

Award No. 10440

Docket No. MW-11805

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Martin I. Rose, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**WABASH RAILROAD COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when, on February 9, 1959, it dismissed Crossing Watchman R. J. DelleRose from service without just and sufficient cause and on the basis of unproven charges.

(2) Crossing Watchman R. J. DelleRose now be reinstated to service, with seniority, vacation and all other rights unimpaired, and that he be reimbursed for all wage loss suffered since he was removed from service.

**OPINION OF BOARD:** After an investigation held on January 15, 1959, Claimant, a Crossing Watchman, was dismissed from service for failure to perform properly his duties as Crossing Watchman at Taft Street, Gary, Indiana, on January 7, 1959. He had been charged with being asleep while on duty during his tour of duty on the date and place mentioned. Upon Claimant's request, a further investigation was held on February 27, 1959. By letter dated March 16, 1959, Claimant was notified that his "appeal for reinstatement to service" was denied because no "additional facts or information pertaining to the manner in which" he performed his duties on the occasion mentioned were adduced at the second investigation.

It is argued in support of the claim that the charge against Claimant was not established by material and probative evidence. The transcript of the first investigation shows Claimant's denial that he was asleep on duty and the testimony of two supervisors, on personal knowledge, as to circumstances from which the conclusion was drawn that Claimant was asleep while on duty. Thus, Carrier's finding of Claimant's misconduct rests on circumstantial evidence and the resolution of conflicting factual testimony involving questions of credibility.

Circumstantial evidence is valid and sufficient to support a charge of wrongdoing. See Award 7657. In addition, this Division will not weigh evidence and resolve credibility conflicts in discipline cases. See Awards 8488, 7139, 4796. As a result, we cannot say on the record here that there is no

support in the evidence for the Carrier's findings that Claimant was asleep while on duty and did not properly perform his duties. Manifestly, an employe who sleeps on his job is derelict in the performance of his duties.

It is also contended in support of the claim that the fact that Carrier granted a second investigation constituted an admission that the first investigation was not a fair and impartial hearing, and that the testimony introduced at the first investigation cannot be used to substantiate the charge against Claimant.

The record does not support these contentions. The second investigation was granted in accordance with the applicable agreement because Claimant requested it. By letter dated February 17, 1959, he wrote the Carrier, in part, as follows:

"It is my desire that I be given a fair and impartial hearing as provided in Rule 20a, of the effective agreement. It will be my intention to have a representative present at the hearing."

No claim was made in that letter or at the second investigation that the first investigation was not a fair and impartial hearing. Claimant appeared and was represented at both investigations.

On consideration of the record as a whole, and for the reasons indicated, the claim must be denied.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe 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.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 21st day of March 1962.