

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37422
Docket No. MW-37527
05-3-02-3-630**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [withheld from service on August 16, 2001 pending investigation and subsequent advisement on October 5, 2001 of a ten (10) day actual suspension] imposed upon Mr. S. Thomsen for his alleged violation of Rule 1.9 – Respect of Railroad Company of the GCOR Rules and General Rule (L), 31 and 29 of the Safety Handbook in connection with allegations of bringing a minor to work and allowing him on Company property on August 16, 2001 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File D1662-06.01/8-00421).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Thomsen shall receive the remedy prescribed by the parties in Rule 20(g).”**

FINDINGS:

The Third 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.

On Thursday, August 16, 2001, the Claimant was assigned to assist in the loading of machines and to flag the Townline Road crossing at Mile Post 22.5 just west of Loretto while Speedswing Machine Operators Tendrup and M. Smith pulled rail to and from the siding. The Claimant brought a 15-year old, M. Beck, to work in order to observe railroad work for a school project. The Claimant introduced Beck to Supervisor Nilson and explained the reason for Beck's presence. Through a series of phone calls, the Carrier's security forces were called to locate Beck. At approximately 3:00 P.M., the Claimant was instructed to take Beck home.

By letter dated August 21, 2001, the Claimant was directed to attend an Investigation to be held on August 29, 2001, "... for the purpose of developing all facts and circumstances and placing responsibility, if any, in connection with your involvement in bringing a minor to work and allowing him on company property on Thursday, August 16, 2001 in violation of Rule 1.9 - Respect of Railroad Company of the GCOR Rules and also in violation of General Rule (L), 31 and 29 of the Safety Handbook and other company policies and rules. You will remain out-of-service pending the results of the hearing."

In a letter dated October 5, the Carrier notified the Claimant that as a result of the August 29, 2001 Investigation, he was suspended for a period of ten days for violating Rule 1.9 and General Rule (L), 31 and 29 of the Safety Handbook.

By letter dated November 16, 2001, the Organization filed an appeal alleging that the discipline was unwarranted. It asserts that the burden of proof in a discipline matter such as this is on the Carrier and that burden has not been met. The Organization contends that the Carrier imposed harsh and excessive discipline against the Claimant. In addition, the Organization claims that the decision was not

rendered in a timely manner. It further claims that even if the Claimant was at fault, the discipline imposed was too severe.

Conversely, the Carrier takes the position that the Claimant was afforded a fair and impartial Investigation and was guilty as charged. According to the Carrier, the record provides substantial evidence to support the Claimant's culpability. The Carrier asserts that it met its burden of proof and that the discipline was appropriate based on the nature of the offense.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to pass upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of its discretion. See Second Division Award 7325, Third Division Award 16166.

Third Division Award 32332 held that the "... Board has no authority to resolve credibility questions, and must adopt those made by the Hearing Officer if there is a reasonable basis to support his findings."

The Board finds substantial evidence to uphold the Carrier's decision. The Carrier proved that the Claimant improperly brought a minor onto a worksite and thereby placed that minor in danger. Further, the Hearing Officer determined that Supervisor Balmer's testimony that the minor was on Company property and, therefore, in danger was more credible than the Claimant's statements. As noted above, we may not overrule that determination if such determination is founded upon a reasonable basis. In addition, because the discipline imposed was reasonable, the Board will not change that result. Further, the Organization asserted a procedural claim that is an affirmative defense. The party asserting an affirmative defense bears the burden of proving such affirmative defense. In the instant case, after a review of the evidence, the Board cannot find that the Organization has been successful in meeting its burden.

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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 Third Division**

Dated at Chicago, Illinois, this 22nd day of March, 2005.