

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

Parties to Dispute: (Brotherhood Railway Carmen of the United States
(and Canada
(Washington Terminal Company

Dispute: Claim of Employees:

1. That the Washington Terminal Company violated the controlling agreement when they unjustly assessed Car Cleaner Barry T Whitmyer a ten day suspension as a result of an investigation held October 31, 1979.
2. That accordingly the Washington Terminal Company be ordered to compensate Mr. Whitmyer his net wage loss (23 days) he was caused to lose by this unjust 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 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.

This claim arises out of a charged altercation between Claimant and a fellow employe, C. C. Ingram. Claimant, an employe with three and one-half years service at the time of the incident, October 16, 1979, was removed from service immediately following the incident. Subsequently, as a result of the investigation, he was assessed an additional ten (10) day suspension. C. C. Ingram was dismissed from service because of his actions with regard to the charged altercation.

The Organization contests these actions on the grounds Claimant was the victim of a vicious attack, which resulted in injury. It protests the use of Claimant's past record and asserts its use in establishing the correctness of the charge is irrelevant.

Carrier relies entirely on the testimony of two witnesses: an Electrician Helper and a Car Cleaner. The General Rule which Claimant is charged with violating reads, in part: "Engaging in altercations is prohibited." An altercation is defined as engaging in a heated and noisy quarrel. The Board has reviewed the record and finds the Carrier properly deduced an altercation took place. It is undisputed that following the incident, Claimant was found to have contusions of neck, left shoulder, upper back, and left knee, cervical dorsal strain, and abrasion of left knee. The Electrician Helper testified he heard an argument between Ingram and Claimant. The testimony clearly established Claimant was trying to escape from Ingram, who had a black object in his hands.

Despite engaging in this incident, Claimant became the victim of a violent assault by Ingram. The Board is satisfied the Carrier's position is supported by substantial evidence, and Claimant is guilty of participating in an altercation. We find the issuance of a ten (10) day suspension reasonable and proportionate to Claimant's role of the non-aggressor. In the issuance of this penalty, however, Carrier has overlooked an additional thirteen (13) days Claimant lost by reason of his being taken out of service before the hearing. To the extent this period does not conform to the discipline imposed, Claimant is to be paid for the thirteen (13) days lost prior to the hearing.

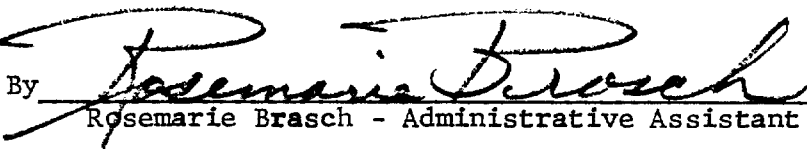
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Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 22nd day of July, 1982.