

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

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(
(Consolidated Rail Corporation

Dispute: Claim of Employes:

1. That the Consolidated Rail Corporation be ordered to remove from the record of Machinist D. Self the ten day suspension for allegedly violating Safety Rule 4229 J, in accordance with the provisions of Rule 7-A-1 (e) of the prevailing Agreement effective May 1, 1979.

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.

While changing brake shoes on Locomotive 2649 on April 13, 1981, the inside brake shoe fell on the Claimant Machinist's left foot resulting in a fractured toe and causing him to be off duty for approximately three (3) weeks. The Claimant received a ten (10) day deferred suspension for violation of Safety Rule 4229 J which provides as follows:

"When lifting material or other object alone or with others, if object gets out of control immediately move clear until it comes to rest".

It is well established in the field of labor relations that in discipline cases, the burden of proof rests upon the employer to show that an employe is guilty of the offense upon which the disciplinary penalty is based. In this connection the fact of an injury is not adequate to show a violation of Safety Rule 4229 J. The Claimant indicated that because of the position in which he was standing, he could "only move the lower half" of his body. He made an attempt to get out of the way of the falling brake shoe but as he acknowledged, "with a limited area, [he] couldn't move too far". There is nothing in the record to warrant the conclusion that the Claimant's injury resulted from a failure to exercise due care and diligence. No proof was offered by the Carrier to show that the Claimant was careless and did not exercise the requisite standard of care in changing the brake shoes on April 13, 1981. In light of the circumstances surrounding the Claimant's injury, it cannot be said that it is presumed that he was careless under Safety Rule 4229 J.

Furthermore, the Carrier's Safety Committee Report of the April 13, 1981 accident specifically made a point of stating that the Claimant's partner "did not follow Rule 4020 A". The report also said that if the Claimant "had shoes, as prescribed in Rule 4007 A, this could have reduced blow to foot (steel toe)". It should be noted that the Claimant was not charged with a violation of Rule 4007 A. The Safety Committee did not refer to any violation of Safety Rule 4229 J by the Claimant.

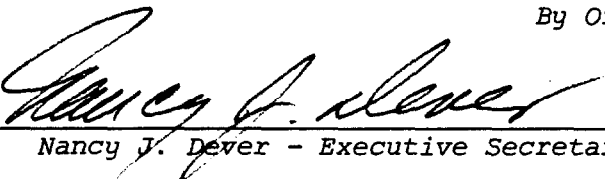
The record also disclosed that over the course of 10 1/2 years of service with the Carrier, the Claimant sustained personal injuries which resulted in being off duty on those occasions. The past record of the Claimant does not suggest to the Board that he has, in fact, committed a violation of Safety Rule 4229 J in the instant case. There is nothing in the record to warrant a finding that the Claimant's past injuries bears a functional relationship to the injury that he suffered on April 13, 1981. Accordingly, the Carrier failed to prove that the Claimant violated Safety Rule 4229 J on April 13, 1981.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of January 1985.