

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13563

Docket No. 13464

00-2-99-2-63

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
((System Council No. 16)
(Burlington Northern Santa Fe Railway Company
((former Burlington Northern Railroad)

STATEMENT OF CLAIM:

- “1. That in violation of the current Agreement, Rule 35 in particular, Crane Operator R. L. Boone and Electrician M. E. Burgus were unjustly suspended for a period of thirty (30) days and placed on probation for a period of three (3) years by the Burlington/Santa Fe Railroad Company following an investigation held on October 31, 1997;
2. That the investigation held on October 31, 1997, was not a fair and impartial investigation under the terms required by the Rules of the current Agreement;
3. That the issuance of thirty (30) days’ suspension and the three (3) years’ probationary period was unjust, excessive and unwarranted; and
4. That, accordingly, the Burlington Northern/Santa Fe Railroad Company should be directed to make Crane Operator R. L. Boone and Electrician M. E. Burgus whole for all lost wages, rights and benefits which were adversely affected by their suspension and that all record of this matter be set aside.”

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 were given due notice of hearing thereon.

At approximately 10:30 A.M. on October 22, 1997, while on duty and on Company property, the Claimants are alleged to have become involved in a physical altercation. Following an Investigation held on October 31, 1997, both men received 30-day, disciplinary suspensions and were placed on probation for three years.

In the claim, the Organization argues that the Carrier's Investigation was biased, chiefly because neither of the two witnesses it called had any first-hand knowledge of the alleged scuffle. Specifically, Locomotives Foreman R. K. Droz testified that he had been informed of the altercation by employee Mike Patrick, who did not testify, and employee Dave Taylor, who did testify, said he saw no physical contact between the Claimants. Additionally, the Organization was not given or allowed to read the notes taken by Foreman Colesby of his interviews with Boone, Burgus and Taylor as requested.

The record indicates that the seniority of the Claimants Boone and Burgus dates to September 1989 and August 1978 respectively. According to Foreman Droz, testifying from notes made contemporaneously, Boone came into his office around 10:30 A.M. and advised him that he had "had it" with Burgus and "was going to punch him out." He explained that Burgus had just "made a smart remark" to him and was "always bothering him and he was fed up." Droz advised Boone to go cool off for a few minutes until he had finished a scheduled meeting with another employee and had more time to talk. Shortly thereafter, he "heard a noise that sounded like a thump." Unable to determine its source, he went downstairs, found Boone standing at the base of the overhead crane ladder and asked him what had happened. Boone replied that "he was on top and Burgus was on top," which Droz took to suggest that a fight had occurred. Droz then found Burgus in his work area, the leg of his bib overalls torn and his hard

hat missing. Burgus informed Droz that Boone had ripped his new bibs, but gave no further specifics.

General Foreman F. L. Colseby testified that he conducted interviews with both the Claimants and Dave Taylor early in the afternoon on the date of the incident. Burgus informed him that he was talking to Taylor in the bathroom when Boone came in "and started shoving me." He explained that he had earlier unhooked a part from a crane Boone was operating and Boone may have misunderstood a gesture he made at the time. In the course of that discussion Boone admitted that "we shoved each other." In response to his question to Taylor, "Did they make physical contact with each other?" Taylor responded, "Yes," although he saw no fisticuffs.

In speaking with Colesby, the Claimants both admitted having a verbal exchange but denied any physical contact between them, Boone explaining that his earlier reference to Burgus being "on top" referred to being "on top of the argument." Burgess denied that he had accused Boone of ripping his overalls, and explained that he tore them on a jagged edge of a door jam in the bathroom.

The Board finds sufficient record evidence to sustain the Carrier's imposition of the discipline at issue here. First, the Carrier's Rules prohibiting "altercations . . . practical jokes or wrest[ling] with each while on duty or on railroad property" are clear and have been repeatedly upheld by numerous Second Division Awards when the facts demonstrated violations. Second, we see no prejudicial error in the Carrier's handling of the Claimants' Investigation and Hearing. There is no record evidence to suggest that employee Patrick knew anything more about the conduct in dispute than that it happened in the bathroom. Accordingly, Patrick was in no sense a critical witness; his absence cannot be said to have compromised the Claimants' defense.

With regard to the merits, the transcript reveals that in his initial complaint to Foreman Droz, Claimant Boone himself threatened to punch Burgus. Droz then heard a loud thump - enough noise to originally think the crane may have hit something. Burgus then grumbled that Boone had ripped his bib overalls - a complaint that morphed into the "bathroom door jam" explanation only after Notice of the Investigation had been served. Based upon those circumstances, and upon the unguarded early admission of Claimant Boone which can be reasonably understood to concede that the parties had been on the ground wrestling, the Board concludes that the Carrier's credibility determinations were appropriate. As to the severity of the discipline imposed, a three-year period of probation is a durable penalty. That time

period has, however, for all practical purposes, now lapsed and the issue is moot. The 30-day, disciplinary suspensions were not excessive under the circumstances and are upheld.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 27th day of October, 2000.