

The Second Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Firemen & Oilers
(
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM:

1. That in violation of the current Agreement, Laborer E. Komosa, Hostler/Laborer, Gary, Indiana, was unfairly dismissed from service of the Elgin, Joliet and Eastern Railway Company effective June 27, 1990.

2. That accordingly, the Elgin, Joliet and Eastern Railway Company be ordered to make Mr. Komosa whole by restoring him to service with seniority rights, vacation rights and all other benefits that are a condition of employment, unimpaired, with compensation for all lost time plus 6% annual interest; with reimbursement of all losses sustained account loss of coverage under Health and Welfare and Life Agreements during the time held out of service; and the mark removed from his 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.

Claimant was dismissed as a result of an incident which occurred on June 27, 1990, when the Superintendent, Locomotive Department observed him for approximately five minutes and concluded that he was sleeping. By letter dated June 27, 1990, the Superintendent notified Claimant that he was dismissed from service. Claimant requested an Investigation, which was held on July 31, 1990 before the Manager MofE. The sole witness against Claimant was the Superintendent. By letter dated August 17, 1990, the Manager found "no basis for rescinding your dismissal of June 27, 1990." The Claim was dated August 31, 1990, and received by Carrier on September 4, 1990.

The Organization contends that Claimant was denied a fair Hearing because of the multiple roles played by the Manager and a fair appeal because the Superintendent also served as an appeals officer. The Organization further contends that Claimant's due process rights were violated because he was dismissed without a prior Investigation.

On the merits, the Organization argues that the evidence failed to prove the offense, because there was no evidence that Claimant's eyes were closed and because the Superintendent was only able to observe Claimant lying on his side and was unable to observe whether Claimant was asleep. The Organization also contends that dismissal was an excessive penalty and should be set aside as arbitrary and capricious.

Carrier contends that the Claim is procedurally defective. Carrier further argues that the Agreement authorized Claimant's dismissal prior to an Investigation. Carrier maintains that the Manager's multiple roles did not deny Claimant a fair Hearing. Carrier contends that the Superintendent's role as an appeals officer did not infringe Claimant's Agreement due process rights because Claimant received a subsequent independent review. On the merits, Carrier argues that the finding that Claimant was asleep was supported by substantial evidence and that the penalty was warranted under the circumstances.

Initially, we confront Carrier's argument that the Claim was not filed in a timely manner. Article 32(1)(a) of the Agreement requires that all claims "be presented in writing . . . within 60 days from the date of the occurrence on which the claim or grievance is based." Carrier contends that the Claim is based on Claimant's dismissal which occurred on June 27, 1990. The Organization contends that the Claim is based on the Manager's decision after the Investigation, which occurred on August 17, 1990.

The Board recognizes that the Claim challenges Claimant's dismissal and that generally, a conference or request for reconsideration of a Claim does not prevent the time limits contained in an Agreement from running. In the instant case, however, the substance of the Claim is that the evidence failed to prove the charge. Thus, the Claim could not arise until the evidence was presented at the Investigation. Accordingly, we conclude that the occurrence on which the Claim is based includes not only the dismissal, but also the Investigation. The Claim was filed within 60 days following the conclusion of the Investigation and is therefore timely.

The Board finds no due process violation resulting from Claimant's dismissal prior to the Investigation. Article 33 (a) of the Agreement provides, in relevant part:

"An employe disciplined or discharged will be
advised of the cause for such action in writing.
Should such an employe feel that the discipline

assessed against him is unjust, a fair and impartial investigation into the facts of his case shall be had, provided, such employee makes written request for same within ten (10) days of his receipt of notice of discipline."

The Agreement clearly authorizes the imposition of discipline, including discharge, prior to an Investigation. Were we to hold that the Claimant's rights were violated by his pre-Investigation discharge, we would be rewriting the Agreement. We have no authority to do so.

We reject the Organization's argument that the Manager's multiple roles violated Claimant's Agreement due process rights. The Manager was not involved in the incident under Investigation and there is no evidence that Claimant was denied a fair Hearing or fair review.

The Organization's position regarding the Superintendent's multiple roles requires greater discussion, however. The entire case turned on the relative credibility of the testimony by the Superintendent and the testimony by Claimant. A Claimant is denied a fair Hearing when the principal (or as in this case the only) witness against him also evaluates his own credibility as a witness. See Third Division Award 28671; Second Division Awards 9698, 10327.

In the instant case, however, the Superintendent did not pass on the credibility of his own testimony. Credibility determinations were made in the first instance by the Manager who conducted the Hearing and concluded that the evidence developed at the Investigation proved the charges on which the dismissal was based. The Superintendent did decide an appeal from the Manager's decision. However, his decision was subject to further review by Carrier's highest ranking officer, its Director of Labor Relations. The Organization could have urged Carrier's highest ranking officer to disregard the Superintendent's appellate decision because of the Superintendent's role as a witness, but it did not do so. In any event, unlike the situation in Second Division Award 10327, there is no evidence in this record which would indicate that the Director of Labor Relations failed to conduct an independent review of the record. Accordingly, in keeping with prior precedent of this Board, we must hold that there was no prejudicial Agreement due process violation. See Second Division Award 11122.

Turning to the merits, we find that substantial evidence supports the finding of violation made on the property. Rule S prohibits, "Sleeping or assuming an attitude of sleep, with eyes closed or covered, while on duty." The Superintendent testified that he observed Claimant in the locker room for five minutes, that Claimant was laying on his side on a series of cushions on a bench, that Claimant did not move at all during the period of observation, that upon the Superintendent's entry into the room Claimant got up and appeared to have awakened from a deep sleep, disoriented and with red puffy eyes. It is a reasonable conclusion, based on the Superintendent's testimony, that Claimant was in fact asleep. Although Claimant denied sleeping, his denial was not credited on the property and we are bound by that credibility determination.

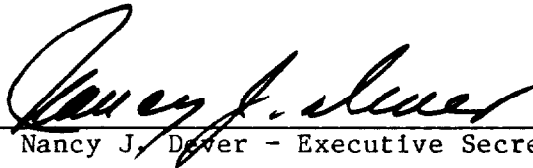
Turning to the penalty, we recognize that Claimant had provided 24 years of service at the time of his dismissal. Nevertheless, in light of the severity of the offense and Claimant's poor prior disciplinary record, we are unable to say that dismissal in the instant case was arbitrary or capricious.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 14th day of October 1992.