

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, Express 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 Employee involved in this dispute are respectively Carrier and Employee 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

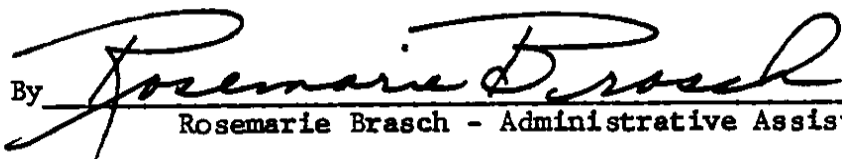
That the Agreement was not violated.

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.