

The Second Division consisted of the regular members and in addition Referee James C. McBrearty when award was rendered.

Parties to Dispute: (System Federation No. 7, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Electrical Workers)
(Burlington Northern Inc.

Dispute: Claim of Employees:

1. That in violation of the current working agreement Mr. T. E. Bronson, Electrician, Burlington Northern, Inc., was unjustly suspended from the service of the Carrier from April 27, 1975 through and including May 11, 1975.
2. That accordingly, the Carrier be ordered to compensate Mr. Bronson for all time lost and the record of the suspension be removed from his 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 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 waived right of appearance at hearing thereon.

Claimant is regularly employed by Carrier as an Electrician at Carrier's Roundhouse facilities at Glendive, Montana, with assigned hours of 11:00 P.M. to 7:00 A.M. His seniority date is March 15, 1974.

On March 21, 1975, Claimant was given notice in writing to attend investigation on March 27, 1975, for the purpose of ascertaining the facts and determining his responsibility for his failure to protect his assignment on the night of March 20, 1975.

As a result of the investigation, Claimant was suspended for 15 days from April 27, 1975, for violation of Rules 665 and 673 of Carrier's Safety Rules.

Rule 665 reads:

"Employees must report for duty at the assigned time and place. They must be alert, attentive and devote themselves exclusively to the Company's service while on duty. They must not absent themselves from duty, exchange duties with or substitute others in their place without proper authority."

Rule 673 states:

"Employees 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."

Petitioner argues that Carrier's action in assessing a 15-day suspension against Claimant was an arbitrary, capricious, and unjust action.

Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases 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 whether, without weighing it, there is substantial evidence to sustain a finding of guilty. If that question is decided in the affirmative, the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that the Carrier's action with respect thereto was discriminatory, unjust, unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.

Turning then to the record in the instant case, it is undisputed that Claimant did not report for work on March 20, 1975 until 11:30 A.M. or 11:35 A.M. It is also undisputed that he did not have permission to be late, nor did he call in to report that he would be late. Such tardiness is a violation of Carrier's Rule 665. Claimant argues, however, that he had a flat tire on his pick-up truck, and had trouble changing it. According to Claimant, he "twisted two wrenches off" changing the tire. Moreover, he stated that there was no phone available at the location where he was having trouble.

The record also indicates that Carrier's foreman testified that he smelled alcohol on Claimant's breath, and Claimant "was acting real boisterous."

Claimant testified that he had "three beers between the hours of 6:00 P.M. and 8:30 P.M." to wash down some "strong garlic deer sausage" which he had been eating. Claimant stated, however, that he was not under the influence of alcohol when he came to work, and that it was the foreman who used "boisterous language," and not he.

Furthermore, Carrier's foreman claimed that at approximately 1:10 A.M. on March 21, he found Claimant sitting in the engineer's seat of unit 1903, "slouched down with his feet on the rear engineer's door," so that the foreman had to have Claimant move his feet so the foreman could get out the back door. Grievant does not deny this.

Finally, at 1:30 A.M. Carrier's foreman testified that he found Claimant asleep in the cab of unit 1903, which unit was sitting on track two outside the Roundhouse. According to the foreman, Claimant "was flat on his back lying across the two firemen's seats," a violation of Carrier's Rule 673.

Claimant denies he was in a lying down position at 1:30 A.M., and claims his eyes were not covered nor concealed, and that he was not in a slouched position.

On this alleged sleeping incident then, we have a complete denial by Claimant. Obviously if we accept this denial we have to discredit the testimony of Carrier's foreman. However, the Board has consistently refused to determine the credibility of witnesses. So, too, the Board has left to the trier of the facts the matter of weighing or resolving conflicts in the evidence.

There is no rule which states that the Hearing Officer is under an obligation to believe the Claimant's testimony, and completely reject that of Carrier's foreman who testified against him. If, as in this dispute, there be a conflict in the testimony adduced, it is the function of the trier of the facts and not the function of this Board to resolve such conflict. (See Third Division Awards 16168, 13475, 12074, 9326, 9175, and 9046).

In reviewing the entire record in this dispute, we cannot say that the trier of facts had no substantial evidence before him upon which to credit the testimony of Carrier's foreman, and to discredit the testimony of Claimant regarding the sleeping incident, the latter's testimony in effect being a general denial.

This Board recognizes that proving an employee was sleeping is a most difficult task. The excuses often offered are a tribute to human inventiveness. They may range from praying to meditating (with closed eyes) on the sterling attributes of the supervisor who has caught the sleeper in the act.

Because they recognize the complications of proving a worker was sleeping, many managers choose instead to call the offense "neglect of duty," "inattention to appointed tasks with resulting hazards to safety," or some other locution appropriate to the circumstances. If there is evidence that the worker was in such a relaxed or supine physical state that he was not fulfilling his responsibilities, arbitrators generally will not require that actual sleeping be proved.

Form 1
Page 4

Award No. 7325
Docket No. 7185
2-BNI-EW-'77

The record in the instant case reveals that Carrier's findings are based upon substantial and credible evidence, and we cannot find that any procedural or substantive rights of the Claimant were violated. Therefore, we will deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 12th day of July, 1977.