

NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 4055

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BURLINGTON NORTHERN RAILROAD COMPANY \*  
    (Former Frisco) \*  
    -and- \*  
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES \*  
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CASE NO. 7

AWARD NO. 7

On January 21, 1986, the Brotherhood of Maintenance of Way Employees (hereinafter the "Organization") and the Burlington Northern Railroad Company (hereinafter the "Carrier") entered into an Agreement establishing a special board of adjustment in accordance with the provisions of Section 3, Second of the Railway Labor Act, Public Law 89-456. The Agreement was docketed by the National Mediation Board as Public Law Board No. 4055 (hereinafter the "Board").

This Agreement contains certain relatively unique provisions regarding the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction is limited to disciplinary disputes involving Carrier employees represented by the Organization. Although the Board consists of three members, a Carrier Member, an Employee Member and a Neutral Member, awards of the Board only contain the signature of the Neutral Member, and the parties have agreed that such awards will be final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

In accepting the assignment, the below-signed Neutral Member agreed to render awards in disputes submitted within thirty (30) days of the date required documentation was received from the parties.

In initiating a case before the Board, the parties have agreed that they will provide the Neutral Member, by mail, with the following documentation: the notice of investigation; the transcript of investigation; the letter assessing discipline; and, the correspondence exchanged on the property. The Board has the authority to require or permit the production of such additional written evidence as the Neutral Member may decide is appropriate for review. The above documentation shall constitute the record of proceedings before the Board. The parties have agreed that it is not necessary to have oral hearings in the cases presented to this Board.

The Board's review is limited to the documentation provided and any additional argument, evidence or awards which the Board might require after review of the initial submission of the dispute. In deciding whether the discipline assessed should be upheld, modified or set aside, the Neutral Member shall determine (1) whether there was compliance with the applicable provisions of Schedule Rule 91; (2) whether substantial evidence was adduced at the investigation to prove the charges made; and (3) if discipline is found to be appropriate, whether the discipline assessed was excessive.

#### Background Facts

Mr. Kenneth D. Silva (hereinafter the "Claimant") entered the Carrier's service on May 24, 1977 as a Trackman. The Claimant promoted to the position of Machine Operator, and he was in charge of operating a Ballast Regulator on October 3, 1985, the date he was dismissed from the Carrier's service for his "alleged sleeping while on duty in (the) cab" of the Ballast Regulator he was operating while working on Surfacing Gang S-3 near Irving, Texas.

An investigation of the incident was held on October 16, 1985 in Irving, Texas. The Claimant was present and represented by the Organization. As a result of that investigation, the Carrier found the Claimant guilty of violating Rule No. 569 concerning sleeping while on duty as well as Rule No. 502 regarding employees' responsibility to devote themselves exclusively to the Carrier's service while on duty. As a result of these findings, the Carrier assessed a sixty (60) day disciplinary suspension for the alleged infractions.

### Findings and Opinion

The Carrier's notice of investigation, dated October 8, 1985, in specifying the alleged charge reads in its entirety as follows:

"This investigation is for the purpose of ascertaining the facts and determining Mr. Silva's responsibility, if any, in connection with his being dismissed from service of Burlington Northern Railroad on October 3, 1985 by Foreman, E.L. Burk, for his alleged sleeping while on duty in cab of ballast regulator BNX60-0184 at about 0950 hours on October 3, 1985, while working on Surfacing Gang S-3 near Irving, Texas."

During the course of the investigation the Conducting Officer questioned a number of witnesses regarding the Claimant's alleged failure to "change the straws" on the ballast regulator. There was a conflict in the evidence regarding the Claimant's knowledge of the alleged availability of proper tools (a particular wrench) to perform this duty; and there was also some question of whether the Claimant had been given specific instruction to perform the task in question.

The Carrier concluded, based upon its October 22, 1985 notice of discipline, that the Claimant, in addition to his alleged violation of the rule for sleeping on duty, had failed to attend to his duties and was thus also in violation of Safety Rule 502.

As is clear from the notice of investigation quoted above, the Carrier failed to include any reference to an alleged violation of Rule No 502 in its October 8, 1985 transmittal. Additionally, the notice of investigation contains no inference that the Claimant would be charged with or that an investigation would consider his alleged failure to perform the task of changing the straws on the ballast regulator on the date in question. Accordingly, this Board is constrained to find that the Carrier failed to give the Claimant any notice regarding this charge and, therefore, we will exclude this charge from our consideration of the record.

Thus the question before the Board is whether the Carrier has presented substantial evidence to establish that the Claimant was sleeping in his cab while on duty and thus violated Rule No. 569 which provides as follows:

"Employees must not sleep while on duty. Lying down or in a slumped position with eyes closed or

with eyes closed or concealed will be considered sleeping."

The rule requires the Board to make a simple finding of fact. Gang Foreman E.L. Burk, who removed the Claimant from service testified that he did not observe the Claimant sleeping in the cab of the ballast regulator. He testified that he relied upon a statement from Assistant Foreman S.L. Rhodes in concluding that the Claimant had violated Rule No. 569. Assistant Foreman Rhodes testified that when he approached the cab of the ballast regulator the Claimant was "slid down in the seat with his head leaning back on the top of the seat and his feet propped up on the levers on the front of the machine". In answer to a direct question from the Investigating Officer whether he, Assistant Foreman Rhodes, could see if the Claimant's eyes were shut he responded "No, I couldn't". Assistant Foreman Rhodes also testified that when he had first approached the Claimant in the ballast regulator the Claimant was not moving, "so I opened the door when he moved and he got up -- slid up in the seat and raised up, still in the machine".

These colloquies establish, without doubt, that no Carrier officer observed the Claimant sleeping or with his eyes closed. The Carrier's case is built upon pure speculation. There is no reliable evidence in the record to conclude that the Claimant was sleeping, or that he had his eyes closed or that he concealed himself in violation of Rule No. 569.

Obviously, Carrier officers were upset that Claimant Silva was not out of his cab changing the straws on the ballast regulator. In fact, when Assistant Foreman Rhodes opened the cab door and spoke to the Claimant his concern was not with the Claimant's alleged sleeping but with the Claimant's failure to use an available wrench to perform the work in question. However, the Carrier cannot convert its distress regarding the Claimant's alleged failure to perform certain work into a sustainable charge of "sleeping on duty", unless there is some independent proof that the Claimant was actually sleeping or in a state that could be properly considered sleeping under the Rule.

As the Carrier has failed to establish such proof, the claim will be sustained.

Award The claim is sustained. The Carrier is directed, within fifteen (15) days of the receipt of this Award, to pay the Claimant for all time lost as a result of the improper disciplinary suspension, to make the Claimant whole for any loss in benefits or seniority he may have suffered and to immediately expunge any reference to this discipline from his Personal Record.

This Award was signed this 20th day of December 1986 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

Richard R. Kasher, Neutral Member  
Public Law Board No. 4055