

Award No. 4866

Docket No. 4802

2-CB&Q-MA-'66

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Donald F. McMahon when award was rendered.

**PARTIES TO DISPUTE:**

**SYSTEM FEDERATION NO. 95, RAILWAY EMPLOYEES' DEPARTMENT, A. F. of L.-C. I. O. (Machinists)**

**CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY**

**DISPUTE: CLAIM OF EMPLOYEES:**

1. That under the controlling agreement Machinist E. H. Warth was unjustly discharged from service at 10:15 A. M., July 20, 1964, at West Burlington, Iowa.

2. That accordingly the Chicago, Burlington & Quincy Railroad Company be ordered to compensate Machinist E. H. Warth for all time lost between 10:15 A. M., July 20, 1964 and November 23, 1964 when the carrier reinstated him with service rights unimpaired. This to include premiums for Hospitalization and Life Insurance.

3. That the Carrier be ordered to clear this charge from his personal record.

**EMPLOYEES' STATEMENT OF FACTS:** Machinist E. H. Warth, hereinafter referred to as the claimant was employed by the Chicago, Burlington & Quincy Railroad, hereinafter referred to as the carrier, for a period of approximately 10 years at its West Burlington, Iowa shops.

On July 20, 1964 the claimant was engaged in making repairs to a boring mill and was assisted by another Machinist, J. W. Darnold. They were to change the lower bearing and this necessitated getting into the pit under this machine and first draining the oil from two supply cavities. The claimant was draining the oil into a bucket from the first cavity when he discovered they would have to have a different wrench in order to drain the second cavity. Machinist Darnold went to the tool room to get this wrench while the claimant stayed in the pit to watch the bucket so that it did not overflow.

Supt. of Shops W. C. Horst appeared on the scene and summoned the Ass't Supt. upon which they accused, the claimant, of sleeping and dismissed him.

The Shop Supt. had arrived at this pit area immediately following Machinist Darnold having talked to claimant and leaving to obtain the wrench.

After the claimant was dismissed Machinist R. H. Hugg was assigned to help Machinist Darnold on the repairs and to continue draining the oil into the bucket in the pit.

Under date of July 23rd the claimant addressed a letter to Shop Supt. Horst requesting an investigation in accordance with the provisions of the controlling agreement.

The investigation was held on August 4, 1964. The transcript was incomplete and under date of August 8, 1964, General Chairman DeHague, protested this fact.

A revised page 19 of the transcript was transmitted to him on September 23, 1964.

Also in the investigation a letter was entered on page 26 which was signed by Foreman O. W. Sandberg and embodied a statement supposedly made to him by the claimant.

This dispute was handled on the property with all carrier officers who handle disputes, including carriers highest officer.

Under date of November 7, 1964, General Chairman DeHague requested that the carrier at least agree to re-instate the claimant immediately without prejudicing his right to continue the claim for time lost and his record to be cleared. This was accepted by the carrier under date of November 18, 1964 when the chief mechanical officer wrote to General Chairman DeHague that he would re-instate the claimant with the understanding that his claim for pay and for his record to be cleared might be further appealed. This was accomplished and the claimant returned to service on November 23, 1964.

The carrier refused in subsequent conference to adjust this claim any further and so all statements used herein by the employes were transmitted to the carrier by letter dated February 20, 1965.

The agreement effective October 1, 1953, as it has been subsequently amended, is controlling.

**POSITION OF EMPLOYES:** It is submitted that under the circumstances surrounding the charges against the claimant, that the carrier did not give him fair treatment when they removed him from service. The carrier charged him with being asleep and this charge they could not prove because: —

1. The investigation record does not in any way convict the claimant of the charge.

2. That the claimant certainly was awake up to within a very short while before being observed by Supt. Horst. This shows that he had no time to become asleep in such a short period.

3. The claimant was performing a job during this period of observation by the Supt., and this job did not require a large amount of movement. In fact the claimant had to be replaced, after being dismissed, by another machinist who continued this job of draining oil.

4. In the investigation it was dearly brought out that no witness at any time observed the claimant's face. So in an attempt to make some evidence the carrier introduced a false statement on page 26 signed by Foreman O. W. Sandberg. The claimant denied talking to this Foreman O. W. Sandberg.

