 Agreement when they arbitrarily, unjustly and capriciously suspended and censured Carman J. L. Anderson March 10, 1989.

2. That the Missouri Pacific Railroad Company be ordered to compensate Carman J. L. Anderson as follows:

- A. Returned to service with seniority rights unimpaired.
- B. Made whole for all vacation rights.
- C. Made whole for all health and welfare and insurance benefits.
- D. Made whole for all pension benefits, including railroad retirement and unemployment insurance.
- E. Pay for all time lost, including all time for holiday pay and all other compensation, for overtime that he would have received from March 10, 1989 until returned to service on March 23, 1989 and further, that his record be cleared of the thirty (30) day deferred suspension that began March 24, 1989.

FINDINGS:

The Second 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 employees 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 charged with being insubordinate when instructed by his Foreman to assist in moving break beams from a pallet to the safety brake beam rack. He was also charged with failing to properly lift the brake beam in accordance with pro-back lifting techniques which resulted in an alleged injury to a fellow worker. After hearing, Claimant was given a ten-day actual suspension and thirty days' deferred suspension.

The questions before this Board are whether there is substantial evidence to support the Carrier findings and whether if there are, the penalty assessed is appropriate.

It is undisputed that Claimant had been instructed in proper back lifting techniques. At the hearing, one of his fellow workers, who was not directly involved in the incident but was witness to it, testified:

"As I was doing my work assignment, I had to go around the end of the car to pick up some brake shoes and as I went around the end of the car to go to the knuckle high table where the brake shoes were located, I observed James Mercer and [claimant] were putting brake beams from a pallet on the floor into the brake beam rack. At that time, James Mercer picked up the beam and walked around the rack, [claimant], he picked the beam up, he turned partially and he slung the beam into the rack."

Another employee, who indicated that he had a muscle strain from Claimant's allegedly improper handling of the beam, testified when asked whether Claimant had performed his duties in accordance with Carrier safety standards:

"That is a hard question to answer. When the brake beam dropped, I honestly can't say that he did it intentionally. So, to answer that, one would have to know if [claimant] intentionally threw the beam or if it was possible that it slipped from his hands. Since I didn't ask him, I have no way of knowing."

Claimant testified that he did not remember the incident and so was unable to recall any details of what occurred.

From the evidence presented at the hearing, it is clear that Claimant did not follow approved pro-back techniques in his handling of the brake beam.

Claimant was also charged with being insubordinate when instructed by his Foreman to assist in moving break beams from a pallet to the safety brake beam rack. The evidence regarding this charge is the testimony of his Foreman, who stated:

"I asked [claimant] to assist Jim Mercer in stacking brake beams from the pallet to the brake beam rack, he made the statement that he thought it was unnecessary due to the fact that they were using brake beams on the other side of the truck shop. That was that was said."

The Foreman then, in response to the question, "In this conversation did [claimant] appear to be normal, quarrelsome or angered," answered:

"Yes, sir. He seemed to be angered. But he did go ahead and assist Jim Mercer."

The coemployee stated that he never heard Claimant become "belligerent and threatening" to the Foreman.

The evidence adduced at the hearing does not support the charge that Claimant was insubordinate. The question then is whether the Carrier-assessed penalty is appropriate under the circumstances of this case.

The Carrier has stated that it considers this a serious offense. However, the injured worker did not take any time off, did not consult a doctor and did not file an accident report until required to do so by his supervisor. That the coemployee was injured by the carelessness of Claimant cannot be denied. No one has any proof it was deliberate and while Claimant did not follow pro-back procedures, that failure does not warrant the penalty assessed against him. The suspension will be reduced to one day, with no additional deferred time, and Claimant will be made whole for lost wages and other benefits as a result of Carrier's assessment of a greater penalty.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of January 1992.