

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **24179**
Docket Number CL-24084

John B. **LaRocco**, Referee

PARTIES TO DISPUTE:

{Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, Empress and Station **Employees**
{**Bessemer** and **Lake** Erie Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (**GL-9408**)
that:

1. Carrier violated the effective Clerks' Agreement when, following an investigation held on July 24, **1979**, it arbitrarily and capriciously dismissed R. O. Holsinger **from** service by Notice of Discipline Applied, dated August 2, 1979.

2. Carrier further violated the effective Clerks' Agreement when following an investigation held on August 30, 1979, it again arbitrarily and capriciously dismissed R. O. Holsinger from service, while he was in a dismissed status by virtue of the Carrier's Notice of Discipline Applied, dated August 2, 1979, by Notice of Discipline Applied, dated September 7, 1979.

3. Carrier **shall** now be required to reinstate R. O. Holsinger to service, with his seniority and all other rights unimpaired and shall compensate him for all time lost as a result of his two dismissals from service.

4. The Carrier shall **now** be required to clear his record of the charges placed against him under dates of July 10, **1979**, and August 1, 1979, respectively.

OPINION OF BOARD: This case is the consolidation of **two** claims brought by the Organization on behalf of Claimant, a janitor, who was stationed at Butler, Pennsylvania. The first claim is an appeal of the Carrier's decision to dismiss Claimant from service as the result of an investigation held on July 24, 1979 for **Claimant's** alleged sleeping while on duty on July 10, 1979. On August 1, **1979** (which was one day before the effective date of Claimant's dismissal on the sleeping charge), the Carrier notified **Claimant** that **it** was convening another investigation to determine if Claimant had filed a false personal injury report on July 10, 1979. As the result of the second investigation, the Carrier again dismissed Claimant from service on September 7, **1979** and the Organization also properly appealed the **second** dismissal.

Throughout the handling of the claims on the property, the **Organization** vigorously objected to both the second investigation and the second discharge on **two** grounds. First, the Organization contended that because Claimant had already been discharged, Claimant was no longer an employee and consequently the Carrier lacked authority to impose discipline. Second, the Organization asserts that the Carrier placed Claimant in double jeopardy by holding the second investigation which violated Claimant's fundamental due process rights under the applicable **Agreement**.

We must reject the Organization's objections. Even though Claimant had been dismissed prior to the investigation dealing with the personal injury report charge, **Claimant** still had an **employment** relation with the Carrier since he retained a right to appeal the first dismissal. Pennsylvania Railroad Co. v. Day, 360 U.S. 548(1959). Indeed, on August 23, 1979, prior to the second investigation, the Organization timely **filed an** appeal challenging the propriety of the Carrier's decision to discharge Claimant. As to the double jeopardy contention, this Board has concluded, after reviewing the voluminous record herein, that the second investigation concerned an alleged offense **which** was separate and distinct **from** the prior sleeping charge. Since the false injury report allegation was mutually exclusive **from** the subject matter of the first investigation, Claimant was not placed in a position where he had to twice defend himself against the **same** charge.

Though the two dismissals have been consolidated into one case before this Board, we **must** independently consider the merits of each claim.

At approximately **10:00** A.M. on July 10, 1979, the Assistant **Trainmaster** began searching for Claimant because Claimant was not at his assigned work location. A short **time** later, the Assistant **Trainmaster** and the first trick **Yardmaster** discovered Claimant lying on a cot in a caboose with his eyes closed, his jacket pulled over his shoulders and he was snoring. After observing Claimant in this position for a few **moments**, the Assistant **Trainmaster** nudged Claimant. Claimant then got up **from** the cot. He said that he laid down on the cot because he had felt pains **in** his back while cleaning the caboose. According to Claimant, he injured his back earlier **in** the shift while he was **moving** a garbage container. At the investigation, Claimant testified he did not think that he had fallen asleep on the cot.

After the investigation was concluded and over the Organization's objection, the **Carrier** came forward with a statement given by Clerk Wolfe to support the Carrier's position that **Claimant** went into the caboose with the express intent to sleep. We sustain the Organization's objection. **This** Board **cannot** consider the Clerk's statement since it was untimely introduced as evidence subsequent to the investigation. Claimant had no opportunity to rebut the contents of the statement or to examine the Clerk on the statement's **accuracy**. In deciding whether or not Claimant committed the charged offense, this Board is restricted to evaluating the evidence submitted at the July 24, 1979 investigation.

Looking only at the transcript of the investigation, we find that the Carrier presented substantial evidence that **Claimant** was sleeping while on duty on July 10, 1979. **Two** eyewitnesses unequivocally testified that they observed Claimant in a horizontal position on a cot at an isolated place.. They also heard Claimant snoring. Claimant exhibited all the **characteristics** of a sleeping person. Regardless of whether or not he was experiencing back pain, Claimant had no right to lay down and fall asleep. **Claimant's** conduct was clearly contrary to Carrier Rule 502.

The Carrier rightly relies on its **employees** to remain alert and attentive while on duty. Thus, **sleeping** is a serious offense. Given **Claimant's** poor prior

disciplinary record, we see no justification for disturbing the assessed penalty.

Since we are upholding the Carrier's decision to dismiss Claimant on the sleeping offense, we need not address the merits of the second claim. Even if this Board sustained the Organization's appeal of the discipline arising from the false injury report charge, we could not alter the ultimate disposition of this case.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as **approved** June 21, **1934**;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

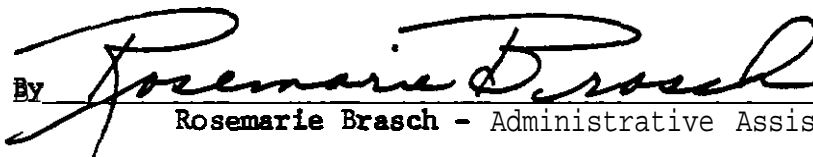
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of February 1983.