

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32565
Docket No. MW-33456
98-3-96-3-9/9

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of employee H. Hernandez, Jr. for alleged violation of Rules 1.6 and 1.7 of the General Code of Operating Rules on June 25, 1995 was unwarranted, on the basis of unproven charges and in violation of the Agreement (System File B-M-403-F/MWB 95 11-17AA BNR).
- (2) The Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

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.

The Claimant was advised on June 26, 1995 to attend an Investigation to determine facts and place responsibility, if any, in connection with his alleged quarrelsome or vicious conduct on June 25, 1995 at approximately 9:40 A.M. while on duty at the Forsyth, Montana, section house.

After an Investigation was held the Claimant was advised that he had been found guilty as charged and he was dismissed from service. This discipline was appealed by the Organization in the proper manner under Section 3 of the Railway Labor Act and the operant Agreement, up to and including the highest Carrier officer designated to hear such. Absent settlement of this claim on property it was docketed before the Third Division of the Railroad Adjustment Board for final adjudication.

The Rules at bar state the following, in pertinent part.

"Rule 1.6

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Immoral
5. Quarrelsome
6. Discourteous"

"Rule 1.7

Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on railroad property."

The Claimant to this case is H. Hernandez, Jr. He held position as a regularly assigned Section Laborer with the Forsyth, Montana, section gang when the alleged incident happened which led to his dismissal. The section gang normally worked Monday through Friday, with Saturday and Sunday as rest days. The Claimant's Supervisor, who testified at his Investigation, was D. Bartholomew.

June 25, 1995 was a Sunday. The gang was assigned overtime work on this day. It was assigned to lay out new rail between Mile Posts 100 and 130 near Forsyth, Montana. All members of the gang reported to work at the Forsyth section house. The alleged incident took place while the gang was waiting for clearance. The alleged incident took place at about 9:40 A.M.

In the lunchroom of the section house Foreman D. Bartholomew, at around 9:40 A.M., used a small, "common pocket knife" to open an envelope which contained some Carrier documents which he had received. After Bartholomew opened the envelope he placed the knife on the lunch table. He then got up and turned and walked away reading the documents from the envelope he had just opened. There is no dispute that the Claimant picked up the knife and started to clean his fingernails with it. When the Foreman noticed what the Claimant was using the knife for he retrieved it, stating to the Claimant that he did not want his knife to be used for such purposes since he used it on occasions to cut fruit and so on. The Claimant returned the knife to the Foreman.

The instant case centers around whether the Claimant did anything else with the pocket knife in question except attempt to clean his finger nails with it at approximately 9:40 A.M. on the morning of June 25, 1995. Because the following morning the Claimant was charged with threatening another employee while he had the knife in his possession at the time and place described in the immediate foregoing.

According to testimony by Foreman Bartholomew at the Investigation, he was not aware that any incident allegedly occurred until the following morning. On June 26, 1995 "... three officials arrived. ..." and requested that Mr. Hernandez be present. The Foreman and Mr. Hernandez were then given letters requesting them to be witnesses to an incident involving "... a knife and two of the employees" working on the Forsyth gang. According to Bartholomew he was not aware of any alleged incident prior to the morning of June 26, 1995. According to this witness, he was present when the alleged incident was supposed to have happened but he was "... aware of nothing" and "... nothing was brought to his attention either during or after the fact. ..." He "... had no idea anything was amiss until. ..." the morning of June 26, 1995.

According to the main witness against the Claimant, fellow worker D. J. Freed, Hernandez picked up the knife on that morning on June 25, 1995 and made a gesture with it that Freed apparently considered to be intimidating. According to this witness, there had also been other times in the past when the Claimant had tried to intimidate

him. For example, the Claimant had stared at Freed on a number of times which had made Freed uncomfortable. At other times the Claimant had not acknowledged greetings by Freed. The Claimant did not talk with Freed while on the job. According to Freed he told the Foreman about the June 25, 1995 knife incident within several minutes of its happening.

