

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25431

Docket Number CL-24175

Herbert Fishgold, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**

PARTIES TO DISPUTE: (

(**Elgin, Joliet** and Eastern Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (**GL-9511**) that:

1. Carrier acted in an arbitrary and capricious manner when it suspended Clerk A. J. **Berta** from service for a period of ten (10) days commencing June 26, 1980;

2. Carrier shall now compensate Clerk A. J. **Berta** for all time lost as a result of this suspension from service and shall clear his record of the charge placed against him.

OPINION OF BOARD: [On May 26, 1980, Clerk A. J. **Berta** was on duty and assigned to an Input/Output Technician's position, working midnight to 8:00 a.m. As a result of an incident occurring during his shift, **Berta** was charged with 'allegedly sleeping or assuming an attitude of sleep while on duty at 7:20 a.m. on May 26, 1980'. This would constitute a violation of Rule H, which reads as follows:

'Sleeping or assuming an attitude of sleep, with eyes closed or covered, while on duty is prohibited.*

Following an investigation hearing, **Berta** was suspended from service for a period of ten (10) days.

The facts with regard to the incident in question are in dispute. According to the testimony of R. L. **Delaney**, Manager Special Equipment:

'On Monday, May 26, at approximately 7:20 a.m....I observed Mr. **Berta** sitting by the screen in the south-west corner of the office. He was sitting in front of the desk with his feet propped up on the tray, the pull-out tray of the desk. He was leaning back in his chair with his eyes closed. His head was tilted forward a little bit, his hands folded in front of him. And as I approached him, I said, '**Berta**, wake up'. It was necessary for me to call his name twice more before I was able to awaken him. He was disoriented for a few moments.'

According to Mr. **Berta's** testimony:

"I was sitting with my feet propped up on the tray which I do when the work is caught up and I don't think I am the only one that does that. Rut, I definitely stated that I was not sleeping at the time. It was resting my feet up on the desk, the tray, which I do not deny."

When asked if he had his eyes closed, **Berta** responded, "I cannot recall. I know I was not sleeping. Now, I do not believe I had my eyes closed".

It is undisputed that at about 7:10 a.m. some reports were generated by the computer and that Mr. **Berta** stripped them from the printer and delivered them to the Chief Train Dispatcher. Thereafter, at approximately 7:18 a.m., Mr. R. A. Gleason, Chief Yard Clerk, testified that he walked in the office where Claimant was to pick up the yard check in the basket, and kidded with **Berta** that it was day work. Gleason further stated that:

"He (Mr. Delaney) walked in, looked around and turned around and walked out the door to where the counter is. He turned back around and came in at that time and I was starting out of the room and heard him tell Tony, '**Berta**, wake up'. I heard **Berta** respond by saying, 'I am awake'. I was at the doorway at that time."

Gleason repeated that Delaney only said "**Berta** wake up" the one time, and that **Berta** answered right away that he was awake.

Delaney did not recall having come into the office, leaving, and coming right back. Both **Berta** and Gleason stated that he did. While Delaney stated that he had to call out to **Berta** three times to wake up and that **Berta** appeared disoriented, both **Berta** and Gleason stated that Delaney only called out one time and **Berta** immediately responded that he was awake.

On the state of the record herein, the Board is unable to find that **Berta** was asleep at 7:20, particularly since he and Gleason had exchanged comments at 7:18. The remaining question is whether **Berta** was "assuming the attitude of sleep" within the meaning of Rule H. **Berta** acknowledged that his feet were in an elevated position, and that he often did this because of a prior problem with his foot. The record also indicates that his eyes may have been closed. But the record also indicates that **Berta** was not remiss in performing any of his duties and that he immediately responded to Delaney.

The Carrier takes the position that, nonetheless, whenever an employe has his feet in an elevated position with his eyes closed he is not working or assuming the attitude of work, but rather, sleeping or assuming the attitude of sleep, which is a disciplinary offense considering the circumstances that he is on duty and under pay. The Carrier further maintains that the ten-day suspension was in line with the practice on the property for first offenders of Rule H.

While the Board agrees with the Carrier that sleeping is a serious offense, warranting the degree of discipline cited by the Carrier, the facts of this case, when read in light of Rule H and the cases relied upon by the Carrier in support thereof, do not warrant the same conclusion.

Berta was not observed by Delaney for other than a few seconds, and, at most, **Berta** had his eyes closed. Under all these circumstances, the Board finds that the ten-day suspension was improper, and that **Berta** should be compensated for all time lost as a result of his suspension from service. However, since **Berta** apparently had his eyes closed, causing Delaney to have to tell him to "wake up", the Board finds that a letter of reprimand **would** be appropriate to remedy the concerns of the Carrier.

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

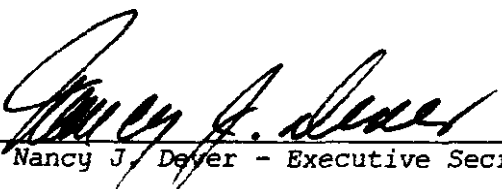
That the discipline was excessive.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois this 30th day of April 1985.