

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States
and Canada
{ Burlington Northern Railroad Company

Dispute: Claim of Employees:

1. That the Burlington Northern, Inc. violated Rule 35(g) of our current Agreement when they placed a mark of censure on Apprentice Kenneth W. Stich's record.
2. That accordingly, the Burlington Northern, Inc. be ordered to remove said mark of censure from Kenneth W. Stich's record.

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 employees 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, Mr. K. W. Stich, was a Carman Apprentice, working the 7:30 A.M. to 4 P.M. shift for the Burlington Northern Railroad at the St. Cloud Steel Shop, St. Cloud, Minnesota when the alleged incident took place.

On November 23, 1979 Claimant received Form SC-61 stating that he had been observed running on November 21, 1979 at 4:01 P.M. from the "Steel Shop on passage way which crosses west end of Paint shop" which was in violation of Unilateral Carrier Safety Rule No. 36. Subsequent to this Claimant received on December 10, 1979 notification to attend a formal investigation into this matter in Shop Superintendent's Office at 9:30 A.M. on December 18, 1979. As a result of this investigation Claimant received notice on January 9, 1979 that the following statement was being placed on his permanent record and was becoming part of his personnel file: "Censured for violation of Rule 36, Form 15001, by running on Company property".

General Safety Rule No. 36 states the following:

"Running up and down stairs, running or sliding in rooms or passageways is prohibited. Use extreme caution when rounding corners to prevent collision with vehicle or persons."

The sole issue to be resolved in the instant case is whether Carrier's decision is based on substantial evidence, which in the words of the U.S. Supreme Court means "more than a mere scintilla. (Substantial evidence) 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).

A close study of the transcript of the hearing held on December 18, 1979, as well as supporting exhibits, can only lead to the conclusion that substantial evidence is lacking in the instant case. While it is alluded to again and again in hearing that the discipline was levied against Claimant for an alleged incident which occurred on November 21, 1979 (which is supported by Form SC-61 noted earlier), chief and only witness of the Carrier to this incident, Mr. I. E. Orthengren, clearly states that he witnessed an incident similar to this alleged one on November 23, 1979. It is to be noted here that Claimant is not being accused of an alleged rule infraction on that date, in the instant case, but only on November 21, 1979. Later in the hearing when Hearing Officer asks Mr. Orthengren if he was "convinced that Mr. Stich knew he was violating Rule 36 at the time of this incident on November 21st" Mr. Orthengren again responds in the affirmative which leads the Board to conclude that there was some confusion in the mind of the witness of when he had actually witnessed the alleged rule violation. This confusion of dates in the testimony is noted by Organization Representative, Mr. J. P. Zellner, at the hearing, but no attempt is made by the Hearing Officer, which is the only way this confusion could have been clarified, to explicitly interrogate Mr. Orthengren further on when, in fact, he had seen Claimant engage in the alleged rule infraction. Statements by Hearing Officers are no substitute for evidence by witnesses. Nor is an unresolved dilemma substitute for substantial evidence.

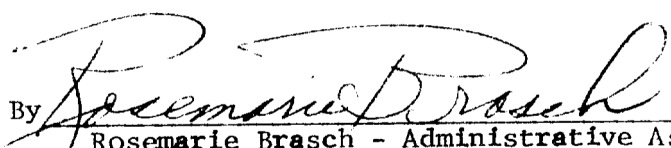
A W A R D

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 3rd day of March, 1982.