Testimony by the Claimant is that he made no gesture to Freed with the knife and just immediately gave it back to the Foreman after the latter asked him to do so. That was the sum total of what happened on the morning of June 25, 1995. If the Claimant had looked like he stared at Freed in the past the Claimant states that he neither meant to do so nor had any reason to have done so. At one time he may have been staring in the direction of Freed but was preoccupied with some issue involving his daughter and was not thinking of Freed. The Claimant states that he had never had a conversation with Freed. He just had nothing to say to him. The Claimant did remember one time when Freed offered him water and he had not answered because he had just been "... busy working. . . ."

The sum total of the evidence in the instant case against the Claimant centers on the testimony given at the Investigation by his accuser, Laborer Freed. According to Freed, the Claimant did not say anything to him while the latter was holding the knife at about 9:40 A.M. on June 25, 1995. The Claimant just looked at him in a way Freed considered intimidating, but the Claimant had not pointed the knife at him. But the Claimant did make a sweeping motion with the small knife across his chest, according to Freed. There were no other witness to this action even by those in close proximity. The Claimant denies he did this. The Foreman said he saw nothing. A Truck Driver present when the alleged incident took place testified also at the Investigation that he saw nothing. The main witness states that he told the Foreman about the incident several minutes later. The Foreman cannot corroborate this.

A review of the testimony by the main witness shows inconsistency about his own perceptions of the seriousness of what he states allegedly happened on the morning of June 25, 1995. The main witness, Mr. Freed, states: "... I do not know if he was just joking around, (or) kidding with me. . . ." Thus even if the incident had happened - and there is no corroborating evidence whatsoever that it did - it may have been a "... kidding around. . . ." type incident which Freed may have later decided was a threat.

The Board notes that the whole incident involved in this case occurred under considerable time and space constraints. The room involved was about 12 by 20 feet. The Claimant was not but some 8 feet away from the Foreman throughout the time the incident was supposed to have taken place. The Foreman heard nothing, saw nothing, and no one said anything to the Foreman. The Foreman, who is the Carrier's witness, cannot even corroborate that the main witness told him, within a few minutes, that the alleged incident had happened.

The main witness intimates that the alleged incident was but one of a series of incidents which had happened between he and the Claimant. According to this witness, the Claimant had not responded, in the past, to salutations and that he did not talk with the witness while on the job. Further, on one instance the Claimant apparently disregarded an offer for water. The witness also states that the Claimant had stared at him in the past. The Board is simply in no position to conclude that any of these things, if they had happened, which are occurrences which probably happen on daily basis in a multitude of work environments, amount to threats by one employee against another. Further, the Claimant's versions of all these events are quite different than the perceptions of them by the main witness. The Claimant states that he had never really ever had a conversation with the Claimant, of any kind, and that he had declined taking water on one occasion but only because he was busy and so on. None of these occurrences individually, nor all of them collectively, are basis for an employer to discharge an employee because another employee complains of such behavior. The Claimant testifies that the so-called staring incidents were, in his mind, just misunderstandings and the Board must conclude, given all facts of this case, that such is not an unreasonable conclusion.

This Board must frame conclusions on basis of substantial evidence. Such has been defined, in this industry, as such "... relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . ." (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229). The burden of such evidence must be borne, in the instant case, by the Carrier (Third Division Awards 22180, 22292, 22760). A review of the full record warrants conclusion that there is not a scintilla of evidence from any other source to support the rendition of facts by the chief witness to this case. Not only is there no corroborating evidence to this witness' version of what happened, but in important areas, the Carrier's own witness contradicts his version of the facts. Of particular concern here, for example, is that the chief witness claims he immediately told the Foreman of the incident after it happened on June 25, 1995. But the latter categorically

denies this. The chief witness also testified that he saw the Claimant make - what may or may not have been, in his mind, at the time - a threat with a knife. Everyone else who was in close proximity to the Claimant and the chief witness on June 25, 1995 are simply not able to confirm this. The Board has no other alternative but to conclude that the credibility of the one and only witness against the Claimant is suspect.

There is insufficient substantial evidence in this case to support conclusion by this Board that the Claimant to this case merits discharge. The Claimant shall be put back to work with back pay for all time lost and with seniority unimpaired. Any and all reference to his discharge shall be removed from his file.

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 Third Division

Dated at Chicago, Illinois, this 29th day of April 1998.