

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25430
Docket Number CL-24020

Herbert Fishgold, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employes**
PARTIES TO DISPUTE: (
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9391) that:

1. Carrier violated the Agreement between the Parties when, on November 1, 1979, they arbitrarily and capriciously assessed Clerk J. A. Misita fifteen (15) days deferred suspension.

2. Carrier's action was unjust, unreasonable and an abuse of Carrier's discretion. This discipline was assessed in spite of Carrier's failure to prove its' charges.

3. Claimant's record shall be cleared of this charge with all rights and privileges unimpaired.

OPINION OF BOARD: By letter dated October, 1979, Clerk J. A. Misita was charged as follows:

"You are hereby charged with the violation of Norfolk and Western Safety Rule Number 1004 in that you were observed throwing a paper towel across the room at another employee, striking said employee in the face, at approximately 6:55 a.m., October 5, 1979, while you were performing service as #365 General Clerk, on duty 11:45 p.m., October 4, 1979."

Following an investigative hearing, Claimant was given a 15 day deferred suspension. Claimant subsequently resigned on March 4, 1981, without ever having served the suspension.

Safety Rule 1004 reads as follows:

"Scuffling, horseplay, practical jokes, and all conduct of a similar nature, while on duty **or** OR company property, is prohibited."

The facts involving the alleged incident are in dispute. Trainmaster H. E. McKelvey, Supervisor at Bellevue Terminal, stated that on the morning of October 5, 1979, he was standing in the doorway of the office where Mr. Misita was working, and saw **"Mr. Misita throw a paper towel, rolled up in the form of a ball, across the room, striking Mr. Boles on the side of the face"**. McKelvey immediately confronted Misita, making reference to Safety Rule 1004, and asked if Misita understood that this conduct could not occur while on duty, to which Misita replied, yes, he understood.

At the investigation, Misita testified that he did not throw a paper towel or ball of paper towel at another employee, Clerk Boles. Moreover, Boles, the employee who was allegedly struck by the towel, verified Misita's denial of throwing a paper towel at him:

Q. "Were you on the date in question struck in the face with a paper towel at approximately 6:55 on the date in question?"

A. "No, sir, I was not."

Q. "Mr. Boles, were you at any time on your tour of duty on October 5, 1979, struck by any object in the face to possibly include the cheek area, by any object?"

A. •••••

Both Misita and Boles acknowledged that McKelvey did approach them, and asked Misita if he was aware of Rule 1004, and asked Boles whether or not he (Boles) was "O.K.".

The Hearing Officer weighed the evidence contained in the Transcript of the testimony, observed the demeanor of the charged employee and the two witnesses, and chose to believe the testimony of McKelvey. However, the Carrier failed to call any of the other witnesses present during the alleged incident, and failed to produce the rolled-up paper towel.

(In all of such contradictory testimony, including any denial of wrongdoing by the alleged victim, the Board must conclude that, based on the instant record, they cannot find substantial evidence to sustain the deferred suspension.)

FINDINGS: The Third Division of the Adjustment Board. upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

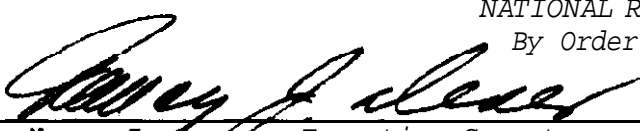
A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division,

Attest:


Nancy J. Leves - Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1985.