

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

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(
(Burlington Northern Inc.

Dispute: Claim of Employee:

1. The Carrier unjustly placed a censure on the record of C. R. Hemmer, Machinist, Lincoln, Nebraska, and also unjustly suspended this employe from service during the period extending from April 21 to May 11, 1976, inclusive.
2. The Carrier now remove the entry of censure placed on Mr. Hemmer's record and reimburse Mr. Hemmer for all time lost while suspended from service from April 21 to May 11, 1976, inclusive.

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.

Claimant was censured and suspended from April 21 to May 11, 1976 for allegedly failing to comply with instructions not to purchase soda pop from a soft-drink dispensing machine placed in the shop by another employee, without management approval. The machine had been in the shop for some 2 to 4 weeks before the day the incident giving rise to this case occurred.

At about 4:00 p.m. on the day in question, Claimant bought two cans of pop from the vending machine, and was observed leaving the machine with soda cans in his hands by the Assistant Master Mechanic, Mr. Jaeb, who had apparently just learned about the machine. Mr. Jaeb remarked to Claimant that the machine had been illegally placed in the shop. At that time, Mr. Jaeb issued no instructions or directions to Claimant or to other employees to discontinue buying soft drinks from the vending machine.

At 5:30 p.m. on the same day, while the vending machine was in process of being removed (its contents having been emptied), Claimant was observed by Mr. Jaeb approaching the machine. Mr. Jaeb testified he told Claimant, "I suggest you better not buy any pop and ... go to work where you belong." Claimant bought two cans of soda from the owner of the vending machine, deposited them in the locker room and then returned to his work station.

Claimant denied at the investigation that he heard Mr. Jaeb's remarks and that he would not have bought the pop if he had heard him. Another employee, standing near the two men, testified that he heard the instructions.

At about 5:45 p.m. the same day, Claimant was removed from service pending investigation, but no charges were proffered nor reason given him at that time for such action.

The Board is of the opinion that Claimant's action does not warrant the penalty imposed. No instructions or directions were issued by Mr. Jaeb to Claimant, or to any other employee, not to buy pop from the illegal vending machine. Mr. Jaeb had learned about the machine shortly before 4:00 p.m. that day. He saw Claimant and others patronizing the machine, buying or drinking soda pop. Yet he gave no explicit instructions or orders directing them not to use the vending machine. Even at the time of the incident at 5:30 p.m., which gave rise to this case, he allegedly advised Claimant, "I suggest you better not buy any pop....". (Underscoring added).

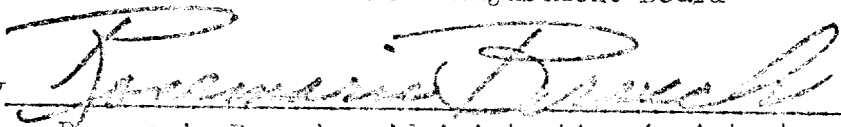
Rule 35(b) of the Agreement between the parties refers to employees "who may be held out of service in cases involving serious infraction of rules pending investigation...." (Underscoring added). In our view, buying a can of pop, especially in light of the inexplicit statements of Mr. Jaeb, does not justify the penalty meted out to Claimant, although we question Claimant's judgment in buying the pop after he had been notified earlier that the machine was illegal and that it was in the process of being removed from the premises. Nevertheless, Claimant's action does not, as we see it, constitute a serious infraction contemplated by Rule 35(b) as a basis for discipline. Accordingly, we will sustain the claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 4th day of January, 1979.