Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8130
Docket No. 8019
2-N&W-FO-'79

The Second Division consisted of the regular members and in addition Referee Robert E. Fitzgerald, Jr. when award was rendered.

Parties to Dispute: (System Federation No. 16, Railway Employes' Department, A. F. of L. - C. I. O. (Firemen & Oilers)
(Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That under the current agreement Laborer F. N. Wilkerson was unjustly assessed a fifteen (15) day deferred suspension on July 25, 1977. As a result of a second investigation, held on the same day, Mr. Wilkerson's fifteen (15) day deferred suspension became an actual suspension from the service of the railroad.

2. That Laborer F. N. Wilkerson was unjustly and unreasonably held out of service pending investigation.

3. That accordingly the Carrier be ordered to reimburse this employe and make him whole for all lost wages involved in this suspension including vacation rights, Railroad Retirement benefits, sickness benefits, and any other benefits he would have earned which were lost as a result of F. N. Wilkerson's 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 case arose because the carrier issued a deferred suspension of 15 days to the Claimant at a meeting held on July 25, 1977. The claim involves only the propriety of the carrier's issuance of the 15 days deferred suspension, and does not involve the later imposition of the 15 days suspension at a subsequent meeting on that date.

In this case, as is found in most discipline cases which come to our Board for appellate review, petitioner has advanced a number of arguments that amount to nothing more or less than a request that this Board substitute its judgment for that of the Carrier on the issues of guilt and discipline. All Divisions of this Board have consistently recognized the fact that Carriers owe to employes, and to the public, a heavy legal obligation to maintain discipline among those in their employ, and it would be both illegal and improper for this Board to attempt to impose any restriction upon a Carrier's complete freedom in disciplinary matters except to the extent of recognizing and applying restrictions created by an applicable labor agreement. Otherwise, we do not substitute our judgment for that of Carrier; we do not weigh evidence; we do not attempt to resolve conflicts in testimony; we do not pass upon the credibility of witnesses. One of the more lucid expressions rendered in this regard is found in Third Division Award No. 5032, wherein Judge J. S. Parker stated:

> "*** Our function in discipline cases is not to substitute our judgment for the company or decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question whether, without weighing it, there is some substantial evidence to sustain a finding of guilty. Once that question is decided in the affirmative the penalty imposed for the violation is a matter which rests in the sound discretion of the Company and we are not warranted in disturbing it unless we can say it clearly appears from the record that its action with respect thereto was so unjust, unreasonable or arbitrary as to constitute an abuse of that discretion. ***" (Underscore ours)

Further, it was stated in Second Division Award No. 6489 (Bergman), where we found:

> "Although the evidence has been discussed, it does not mean that we could substitute our judgment for that of the Carrier. The precedent for this policy is overwhelming in prior Awards. Neither do we sit to do equity. We are an appellate body, in effect, to review the record and consider the contentions of the parties. We look for evidence of prejudgment, abuse of discretion, arbitrary or capricious action which could lead to a reversal on those grounds. We do not resolve conflicts in testimony unless the judgment made may fall into the categories listed above. As indicated, we find substantial evidence to support the conclusion reached."

See also Second Division Award Nos.:

7802 (Roukis)	7122 (Eischen)
7473 (Weiss)	7103 (O'Brien)
7437 (McBrearty)	6866 (Zumas)
7363 (Twomey)	6525 (Franden)
7278 (Marx)	6408 (Lieberman)

The reference to "substantial evidence" in Award No. 5032 is significant. In railroad discipline cases, the Carrier is not bound to prove justification beyond a reasonable doubt, as in a criminal case, or even by a preponderance of the evidence as does the party having the burden of proof in a civil case. The rule is that there must be substantial evidence in support of the Carrier's actions.

Substantial evidence was set forth by the United States Supreme Court as follows:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Consol. Ed. Co. v. Labor Board 305 U.S. 197, 229)"

In this case we are talking about a 15-day deferred suspension, which was assessed following a hearing at which more than substantial evidence was adduced to prove that claimant was guilty of conduct to justify the deferred suspension. Therefore, based upon the foregoing, we will deny the claim, concerning the deferred suspension.

A W A R D

Claim denied.

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 27th day of September, 1979.