

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 11784  
Docket No. 11619  
89-2-88-2-124

The Second Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers  
(Burlington Northern Railroad

STATEMENT OF CLAIM:

1. That in violation of the current Agreement, Electrician Scott Rule was unjustly suspended from the service of the Burlington Northern Railroad Company for a period of thirty (30) days, November 11 through December 10, 1987, following an unfair investigation held October 21, 1987.

2. That accordingly, the Burlington Northern Railroad Company be directed to compensate Electrician Rule for all wages lost by him as the result of the subject suspension such as, but not limited to, vacation and insurance be reinstated in whole; and that all record of the investigation and mark of censures be removed from Electrician Rule's personal record.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

An investigation was held on October 21, 1987 to determine whether Claimant was asleep while on duty on October 2, 1987. According to the Shop Superintendent, Claimant's pickup truck was backed between two (2) tracks at about 5:45 A.M. and Claimant was positioned on the passenger side of the vehicle with his head against the door and his eyes closed. Based upon the investigative record, Claimant was found guilty of violating Rule 569 of the Burlington Northern Safety Rules and General Rules and suspended from service for thirty (30) days, effective November 11, 1987. Said Rule reads:

"An employee must not sleep while on duty. Lying down or in a slouched position with eyes closed or with eyes covered or concealed will be considered as sleeping."

In support of his appeal to the Division, Claimant raised procedural and substantive objections. First, he asserted that he was denied appropriate due process rights, since the same Carrier officer preferred the charges, conducted the investigation, and assessed the discipline. He argued that such multiplicity of roles prejudiced his defense and denied him contracted for due process. Secondly, he disclaimed sleeping on duty, though he acknowledged that his eyes were momentarily closed. On this point, Machinist G. A. Callahan who was sitting in the truck with Claimant testified at the Investigation that Claimant earlier that morning complained of eye soreness. Machinist Callahan also testified that, in his opinion, Claimant was not sleeping nor sitting in a slouched position. Relief Supervisor William Smith, who was working in the tower at that time, testified that at approximately 5:45 A.M., he conversed with Claimant via radio communication about a train that was coming into the yard. It was Mr. Smith's opinion that Claimant was attentive to his duties and not sleeping.

Contrawise, Carrier maintained that Claimant was not denied due process, since under the decisional authority of the Second Division, it was not impermissible nor a denial of due process, for the same Carrier official to assume several investigative roles. It referenced Second Division Award No. 8272 as controlling, wherein the Board held in pertinent part:

"The multiplicity of the hearing officer's role which included preferring charges, conducting the investigation and administering discipline was also not in violation of Claimant's Agreement rights."

As to the substantive merits of this dispute, Carrier contended that Claimant was sleeping on duty as evidenced by the clear observation of the Shop Superintendent. This official testified that at 5:43 A.M., he observed Claimant sleeping in the vehicle. He stated at the Investigation that he specifically asked Claimant if his (Claimant's) eyes were closed and Claimant admitted that his eyes were closed. He further testified that he asked Claimant, if his (Claimant's) head was back in a slouched position and Claimant answered "yes." When asked how he would define a slouched position, the Shop Superintendent testified that in this particular case, Claimant was laying against the door with his head against the door. In rebuttal, Claimant testified that the question asked was whether he (Claimant) was in a reclined position.

In considering this case, we find no denial of contracted for due process. The multiple roles assumed by the hearing officer were identical to the roles identified in Second Division Award No. 8272, and, as such, we cannot conclude that Claimant was prejudicially handicapped by the conduct of the investigation. In fact, the record indicates that Claimant conducted a thoughtful and vigorous defense. Furthermore, with respect to the merits, we find sufficient evidence to conclude that Claimant violated Rule 569. It may well be that Claimant was not incoherent or even actually asleep, but the posture of his body and his own admission that his eyes were closed, conveys the strong impression that he was not fully awake. The Shop Superintendent testified that Claimant admitted his head was back in a slouched position, though Claimant testified he believed the Shop Superintendent asked if he (Claimant) were in a reclined position. If Claimant were in a reclined position with his eyes closed it would give the clear appearance of sleeping. It is this type of conduct which Rule 569 prohibits, and accordingly, upon the record, we must find for Carrier's position. However, in considering the penalty imposed we find the instant suspension somewhat excessive and is thus reduced to fifteen (15) days. There are no indications that Claimant was ever previously disciplined and the modified penalty comports more equitably with the spirit of progressive discipline. He is to be made whole for the difference in time lost.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:   
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 1st day of November 1989.