5. One carrier witness refused to even assume that the claimant was asleep. One pertinent question and answer to this effect was left out of the transcript of the investigation.

6. This same carrier witness admitted in the investigation that to get the claimant's attention, above the noise and clamor of the machines, he merely touched him on the arm and the claimant responded immediately. This certainly is not the reflex of a sleeping man.

7. If an employe was ever faced with tactics of a Kangaroo Court the claimant is such an employe reflects that Shop Superintendent Horst was the accuser and also acted as a witness while Assistant Shop Superintendent Bignell was a witness against the claimant and also acted as the judge and jury in dismissing the claimant. It is inherent in a discipline rule whether spelled out or not that if a hearing is held that it be fair, however, in this case it could hardly be considered a fair hearing when conducted in the manner that this case was handled. The employes contend that for this reason alone the claim is subject to be upheld without considering other features.

On the basis of these facts it is obvious that this carrier capriciously, unjustly and arbitrarily removed the claimant from service, and the claimant is entitled to the full and complete protection of the controlling agreement, to be restored to service with all rights unimpaired and compensated for all time lost in accordance with the following pertinent language of Rule 31 (a) reading:

“\* \* \* If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from said suspension or dismissal, less any amount earned during such period of suspension or dismissal.”

**CARRIER'S STATEMENT OF FACTS:** The West Burlington Shops of the Burlington Railroad are located 210 miles from Chicago at West Burlington, Iowa. This is the principal locomotive shop of this carrier, and the point where major repairs and overhauls to diesel locomotives are conducted. There are about 300 employes working at the West Burlington Shops. There are also many different types of shop machinery at this location.

The claimant in this dispute is employed at the West Burlington Shops as a machinist. He is a young man, now 33 years of age. During his off duty hours he conducts a heavy automobile repair business at his home.

On Monday, July 20, 1964 Machinists Warth and Darnold were assigned to make repairs on a boring mill in the shops. There is a pit underneath this machine approximately 48 inches deep and about 6 feet long. The claim-

ant entered this pit at approximately 9:30 A. M. and drained oil from the lower reservoir on this machine. They did not have a proper size wrench for removing the drain plug in the upper cavity, and Mr. Darnold went to secure this wrench.

Shortly before 10:00 A. M. the superintendent of the West Burlington Shops, in making his tour of the premises, came upon this boring mill with Machinist Warth sitting in the pit. Machinist Warth gave all indications of being asleep. Shop Superintendent W. C. Horst watched the claimant for a few minutes, and then summoned Lead Machinist John Sink to get Assistant Shop Superintendent Bignell and bring him to this location.

At 10:15 A. M. Messrs. Bignell and Sink arrived at the location of this machine and Machinist Warth was still asleep in the pit. They continued to watch him for a few minutes longer, and then Lead Machinist Sink touched him and woke him up.

Machinist Warth was brought to the office and given written notice that he was being dismissed from service. This notice read as follows:

“Effective 10:15 A. M. this date, July 20, 1964, you are being removed from service account being found asleep in pit of boring mill to which you were making repairs.”

Following his dismissal, the claimant requested an investigation. A fair and impartial investigation was held in accordance with the rules of the collective bargaining agreement on August 4, 1964.

A claim was subsequently filed for the reinstatement of Machinist Warth with pay for all time lost. In conference with chief mechanical officer on November 2, 1964, reinstatement on a leniency basis was offered through the general chairman. The organization rejected this offer, but by letter dated November 7, 1964 requested claimant be returned to work on condition that his claim for pay could be continued. This offer was accepted by the chief mechanical officer, and he resumed work with seniority unimpaired on November 24, 1964, or after being out of service a period of 4 months.

Correspondence between General Chairman G. R. DeHague and Chief Mechanical Officer R.E. Taylor continued, and under date of November 28, 1964 the general chairman offered to settle the pay loss claimed for a total of 36 hours at the machinists' rate. This was rejected on the basis that the discipline was justified. The claim for pay lost is now before this Board for decision.

