

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISIONAward No. 12833
Docket No. 12810
95-2-93-2-22

The Second Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

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

STATEMENT OF CLAIM:

- "(1) That in violation of the governing agreement, Mechanical Department Electrician W. J. Barnes was unjustly dismissed following an unfair and heavily biased investigation held on December 13, 1991.
- (2) That in further violation of the agreement, Mr. Barnes was unjustly withheld from service pending the investigation.
- (3) That accordingly, the Burlington Northern Railroad Company should be directed to make Electrician W. J. Barnes whole including restoring him to service with seniority rights unimpaired, restoration of all rights, benefits and privileges of which he has been deprived; and his lost wages should be restored to him at the pro rata rate for eight hours per day for each day he has been denied service, beginning with the date he was withheld from service continuing until he is restored to service, both dates inclusive. Claim also includes removal of all reference to the investigation and discipline from Mr. Barnes 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 was notified on December 7, 1991, to attend an Investigation on allegation that he was sleeping on duty on December 6, 1991. The December 7, 1991 notice also advised Claimant he was being withheld from service pending results of the Investigation. The Investigation was held on December 13, 1991. On December 30, 1991, Claimant was notified that he was dismissed.

The claim before the Board is two pronged. The Organization contends the suspension pending the results of the Investigation was improper and that the Investigation was flawed sufficiently that Claimant's right to a fair and impartial Investigation was prejudiced.

First, the suspension issue must be addressed. The Discipline Rule does provide that:

"...an employee... may be held out of service in cases involving serious infraction of rules pending investigation..."

It was clearly established in the Investigation that Claimant was suspended, not for sleeping on duty, which is a serious infraction, but for other reasons, not related to the charges. The suspension was not, therefore, proper nor in compliance with the Rule.

Regarding the discipline, the Organization's appeal is based on several arguments. First, it argues the Investigation was not fair nor impartial, that the notice of charges was not precise and that certain testimony was omitted from the transcript.

From our review of the transcript we cannot accept the notion that the Investigation was conducted in such a manner that it precluded Claimant from receiving a fair and impartial Investigation. The Organization was not hindered in any way from presenting any defense it deemed proper. Much testimony was recorded as to the definitions of the adjective "prone" that was used to describe Claimant's position when he was discovered sleeping with his body spread out over two seats in an apparent effort to be comfortable. Nor, is there any evidence or testimony that bolsters the argument of an imprecise notice of charges. Neither Claimant nor his representative was in anyway surprised as to what the Investigation was about.

Regarding the charge of an incomplete transcript, the omission of a very small segment of the testimony related to the contention that Claimant was not assigned any work as of 4:40 A.M. when he was awakened by the Supervisors. Such omission did not, in the Board's opinion prejudice Claimant's rights.

Three Supervisors testified as to Claimant's position. The fact he was observed for some period of time in the "prone position" has not been countered by Claimant or his Representative.

Finally, we do not find that the discipline assessed i.e., that of dismissal to be excessive. This is the third such charge of sleeping on duty since December of 1988. The discipline of termination is in line with other awards on this property wherein employees found sleeping on duty have been terminated. See Awards 1 and 20 of P.L.B. No. 3139.

Claimant is to be paid for all time lost excluding the day of the Investigation from the date he was suspended from service until the date of the notice of dismissal. The discipline of dismissal is upheld.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

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 Second Division

Dated at Chicago, Illinois, this 26th day of January 1995.