

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42823  
Docket No. MW-43177  
17-3-NRAB-00003-150372**

**The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference**

**PARTIES TO DISPUTE: (**  
**(Dakota, Minnesota & Eastern Railroad Corporation**

**STATEMENT OF CLAIM:**

- “(1) The discipline (dismissal) imposed upon Mr. R. Weiseler by letter dated April 30, 2014 for alleged violation of General Code of Operating Rules 1.1.2 Alert and Attentive, Rule 1.6 and Rule 1.11 Sleeping in connection with his alleged sleeping on March 25, 2014 was without just cause, excessive, and in violation of the Agreement (System file G-1434D-01/8-0022DME).**
- (2) As a consequence of the violation referred to Part (1) above, Claimant R. Weiseler shall be reinstated to service and he shall ‘... be made whole for the loss of work, wages and other benefits lost that he suffered by the disciplinary action, including the day of the investigation and mileage.’”**

**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 R. Wieseler had established and held seniority as a mechanic within the Carrier's Maintenance of Way Department. On March 25, 2014, the date giving rise to this dispute and subsequently to the filing of this claim, Claimant was assigned and working the position of traveling mechanic.

At 6:00 A.M, the beginning of his 10 hour work day Claimant explained he was directed to clean the shop where the equipment used throughout the winter was kept in order to make it look presentable. Specifically, Claimant cleaned out the pits and the bays and organized some of the inventory. In and around 10:00 A.M./10:30 A.M., Claimant, wet and cold from performing the duties of cleaning the shop entered the Carrier truck assigned to him which was parked in front of the Roundhouse to warm up. During the time he worked in the shop and now while sitting in his work truck, Claimant was waiting for a United Parcel Service (UPS) delivery of parts for a tamper which was being used at the time north of Rapid City, North Dakota. Once the parts arrived, Claimant's plan was to take the parts out to the work location and work on the tamper. According to Claimant, the UPS deliveries to the shop usually arrived in and around 10:30 am which, on this morning coincided with the time he was sitting in his work truck.

At about the same time in mid-morning, Carrier's Assistant Superintendent M. Lockman arrived on the scene while accompanying senior G&W officials across Carrier's property performing a safety inspection of the different facilities and happened to observe Claimant sitting in his truck. According to Lockman, Claimant was wearing sun glasses his head was tilted backward he was not moving and it appeared to him that Claimant was sleeping; although he was unable to determine for certain that he was sleeping because he could not see whether his eyes were closed due to his wearing sun glasses. Lockman acknowledged that at the time he observed Claimant, Claimant was not performing any of his mechanic duties but he was certain that at this time, Claimant was on duty. Lockman related that in the two to three minutes he observed Claimant, he took a picture of Claimant with his head tilted backward. At the end of his two to three minute observation of Claimant, Lockman related that Claimant "woke up" looked over at him and the others he was with and waved. Lockman further related he had a brief conversation with Claimant in the Roundhouse at which time Claimant told him he was waiting for a UPS delivery. Lockman then asked Claimant if it was a normal event for him to sit in his work truck and sleep to which Claimant answered, it was not.

Carrier Supervisor of equipment, qualifications, and training A. Hahn related that during Claimant's tour of duty on March 25, 2014 he received an email from Bill

Held the local Roadmaster in Rapid City regarding Claimant having been observed sleeping while sitting in his truck. In response, Hahn called Claimant that afternoon and inquired what he had been doing during his tour of duty that day. According to Hahn, Claimant told him he was cleaning the shop, became wet and cold from performing this task so he got in his truck to warm up. While sitting in the truck warming up and waiting for some parts to be delivered from UPS, he leaned his head back and fell asleep. Hahn acknowledged it was possible that at the time Claimant was sitting in the truck waiting for a UPS delivery he was taking one of the qualified breaks from work during his tour of duty. Hahn further acknowledged that if Claimant were to take an unpaid lunch break the time taken for lunch is deemed off-duty time.

By letter dated March 26, 2014, the day after Lockman observed Claimant sitting in his work truck appeared to be sleeping, Carrier directed Claimant to attend a formal investigation scheduled to convene April 3, 2014 in connection with his possible sleeping on duty. At the hearing Claimant testified that, in fact, he did fall asleep while sitting in the truck at the time he was observed by Lockman, that he corroborated Lockman's testimony he told Lockman at the time of their conversation in the Roundhouse that he had fallen asleep. However, in his testimony Claimant explained that because he expected to receive the tamper parts from UPS in and around the time he entered his truck to warm up, he decided to take his lunch break because it was his intention to then take the parts to the tamper at the job site and fix the tamper.

The investigation/hearing was held as scheduled and by letter dated April 30, 2014, Carrier informed Claimant that upon review of the hearing transcript it had been determined he was responsible for having committed rules violations in connection with sleeping on duty and, as such, he was being dismissed from employment with the Carrier effective immediately.

We note that in dismissing employees from service, Carriers bear the burden to support such discipline by proffering "substantial" evidence to prove the employees under charge were responsible for committing the rules and policy violations for which they were charged. In addition, upon such proof of guilt Carriers bear the further burden to show that the quantum of discipline assessed was commensurate with the rules and policies infraction(s) committed, and was not arbitrary, capricious, harsh or based on unproven facts. Upon our comprehensive and thorough review of this record, we find Carrier failed to provide substantial proof to support Claimant's dismissal. While Claimant's self-confirmation he fell asleep while sitting in his work

truck to get warm and at the same time waiting for the UPS delivery of parts which, as an aside was delayed and not delivered that day, substantiated Carrier's charge he was sleeping while at work, nevertheless, Carrier failed to refute Claimant's testimony at the investigation/hearing that the time he was observed sleeping, he was on his lunch break and therefore he was not on duty at the time he fell asleep. Rules other than those Claimant was charged with violating support his right to have taken his lunch break at the time he took it, that is four to four and a half hours into his tour of duty and although it is bad optics to have slept in the Company truck in front of the Roundhouse in view of other employees who, at that time were on-duty and working, his doing so was not shown by Carrier to have been in violation of any Carrier policy. Claimant's defense of not being on duty at the time he was sleeping in the truck admittedly was not articulated by him on the two occasions he told Carrier he had been sleeping, now seemingly serves as a convenient fall-back position to show he was not in violation of any Carrier rule or policy raising suspicion he was not being completely honest in his testimony at the investigation. Nevertheless, any suspicion Claimant was not being truthful was Carrier's burden to prove and again Carrier failed to proffer such proof.

In accord with our foregoing analysis and findings, the Board rules to sustain the instant claim. However, we do so in concurrence with Carrier's position pertaining to the remedy to which Claimant is entitled. Specifically, Claimant is entitled only to payment for "actual wage loss" offset consistent with longstanding practice and with interpretation No. 1 of First Division Award 24718. Claimant accepted a position with the RCPE after the territory he worked was bought by that road. In addition to all outside earnings, as Claimant's position was abolished June 1, 2014, it is Carrier's position Claimant would not have performed service beyond that date.

### **AWARD**

**Claim sustained in accordance with the Findings.**

**ORDER**

**This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

**Dated at Chicago, Illinois, this 28th day of November 2017.**