**POSITION OF CARRIER:** The issue in this dispute is whether the dismissal and reinstatement four months later of Machinist E. H. Warth constituted unjust discipline, as alleged by the organization in its statement of claim. This issue in turn depends on the Board's opinion of whether the carrier had reasonable grounds for accepting the evidence brought out at the transcript that Machinist Warth was asleep on duty on July 20, 1964.

The organization places its chief reliance on the fact that none of the eye witnesses could see Mr. Warth's face while he was in the pit under the boring mill, and contends that there was only an unfounded assumption on the part of the carrier that he was asleep. On this basis it alleges the carrier erred in dismissing him from service.

The Carrier's position is that:

- (1) There were three eye witnesses whose testimony was not impeached, and all of them gave evidence at the investigation that Machinist Warth gave the appearances of being asleep. The only challenge to this testimony was that of the claimant himself who denied it.
- (2) The claimant's own actions after he was accused of being asleep on duty evidences his guilt of this offense.
- (3) The complete record supports the discipline that was assessed against this employe and the Board should not interfere with the Carrier's discretion in this case.

The agreement between the Chicago, Burlington & Quincy Railroad and System Federation 95 which became effective October 1, 1953 contains Rule 31 applicable to discipline. This provision grants an investigation upon request to employes who are disciplined, and states that —

"If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from said suspension or dismissal, less any amount earned during such period of suspension or dismissal."

The organization relies on this sentence in the agreement to support its claim for the pay claimant lost. Such claim is of course, under the above rule, subject to deduction for any earnings in outside employment Machinist Warth may have had during the 4 months he was suspended from service.

Of course, the organization has the burden of proving that the claimant was unjustly disciplined. In carrying that burden, it has alleged that the claimant was not asleep. This is of course in recognition of the fact that sleeping on duty is a serious offense which justifies dismissal. This has been the consistent holdings of the Adjustment Board. See, for example—

**Second Division Award 1541, Machinists vs. MP, Referee A. E. Wenke**

"Sleeping on duty results in a complete neglect of duty and is subject to discipline."

A complete dismissal was upheld in Award 1541 and in many other cases which will be cited in this submission. Realizing this, the organization has argued that the claimant was not asleep, in spite of the evidence to the contrary.

Sleep has been defined in the following language:

**"Corpus Juris Secundum, Volume 80, page 1332**

Sleep — A state of repose or quiescence, occurring periodically in man and animals characterized by complete or partial unconsciousness, relaxed condition of body and general diminution of vital

functions; also a dormant or quiet condition; any condition of inactivity, torpor or rest."

The three witnesses who observed claimant while he was in this pit under the boring mill on July 20, 1964 all testified that he gave every indication of being asleep.

The Board's attention is first directed to the testimony of Superintendent of Shops W. C. Horst appearing at page 3 of the record. He described the circumstances surrounding his discovery of the claimant under the boring mill in the following language:

"Shortly before 10:00 A. M. in making my rounds I heard an air blast and investigating to see where it was coming from, I noticed a hose that led to a pit under the Cutmaster Boring Mill, which is located in the wheel bay, and at the same time observing part of the back of a man, as well as the top of his head, apparently in a stationary position. After observing this man for a short time at 10:02 A. M. I summoned Mr. John Sink who was in the near vicinity to get hold of Assistant Shop Superintendent C. R. Bignell and bring him to this boring mill, which Mr. Sink did. Both arrived at the boring mill at 10:15 A. M. at which time I called Mr. Bignell's attention to the condition of the man and observing this man until 10:15 A. M. I had satisfied myself that insolong as a man's body had made no movement but was constantly nodding his head that he must be asleep. On arrival of Mr. Bignell and Sink I disappeared from the scene without putting any words in either one of these men's mouth or mind."

Mr. Horst also testified at pages 4 and 5:

"36. Q. When you first observed this employe in the pit, where was he positioned?

A. He was positioned in the opening after the pit cover had been removed to where approximately half of his head was on the open side of the pit, naturally his body extending to the outside somewhat more.

38. Q. How close to the pit were you when you observed this employe?

A. No more than 6 ft. at the full time I was at this machine.

39. Q. Due to the nature of the construction of this pit, did this position you approximately over the top of this employe so that you would have to look down on him?

