

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13637

Docket No. 13527

01-2-00-2-3

The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

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

PARTIES TO DISPUTE: (

(Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

- “1. That in violation of the current Agreement, Rule 35 in particular, Electrician Steven J. Peterson was unjustly suspended for a period of thirty (30) days, required to contact the Medical Care Manager to determine if medical issues are being addressed properly and required to contact the EAP Counselor to determine if mental and attitude issues are being properly addressed by the Burlington Northern/Santa Fe Railroad Company following an investigation held on June 16, 1998 that was arbitrary and unjust.**
- 2. That the investigation held on June 16, 1998 was not a fair and impartial investigation required by the rules of the current Agreement and that the discipline assessed was unjust and unwarranted.**
- 3. That accordingly, the Burlington Northern/Santa Fe Railroad Company should be directed to make Electrician Steven J. Peterson whole for all lost wages, benefits and rights which were adversely effected by the discipline assessed, and that all records of this matter be set aside.”**

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.

The Claimant entered the Carrier's service on January 16, 1995. He was assigned as an Apprentice Electrician on third shift at the Carrier's Alliance Mechanical Facility, Alliance, Nebraska.

On May 28, 1998, the Carrier notified the Claimant to attend an Investigation to develop the facts and place responsibility, if any, in connection with the charge that he was sleeping and/or in a reclined position with his eyes shut while on duty on May 16, 1998. The Investigation was held on June 16 and 17, 1998. The Claimant was subsequently assessed a suspension of 30 days. In addition, he was instructed to contact the Medical Care Manager to determine if there were medical issues involved and to also contact an EAP Counselor to determine if mental and attitude issues were being properly addressed.

The record in the instant case discloses that the Claimant was observed by his immediate Supervisor, C. M. Deichert, sitting in the Conductor's seat on locomotive BN9642, in a reclined position, with his knees bent and propped against the window ledge and with his eyes closed. According to the Supervisor's testimony, she could not rouse the Claimant by calling his name and found it necessary to tap him on the knee several times before he woke up. Supervisor Deichert testified that when she informed the Claimant that he would have to be written up, he responded that he had a headache and didn't realize he had dozed off. Supervisor Deichert and the Claimant then discussed the matter with the General Foreman, D. W. Miller. Foreman Miller testified that the Claimant admitted he had fallen asleep.

The Carrier contends that it was reasonable to conclude from these facts that the Claimant was sleeping on duty under the definition of such action contained in Rule 28.11, which provides: "Employees must not sleep while on duty. Employees reclined with their eyes closed will be in violation of this rule." The Carrier argues that the penalty was fully warranted given the seriousness with which this Rule violation is viewed in the railroad industry. Cited are numerous cases upholding even more severe penalties, including

termination, for sleeping while on duty. See, Second Division Awards 8712, 9260, 9386, 9474, 10325, 11529, 11854, 12168 and 13419.

The Claimants' testimony contradicted that of the Carrier witnesses. According to the Claimant, he was not sleeping in the locomotive unit nor was he sitting in a reclining position. The Claimant conceded that he had a headache and that he had taken a nitroglycerin pill, but stated that his Supervisor did not have to repeatedly call his name or tap his knee because he was already awake. The Claimant further testified that he never admitted to sleeping. He stated that when the general Foreman asked if he had been sleeping, the Claimant responded, "No, I wasn't; I don't believe so."

Journeyman Electrician E. Burke was working with the Claimant on the morning of May 16, 1998. He testified that he did not observe the Claimant sleeping or in a reclined position with his eyes shut. He admitted, however, that there was a period of approximately 15 minutes sometime after 5:00 A.M. when he left the Claimant alone in the locomotive.

The Organization asserts that the Carrier cannot meet its burden of proof based on the evidence adduced on this record. It argues that only one Supervisor testified that she had seen the Claimant's eyes closed, and her testimony was inconsistent and contradictory. Moreover, the Organization argues that this Supervisor's testimony, and that of General Foreman Miller, should be discounted due to their admitted relationship outside of the workplace. Finally, the Organization contends that the Carrier's determination as to the penalty in the face of such slim and tainted evidence demonstrates that the Carrier's actions were excessive, arbitrary and capricious.

The Board has carefully reviewed the record in this case. Although the Organization in its claim asserted that the Claimant was denied a fair and impartial Investigation, we find no evidence to support that assertion.

On the merits, it is the Board's judgment that substantial evidence supports the Carrier's conclusion that the Claimant was sleeping on duty May 16, 1998 as defined in Rule 28.11. When confronted with conflicts in testimony, we defer to the findings made on the property unless the Hearing Officer's determination was arbitrary or against the manifest weight of the evidence. That is not the case here.

Notwithstanding the Organization's assertions to the contrary, the fact that the Supervisor and general Foreman had a relationship together does not, in and of itself, show

that they collaborated to concoct a story to get the Claimant disciplined. No evidence of bias or motivation against the Claimant was established to support that possibility.

In addition, the Claimant's denials of wrongdoing stand uncorroborated by his fellow co-worker, who was not even present at the time the Claimant was observed sleeping. Equally important, the circumstances surrounding the incident suggest that the Carrier's version was more plausible than the Claimant's. The Claimant admittedly had a headache and had taken a nitroglycerin pill. If he had been awake as he claimed, it is unlikely that he would have failed to respond to the Supervisor immediately when she called him or when she tapped him. All these factors, together with the Claimant's admission when confronted by supervision, compel the conclusion that the Board has no basis for substituting our judgment for that of the Hearing Officer.

Insofar as the penalty is concerned, it must be remembered that the Claimant engaged in behavior that is specifically prohibited by the Carrier Rules and widely regarded in this industry as a dismissible offense. The Carrier opted for a lenient penalty in the form of a 30-day suspension and an instruction to the Claimant to contact the Medical Care Manager and the EAP Counselor to avert any underlying problems which might be affecting the Claimant's attentiveness on the job. This progressive approach can hardly be deemed arbitrary or unreasonable. Accordingly, the claim must be denied.

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 6th day of August, 2001.