

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13811

Docket No. 13678

04-2-02-2-40

The Second Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(The Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

- "1. That in violation of the governing Agreement, Rule 35 in particular, the Burlington Northern and Santa Fe Railroad Company, as a result of an unfair and unwarranted investigation held on December 7, 2000 at Chicago, Illinois, unjustly and arbitrarily suspend Electrician Mark K. Billingslea for a period of thirty (30) days.
2. That, accordingly, the Burlington Northern Santa Fe Railway Company be ordered to make Electrician Mark K. Billingslea whole for all lost wages, rights, benefits and privileges which were adversely affected as a result of the investigation and unjust assessment of discipline, compensate him for all medical bills in connection with his on-the-job injury, and further that all record of this matter be expunged from his personal record, all in accordance with the terms of Rule 35, Paragraph G of the controlling Agreement."

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.

The Claimant was first employed by the Carrier on September 21, 1998.

On March 30, 2000, the Claimant was carrying a tote holding fluorescent light bulbs when he allegedly twisted his ankle, fell and dropped the light bulbs to the ground. They broke and the Claimant reported that he was injured when he got some of the powder from inside the bulbs into his eye. He reported the incident when he returned to the office.

The Claimant's supervisor conducted a preliminary Investigation and determined that an Investigation should be held to develop all the facts.

By letter dated April 5, 2000, the Claimant was directed to attend an Investigation on April 12, 2000. The Claimant was unable to attend the Hearing, therefore, it was convened on April 26, 2000, and continued to December 7, 2000.

After reviewing the evidence presented at Hearing, the Carrier determined the Claimant guilty of being negligent of his duties, careless of his safety and failing to be alert and attentive. He was assessed a record suspension of 30 days for violating Rules S-28.6 and S-28.1.2.

On behalf of the Claimant, the Organization appealed the discipline.

The Carrier argues that the Organization failed to meet their burden of proof in proving that the Carrier violated any of the cited Rules. On the other hand, they contend that the charges against the Claimant were proven and the discipline was warranted.

They maintain that an examination of the area immediately after the incident revealed that there was a scuff on the rail which was obviously created by footwear

that had slid from the rail. They assert the scuff was fresh when first observed by the supervisors. They say the evidence is too coincidental to be ignored. They point out that there had been no trains over the area in several days. Therefore, if the scuff mark was not fresh it would have rusted over. They contend the Claimant was the only employee who reported falling in the area. Furthermore, they argue, the Claimant did not report an ankle injury or any other injury that would be associated with a fall. They submit the Claimant stepped on the rail, slipped off and dropped the fluorescent bulbs.

The Carrier alerts the Board to the fact that there is a Rule prohibiting an employee from stepping on rails. They say the Rule clearly requires that an employee step over rails. They say even if the Claimant stumbled and fell he was careless of his own safety. They say his actions caused the fluorescent tubes to break and that is how he got the white powder in this eye.

The Organization argues that the Carrier's assessment of discipline was the result of an unfair and unwarranted Investigation and was therefore unjust and capricious.

They assert that the Claimant did not receive a fair and impartial Hearing. Moreover, they insist the facts presented do not support the discipline assessed. They contend it is the Carrier as the moving party who has the burden of proof and they have not met that burden. They assert the Carrier's assertions are supported only by supposition and theory.

The Organization points out that since the Carrier claimed there was no clear indication of what caused the accident, how could they determine that the Claimant violated any Rules. They say the Carrier attempted to build a case against the Claimant by saying that he stepped on a rail and slipped. They say this evidence is inconclusive and insufficient to support the charges.

The Organization also cites an attempt by the Carrier to switch pictures that were entered as exhibits. They admit that this action may not be fatal to the outcome of the Investigation, but claim it does give the appearance of an attempt by the Carrier to taint the Investigation.

Finally, they contend an examination of the December 14, 2002, letter assessing discipline, does not state that the Claimant was found guilty of the charges only that he was being disciplined.

The Board would concede that the disciplinary record of the Claimant leaves a great deal to be desired considering his short term employment. However, we have reviewed the evidence presented by the Carrier and find that it is lacking. At no time did the Carrier attempt to establish where the Claimant was taking the fluorescent lights. If that were known it may have been possible to establish that the Claimant had a reason to step on the rail while attempting to cross over the tracks. However, the evidence presented does not meet the Carrier's burden of proving by substantial evidence that the Claimant tripped by stepping on the rail in question. Since there were no eyewitnesses to support this position and the photographs were deficient the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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

Dated at Chicago, Illinois, this 16th day of September 2004.