

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12711
Docket No. 12544
94-2-92-2-67

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Sheet Metal Workers' International
(Association
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

- "1. That the Carrier under the current working agreement between the Sheet Metal Workers and the Carrier violated Rule #6 of the agreement when Sheet Metal Worker, J. M. Scholl, II, was not afforded a fair and impartial hearing.
2. That accordingly, the Carrier be ordered to make Mr. J. M. Scholl, II, whole for any and all money and benefits which he may have lost as a result of said violation, and to clear his record of the charge."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

By notice dated April 18, 1991, Claimant was notified to attend an Investigation to determine his responsibility, if any, for engaging in conduct unbecoming an employee. Claimant was to present all facts relating to allegations that he engaged in horseplay resulting in personal injury at the Enola Locomotive Terminal on April 16, 1991. Following the Investigation the Claimant was notified on May 1, 1991, that he had been found guilty as charged. Claimant was assessed a fifteen days actual suspension.

This Board has reviewed all issues relating to procedure and merits. We find no procedural violations substantiated in this record. Turning to the merits, the Board has carefully considered the testimony to determine if there is sufficient probative evidence to conclude that the Carrier has substantiated the charges.

It is clear from the testimony of the Assistant Shop Manager that the injured employee, Mr. Minton, named the Claimant as one of two employees who had sprayed him with electrical cleaner. Mr. Minton subsequently testified that the Claimant sprayed him. That stands as the sole record of evidence to prove the charges. This Board finds it insufficient, particularly because it lacks substantiation from the full testimony of other witnesses and most importantly because Mr. Minton admitted that he didn't see anyone spray him. No employee in the record ever identified the Claimant as the individual observed engaging in the behavior. The Claimant denied the action.

Without direct evidence, the Board has fully reviewed the incident for indirect evidence to reach the conclusion that Claimant engaged in horseplay or injured Mr. Minton. If anything, the record supports that Mr. Minton sprayed the Claimant and without retaliation. The Board's comparative review of the testimony of three witnesses indicates that there is insufficient probative evidence to conclude that Claimant is guilty as charged.

While the record is clear that something happened to Mr. Minton that morning, it remains unclear as to the facts. The testimony lacks convincing or persuasive evidence to reach the conclusion that the Claimant was engaged in horseplay or involved in practical jokes as charged. Mr. Moore recanted earlier statements and his testimony at the Investigation was thereafter consistent with other witnesses. There is even testimony suggesting that Mr. Minton sprayed himself. There is no testimony from others at the site of the incident that allows the Board to conclude that the Claimant sprayed Mr. Minton or was in violation of Carrier's Safety Rules.

Based on this record where the testimony of witnesses fails to substantiate the charges, the Carrier's conclusions must be rejected. Claim is to be sustained and the Claimant's record cleared. Claimant is to be compensated for time lost.

AWARD

Claim sustained.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 22nd day of June 1994.