Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8712
Docket No. 8578
2-BNI-EW-'81

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Burlington Northern Inc.

Dispute: Claim of Employes:

1. That in violation of the current agreement, Burlington Northern, Inc., arbitrarily and unjustly severed Crane Operator (Electrician Helper) T. Armbrust from service on December 1, 1978.

2. That accordingly, the Burlington Northern, Inc., be ordered to restore Mr. Armbrust to service with seniority unimpaired, compensate him for all time lost, together with restoration of, or compensation for, lost vacation time, holidays, sick pay or hospitalization benefits and any other rights, privileges or benefits to which he is entitled under schedules, agreements, rules or laws and that the entry of investigation and/or censure be removed from his personal file. Beginning date of claim is December 1, 1978.

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 employe 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, a relief crane operator, was discharged on December 1, 1978 for sleeping while on duty in violation of Carrier Rule 673. At the time of the investigation held on November 9, 1978, the claimant had been working for the carrier for only two and one half months.

The organization has raised several objections to the investigation contending the carrier failed to notify the Local Chairman of the hearing in accord with Rule 30(c). The carrier did send a copy of the notice of charges against the claimant to the Assistant Local Chairman. The relevant portion of Rule 30(c) states: "At least five (5) days' advance written notice of the investigation shall be given the employee and the appropriate local organization representative ..." Since Rule 30(c) does not designate any particular union officer, it was reasonable for the carrier to send the notice to the Assistant Local Chairman who has, in the past, handled employe problems at the Havelock Shop. We also note that the Local Chairman received actual notice of the hearing because he appeared at the hearing and

conducted a vigorous defense on claimant's behalf. Therefore, we find the carrier complied with Rule 30(c).

The underlying facts in this case are in dispute. According to the carrier's three witnesses, claimant was observed in a slouched position, with his feet up on the crane cage and with his eyes closed for the period from 5:45 p.m. to approximately 6:00 p.m. on November 1, 1978. A carrier patrolman shined a light in claimant's face without obtaining his attention and eventually the patrolman hit the cage with a brake rod to wake the claimant. These carrier witnesses testified that claimant, after he climbed down from the crane, acknowledged he was sleeping and apologized for his conduct. The carrier argues that the testimony of the three eyewitnesses coupled with claimant's failure to perform work for fifteen minutes constitutes substantial evidence to prove claimant was sleeping. The organization raises two alternative defenses which are inherently paradoxical. First, the employes argue that there was no proof claimant was sleeping because the eyewitness observations are suspect. They observed the claimant from a distance of more than thirty feet in a poorly lighted area of the Fabricating Shop. The claimant testified that he was listening to a radio and saw the people below him. Second, assuming arguendo that the claimant was sleeping, the organization asserts that his sleep was induced by gas fumes escaping from a nearby forge and furnace.

In a discipline case, the burden is on the carrier to proffer substantial evidence that the claimant violated Rule 673 which 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 sleeping."

The testimony of the General Foreman, Foreman and Patrolman demonstrates the claimant was in a position which is defined as sleeping under Rule 673. The claimant, at the hearing, denied he was asleep. When this Board is confronted with direct conflicts in testimony, we are precluded from upsetting the carrier's credibility determinations unless the testimony the carrier relied upon was speculative or clearly contrary to other objective, empirical evidence. Second Division Award No. 6372 (Bergman). There is no reason for this Board to question the varacity of the three witnesses. Thus, we find substantial evidence in the record to prove claimant was asleep while on duty between approximately 5:45 p.m. and 6:00 p.m. on November 1, 1978.

If claimant's sleep was induced by an external factor (such as gas) present in the work environment, then his loss of consciousness would be excused. We must first decide which party has the burden of proving the cause of claimant's sleep. The organization argues that once it raises the inference that gas permeated claimant's work atmosphere, the carrier must prove the sleep was self-induced, i.e. that claimant fell asleep voluntarily. The carrier, on the other hand, argues that the employes must affirmatively prove not only the presence of noxious gas but also that the gas actually caused claimant's sleep. For the purpose of this case, we rule that the carrier has the initial burden of showing claimant was asleep (which it has satisfied) and then the burden shifts to the organization to show that the gas could have caused claimant's condition. The carrier can rebut the organization's evidence by showing that the gas did not affect the claimant. Using this standard, the organization presented sufficient evidence that claimant

was performing work in an area susceptible to gas fumes but it fell short of showing that claimant's sleep could have been induced by the gas. While we understand that claimant was performing his duties under undesirable working conditions, when he disembarked from the crane on November 1, 1978, he failed to mention the presence of gas fumes. Indeed, there was no evidence that claimant had previously complained about gas fumes while operating the crane. In addition, there was extensive that other crane operators may have suffered headaches due to the gas but no evidence that the gas had caused an operator to fall asleep.

Lastly, the organization, on the property and in its submission, contends that the supreme penalty of dismissal was arbitrary and unduly harsh. The carrier asserts that sleeping is a serious offense and, given claimant's short length of service, discharge is warranted. Numerous awards of this division have declared that sleeping while on duty is a serious infraction justifying dismissal. Second Division Award No. 8537 (Brown). Under the circumstances, we cannot say the carrier acted in an arbitrary fashion, so we will not substitute our judgment for that of the carrier in assessing the penalty. Thus, we decline to modify the discipline in this case.

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 6th day of May, 1981.