

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 8695
Docket No. 8600
2-CR-F&O-'81

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: { International Brotherhood of Firemen & Oilers
Consolidated Rail Corporation

Dispute: Claim of Employees:

J. W. Roebuck, Laborer, Consolidated Rail Corporation, Altoona, Pennsylvania was unjustly suspended for nineteen (19) days for the following charges:

1. Fighting with J. W. Burk, fellow employe, during your tour of duty at approximately 2:25 P.M., March 15, 1978, resulting in personal injury to you and Mr. Burk.
2. Conduct unbecoming an employe at approximately 2:25 P.M., March 15, 1978.
3. Violation of Safety Rule 4012 governing Maintenance of Equipment employes "Personal conduct must be free from scuffling, practical jokes or horse play while on duty or on Company property" at approximately 2:25 P.M., March 15, 1978.

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, an assigned laborer, was charged with three offenses which arose out of an altercation between the claimant and a fellow employe on March 15, 1978. Specifically, claimant was charged with fighting, conduct unbecoming an employe and violating a safety rule which prohibits horseplay. After a hearing held on April 3, 1978, the carrier suspended the claimant for nineteen days.

The organization contends that the carrier failed to proffer substantial evidence that the claimant committed any infraction. On the contrary, according to the employes, the evidence at the hearing shows the claimant was merely trying to defend himself when a fellow employe attacked him. The carrier argues that it satisfied its burden of proof because the claimant provoked the fight. Even if claimant did not induce the altercation, the carrier maintains that the claimant is culpable for merely participating in a fight.

After carefully reviewing the record in this case, we conclude that the carrier did not offer substantial evidence that the claimant committed any of the charged offenses. On the contrary, all of the relevant evidence discloses that claimant was trying to avoid a fight. On March 15, 1978, claimant was working with a fellow employe. A verbal dispute developed between the two workers. The claimant told his fellow employe that he was not working hard enough. According to the only eyewitness, claimant fell backwards as the result of blows struck by the fellow employe. Instead of retaliating, the claimant immediately reported the incident to his foreman. Similarly, there is no probative evidence that claimant provoked a fight. Claimant may have mentioned to his fellow employe that the employe was not performing his share of the work. This comment is hardly a justification for the fellow employe to start a fight with the claimant.

To substantiate the charges, the carrier relies solely on the unreliable hearsay statements of the other employe (who told the foreman that the claimant was the aggressor). Yet, that employe did not testify at the hearing. Under the circumstances, his testimony is so self-serving that it does not even constitute a scintilla of evidence to support the charges.

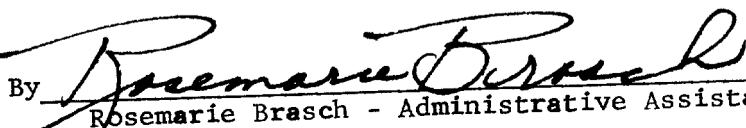
Lastly, as part of the joint submission, the carrier took the position that the claimant must prove his innocence. Without reciting a mass of precedents from this Board, the carrier has the burden of proof in discipline cases at the investigation. If it fails to sustain its burden, the claimant's innocence is presumed. Because the record lacks substantial evidence supporting the charges, the claimant is entitled to back wages actually lost during the period he served the nineteen day suspension at the rate of pay in effect at that time.

A W A R D

Claim sustained to the extent consistent with our findings.

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 29th day of April, 1981.