

Award No. 2292

Docket No. 2152

2-ACL-CM-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Carmen)**

ATLANTIC COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: (a) That the discipline assessed Car Inspectors R. F. Cleaper and C. V. Dickens—5 days actual suspension—is without justification.

(b) That Inspectors Cleaper and Dickens be reimbursed for the 5 days they were unjustly deprived of their service rights.

EMPLOYEES' STATEMENT OF FACTS: MPLX No. 2029, loaded tank car destined for La Grange, Ga., was received through interchange from the Southern Railroad in Atlanta, Georgia along with 46 additional cars at 11:15 P. M. August 19, 1952. The 47 cars were inspected on arrival in the ACL Yards by R. F. Cleaper, east side, and J. P. Peters, west side; 4 cars were bad ordered and shopped for repairs. MPLX No. 2029 was dispatched, along with 32 additional cars, in Local XS 363 368, south, at 12:23 P. M. August 20, 1952. This train received outgoing inspection by M. E. Cheek and N. C. Robinson; both inspectors working a portion of the east and west side of the train. No exceptions were taken to any of the 32 cars dispatched.

Local XS 363 arrived in Manchester, Georgia, at 10:18 P. M. August 20, 1952, with 41 cars, having added 9 cars to the consist between Atlanta and Manchester. This train was inspected on arrival by Inspectors R. L. Hanson and C. V. Dickens. No exceptions were taken to any of the cars on incoming inspection including MPLX No. 2029. This tank car was dispatched at 11:48 P. M. August 21, 1952, from Manchester in train 2/208, consist 40 cars, outgoing inspection made by M. V. Burnette and R. L. Hanson. No exceptions were taken to any of the cars in the outgoing inspection.

The car reached destination and was set off at LaGrange, Georgia, August 22, 1952, where it was unloaded and returned to Manchester enroute to Atlanta in Train 507 August 23, 1952, arriving at 4:00 P. M. It was inspected by J. P. Peters, fireman side, and C. V. Dickens, engineer side. The train consisted of 33 cars, 6 of which were bad ordered to shop for repairs. This car left Manchester in 2/212 at 7:41 P. M. August 24, 1952. Outgoing inspection was made by J. W. Pike and R. K. Upchurch. No exceptions were taken to any of the cars in the outgoing inspection. Train arrived in Atlanta

Carrier is of the firm conviction that neither of these men gave of their best while inspecting this car. They were proven negligent in the performance of their duties, and as stated previously, both acknowledge their responsibility to properly inspect cars, but nevertheless, overlooked an obvious defect that was in plain sight which could have resulted in an accident far more tragic than the one related herein. Carrier considers the discipline administered completely just and in keeping with the seriousness of the offense of which the claimants were guilty, and, respectfully requests that the Board decline this claim.

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.

The parties to said dispute were given due notice of hearing thereon.

This claim is made in behalf of Car Inspectors R. F. Cleaper and C. V. Dickens. It is contended that a five (5) day suspension was actually imposed by carrier upon each of these claimants without any justification for doing so. In view of this contention the organization asks that claimants be now compensated for the five (5) days each of them was improperly deprived of his service rights.

The facts disclose that on Thursday, August 23, 1952, claimant Dickens inspected train No. 507 upon its arrival in carrier's Manchester Yard, en route to Atlanta, on the engineer's side. The consist of this train included tank car MPLX 2029. On the following day, Friday, August 24, 1952, claimant Cleaper inspected the fireman's side of train 2/212 upon its arrival in carrier's Bellwood Yard at Atlanta, Georgia. The consist of this train likewise included tank car MPLX 2029.

On October 2, 1952 Master Mechanic C. C. Persons notified claimant Dickens that he was being charged with failure to properly inspect tank car MPLX 2029 on August 23, 1952. As a result of an investigation held on these charges Dickens was actually suspended from service for a period of five (5) days.

On October 2, 1952, Master Mechanic C. C. Persons also notified claimant Cleaper that he was being charged with failure to properly inspect tank car MPLX 2029 on August 24, 1952. As a result of an investigation held thereon Cleaper was actually suspended from carrier's service for a period of five (5) days.

The particular thing complained of is that neither of these men, during their inspection of this car, noticed that a grab iron was missing and that part of a damaged running board was also missing near the dome thereon.

Carrier contends the organization's declaration of intent to file this dispute with the Second Division, dated December 28, 1955, does not meet the requirements of Section 2 of Article V of their agreement with the organization dated December 15, 1954, effective January 1, 1955, and that consequently the claim is barred. In other words, it is the carrier's thought that an appeal has not been taken until the actual submission thereof has been filed with the Division. That part of the foregoing rule, which is here material, provides as follows:

"* * * except that in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date of this rule for an appeal to be taken

to the appropriate board of adjustment as provided in paragraph (c) of Section 1 hereof before the claim or grievance is barred."

Paragraph (c) of Section 1 provides, insofar as here material, that:

"* * * All claims or grievances involved in a decision by the highest designated officer shall be barred unless * * * proceedings are instituted * * * before the appropriate division of the National Railroad Adjustment Board * * *."

Section 3, First (i) of the Railway Labor Act provides, insofar as here material, as follows:

"* * * disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the dispute."

We think the filing of a declaration of intent with the appropriate Division constitutes the institution of an appeal proceeding before that Division of the National Railroad Adjustment Board within the meaning of the quoted rules of the parties' agreement relating thereto. For a more complete discussion of the reasons why it has that effect see Award 2285 of this Division.

The organization contends the carrier failed to show that each of the claimants inspected that side of the tank car on which the alleged defect was located. In this respect the carrier assumes the burden of proof. When it makes a charge or charges against an employe it has the burden of proving the same and the only evidence that it may consider in determining the guilt or innocence of such employe is that adduced at the hearing or investigation held thereon. It cannot supplement any deficiency in its proof by subsequently, in its submission here, furnishing additional evidence.

The evidence adduced at the hearing shows that both claimants inspected an incoming train containing this tank car but there was no evidence adduced thereat to show that it was then in a damaged condition or from which it could be found that claimants actually inspected the side of this car on which the alleged damage existed. In this respect we have not overlooked statements contained in questions of carrier's representatives, but such are merely conclusions and not evidentiary in character. They cannot be considered for the purpose of establishing these facts. These facts were undoubtedly known to these men by reason of the fact that they were familiar with the contents of Carrier's Exhibits A, B, C, F and G attached to its submission here. But these were never introduced into the record at the investigation. Had carrier done so they would have been adequate to prove the tank car had been damaged; that it occurred prior to these men having inspected it; and that each of the claimants actually inspected the side of the car on which the damage existed at the time they did so.

In view of the foregoing we find the claim must be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30 day of October, 1956.