

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35641
Docket No. MW-35866
01-3-99-3-850**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(I&M Rail Link, LLC

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Mr. J. S. Roberts, effective October 4, 1999, in connection with an alleged violation of I&M Rail Link General Code of Operating Rule 1.11 on July 29, 1999 was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement (System File D-68-99-511-02-IM).
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid discipline shall be set aside and removed from Claimant J. S. Roberts’ record and he shall now be compensated for all lost wages, including but not limited to straight time, overtime, paid and non-paid allowances and safety incentives, flex time, health and welfare benefits and any and all other benefits lost as a result of said discipline beginning on October 4, 1999 and continuing.”

FINDINGS:

The Third 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.

Claimant J. S. Roberts established seniority as a Class 1 Machine Operator and was assigned to a speed swing on the Nahant Section Gang, under the supervision of Section Foreman T. Simmons and Roadmaster J. Manning, when this issue arose.

On the afternoon of July 29, 1999, Foreman Simmons, Section Laborer D. Daniels and the Claimant were in a hi-rail vehicle patrolling the main line near Heinz, Iowa, when the Dispatcher instructed them to clear the track. As the crew cleared the track, they experienced some problems with the hi-rail gear, so they pulled the truck down the roadway and parked under a nearby shade tree. After fixing the gear, Simmons, Daniels and Roberts returned to the truck to wait for authority to return to the main line. As they waited, Daniels was in the driver's seat, Foreman Simmons was in the front passenger seat, and the Claimant was seated on the bench-style passenger seat in the rear of the truck.

At approximately 3:00 P.M., Foreman Simmons spoke to the Claimant, who was sitting behind him in the rear seat. However, when the Foreman turned to address the Claimant "a few minutes later," he observed that he was "laying flat out in a reclined position with his whole body stretched across the seat." Foreman Simmons asked the Claimant, at least two times, to "sit up," however, the Claimant did not respond to either directive. Shortly thereafter, Foreman Simmons "dropped" his hard hat on the floor board of the back seat, startling the Claimant who then sat upright.

As a result of the events that took place on July 29, the Carrier directed the Claimant to attend an August 4 Fact Finding, which was subsequently postponed and held on August 11, 1999. Shortly thereafter, the Claimant was informed that:

"In response to the fact-finding session accorded you on August 11, 1999 you are officially dismissed from service with the I&M Rail Link effective October 4, 1999, for violating General Code of Operating Rule 1.11."

The Organization protested the dismissal asserting that:

“Claimant was not treated fairly, but instead was dismissed arbitrarily, capriciously and discriminately. The fact finding hearing was not held fairly . . . in fact, Mr. Holloway was the prosecution, judge, jury and executioner. . . . Hardly a shining example of due process!

The remainder of the transcript speaks for itself. Claimant was just trying to get out of the sun’s rays that day and had positioned himself in a manner in the back seat of the truck to escape the sun. . . . The truck did not have air conditioning and the crew was caused to sit in a static position while parked for nearly two (2) hours. Claimant was not sleeping, nor were his eyes closed, he was simply trying to shield his face from the direct sun light. The charge of sleeping went unproven at the hearing. . . . An outright dismissal for such a weak and speculative case is tantamount to an abuse of power by I&M management.”

The Carrier denied the appeal premised upon the following:

- “1. The Claimant was in a reclined position in the back of the truck. Foreman Simmons made numerous attempts to get Mr. Roberts to sit up before the Claimant responded and sat up in the truck.**
- 2. One witness (Laborer Daniels) estimated there was a time frame of one half hour from the first time the Claimant was told to sit up to the time he actually responded to the request.**
- 3. By the Claimant’s own admission, he didn’t hear Foreman Simmons’ request the first time. Foreman Simmons testified ‘my tone of voice is generally pretty loud.’ If the Claimant were awake, he would have heard his Foreman.**
- 4. Roadmaster Manning testified that Foreman Simmons reported to him that Joshua Roberts was sleeping in the back of the company truck on the very day that the sleeping rule was the Rule of the Day.”**

At the outset, the Organization asserts that the Claimant was not afforded a fair and impartial Hearing because the Hearing Officer “entered his personal opinions,

misrepresentations, speculations and assumptions.” However, we find no persuasive evidence of Hearing Officer bias in this record. The Organization further asserts that the Hearing Officer was “the prosecution, judge, jury and executioner.” The issue of multiple roles by one officer in discipline proceedings in this industry has been the subject of many Board Awards. While these Awards caution the Carrier against this practice because of the obvious due process risks involved, the better reasoned majority of these Awards also provide that, in the absence of Agreement language specifically prohibiting one officer from serving multiple roles, each case must be reviewed to determine if the employee’s due process rights were actually compromised or prejudiced in any way. We are not persuaded, on this record, that there was any fatal prejudice to the Claimant’s contractual right to a fair and impartial Hearing.

Turning to the merits of the dispute, I&M General Operating Rule 1.11 provides that: “Employees must not sleep while on duty. Employees reclined with their eyes closed will be in violation of this Rule.” Although the Claimant denies that he was sleeping, he effectively admitted that he had assumed a reclined posture with his eyes closed, and was “just relaxing.” The Claimant further admitted that he was “just completely wore out and the sun beating down on you sitting in that nice warm truck doesn’t do too many matters very good.” Thus, the record overwhelmingly establishes a violation of the Rule, and we are convinced that the Carrier successfully proved that the Claimant was sleeping, on the job, on the afternoon of July 29, 1999.

The testimony of Foreman Simmons that the Claimant exhibited all of the signs of being asleep was corroborated in all material respects by a disinterested eyewitness, Section Laborer Daniels. Both also testified that Simmons instructed the Claimant to sit up at least twice, and that the Claimant did not respond or comply either time. As Daniels stated, “he just laid there.” Simmons and Daniels further testified that the Claimant did not respond until Simmons dropped his hard hat onto the floor board of the backseat, which apparently startled and awakened the Claimant. When Foreman Simmons was asked whether it was possible that the Claimant did not hear him when he spoke, Simmons testified that given his “loud tone of voice,” it was unlikely.

In that connection, when asked if an observer could have reasonably assumed he was sleeping, the Claimant made the following admission against self interest:

“I can only tell you what I would assume if I walked up to see somebody in that position and the circumstances that it was under . . . I’d say something

to them and if, you know, they didn't respond then, . . . say it a couple of more times and if they don't respond then they're obviously sleeping."

The Carrier demonstrated by more than a preponderance of the evidence that the Claimant was guilty of sleeping on the job. Any factors in mitigation are more than offset by the multiple entries on his personnel record during his short tenure with the Carrier.

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 Third Division

Dated at Chicago, Illinois, this 28th day of August, 2001.