

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13419

Docket No. 13289

99-2-97-2-60

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

**(International Brotherhood of Electrical Workers
(System Council No. 16**

PARTIES TO DISPUTE: (

**(The Burlington Northern and Santa Fe Railway
(Company**

STATEMENT OF CLAIM:

- "1. That in violation of the controlling Agreement, in particular Rule 30, Telecommunications Department Electronic Technician J. W. Muehlbauer was unjustly dismissed from the service of the Burlington Northern/Santa Fe Railroad Company following an unfair and extremely biased investigation conducted on February 2, 1996;**
- 2. That the hearing conducted on February 2, 1996 was not a fair and impartial hearing as required by the rules of the controlling Agreement and that the discipline assessed was unjust and unwarranted, and;**
- 3. That accordingly, the Burlington Northern/Santa Fe Railroad should be directed to make Electronic Technician J.W. Muehlbauer whole by restoring him to service with seniority rights unimpaired, restore all other rights, benefits or privileges which he was denied during his suspension and to compensate him eight (8) hours per day for each day he is withheld from Carrier's service; and it also includes removal of the entry of censure from Mr. Muehlbauer'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 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 were given due notice of hearing thereon.

On January 18, 1996, Claimant was notified to appear for an Investigation on January 30, 1996. The notice charged Claimant with sleeping on duty on January 12, 1996, and with dishonesty concerning the incident. The Hearing was postponed to and held on February 2, 1996. On February 13, 1996, Claimant was advised that he had been found guilty of the charges and that he was dismissed from service.

The Organization argues that Carrier failed to prove the charges. The Organization maintains that Claimant laid down to rest during his lunch hour because he was suffering from a headache. The Organization further contends that Claimant was denied union representation when he was interviewed about the incident and that he was denied a fair Hearing because the same Carrier official issued the notice of charges, conducted the Hearing and assessed the discipline. The Organization further argues that the Hearing Officer was biased against Claimant because he had discussed the matter with the witnesses prior to the Investigation.

Carrier contends that it proved the charges by substantial evidence. Carrier further argues that the charges were serious and warranted dismissal. Carrier maintains that it did not deny Claimant any of his contractual due process rights.

The Board has reviewed the record carefully. We find that Carrier proved the charges by substantial evidence. Claimant admitted that he was in a reclining position with his eyes closed. Under Carrier's Rules, being in such a position is considered sleeping. Claimant maintained that he was in such position during his one hour lunch

break. The record indicates that Claimant was entitled only to a half hour lunch break and, even under Claimant's version of events, he remained in a reclining position with his eyes closed after the half hour that would have been his lunch break. There was conflicting testimony concerning whether there was a practice to allow employees such as Claimant to take an hour lunch break. As an appellate body, we defer to the credibility determinations made on the property.

There also was conflicting testimony concerning the time that Claimant was found asleep. Carrier's witnesses estimated the time they found Claimant asleep to be 1:15 P.M. Even under Claimant's contention that he followed a practice of taking a one hour lunch break, if Carrier's witnesses estimate is correct, Claimant was asleep after the end of the one hour break. Here too, as an appellate body, we defer to the credibility determinations made on the property and see no reason to disturb the decision to credit the time estimate provided by Carrier's witnesses.

The Organization's procedural arguments do not persuade us to disturb the discipline. The Organization argues that Claimant was denied representation when he was questioned about the incident. Precedent under the National Labor Relations Act has established a right to union representation in an investigatory interview where the employee has a reasonable belief that the interview may lead to discipline. However, there is precedent refusing to apply the NLRA case law under the Railway Labor Act. See, e.g., Third Division Award 22431. Moreover, even under the NLRA, the right is to representation upon request and there is no evidence that Claimant ever requested representation during the interview.

Similarly, we reject the Organization's arguments concerning the Hearing Officer's multiple roles. It is well-established that such multiple roles do not per se invalidate the proceeding. However, such multiple roles may call for closer scrutiny of the record to ensure that the employee was provided a fair Hearing. See Third Division Award 29147. We have scrutinized the record very closely and find nothing improper in the way in which the Hearing was conducted.

The only specific impropriety alleged by the Organization was the Hearing Officer's speaking with witnesses prior to the Hearing. However, the evidence indicates that the Hearing Officer spoke with the witnesses to ascertain their availability and the relevance of their potential testimony. There is no evidence that the Hearing Officer in any way prepared the witnesses for the Hearing, coached them, or did anything

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improper. Accordingly, we are unable to conclude that Claimant was denied a fair Hearing.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 16th day of June 1999.