A. Yes, the vision I had was over, down and at one angle.

40. Q. You stated in earlier testimony that you observed this man from shortly before 10:00 A. M. until the arrival of Mr. Bignell and Mr. Sink at approximately 10:15 A. M. During this observation was any movement at all made by the employe in this pit?

A. I saw no movement of the body except the head.

41. Q. Would you describe the movement of this individual's head?

A. It was nodding.

42. Q. Could you observe the arms of this individual?

A. No.

43. Q. Was there any movement whatsoever during the period of time you observed this individual?

A. None whatever.

44. Q. Could you from your position observe the side of the employe's face?

A. No, the left ear only.

45. Q. Was this employe in a sitting position?

A. That I can't say.

46. Q. Was this employe asleep?

A. He was." (Emphasis ours)

The testimony of Assistant Shop Superintendent C. R. Bignell at page 7 of the record corroborates that given by Mr. Horst. Here Mr. Bignell stated —

"73. Q. How long did you observe Mr. Warth in the pit?

A. I would say approximately 3 minutes, thereabouts.

74. Q. How close were you to Mr. Warth when you observed him?

A. I was standing 5 ft. from pit entrance.

\* \* \* \* \*

79. Q. Was Mr. Warth doing any work?

A. He was not.

(Page 8)

80. Q. Was he motionless?

A. He was, except for one small nod of his head downward.

\* \* \* \* \*

85. Q. Was Mr. Warth asleep in the pit?

A. He was. (Emphasis ours)

86. Q. Who awakened Mr. Warth?

A. Mr. Sink."

The testimony of Lead Machinist J. L. Sink appears at pages 11 and 12 of the transcript. Here Mr. Sink stated —

"117. Q. Did you see his head?

A. Yes I could.

118. Q. Did you see his shoulders and upper part of his body?

A. Yes I could.

119. Q. Could you see either one of his arms?

A. I am not really sure.

120. Q. Was any movement evident by Mr. Warth?

A. I did not see any movement.

121. Q. Did you observe Mr. Warth for the same amount of time that Mr. Bignell did?

A. I did.

122. Q. Was Mr. Warth asleep?

A. He was in a still position.

123. Q. How close were you to Mr. Warth?

A. About 6 ft.

124. Q. Were you looking downward upon him, and did you have the same view of him that Mr. Bignell had?

A. I did.

125. Q. Was Mr. Warth's head bobbing in any way?

A. I did not see his head bob at all. It may have, but I did not observe this.

\* \* \* \* \*

127. Q. How did you awaken Mr. Warth?

A. I reached down and grabbed him on the shoulder and stated that Mr. Horst had been observing him in the pit and that he should get out."

This testimony by these two officers and the lead machinist constitutes more than substantial evidence that the claimant was asleep in the boring

mill pit on July 20, 1964. Their testimony has not been impeached in any manner. There is no way for the organization to minimize its effect. The only opposite view was the self-serving denial by Machinist Warth that he was asleep. On balance, the evidence given by these three people must considerably outweigh claimant's uncorroborated denial.

The Board must also take note of the conduct of Machinist Warth on July 20, 1964, which is not disputed in the record, and which clearly indicates that he was asleep while in the boring mill pit. Please note the testimony of Assistant Shop Superintendent C. R. Bignell at page 8 of the record, involving his conversation with Machinist Warth when he came out of the pit after he had been awakened:

"92. Q. Did you question Mr. Warth as to what he was doing in the pit?

A. I did.

93. Q. What was his answer?

A. He was waiting for Mr. Darnold to return with special tool.

94. Q. Did you ask if he was asleep?

A. He said he was real still down there." (Emphasis ours)

Surely Machinist Warth would not have given an answer like this if he had been awake.

It is also apparent from this record that Machinist Warth did not deny being asleep when he was first confronted with this accusation. This is a more important piece of evidence on the issue than his denial at the investigation on August 4, 1964, fifteen days after the incident. By the time of the investigation the claimant had opportunity to evaluate various courses of action, and consult with Organization representatives. However, when first accused on the morning of July 20, of being asleep, he did not deny this accusation.

For evidence which conclusively proves his failure to make a denial of the accusation on the 20th, see Mr. Bignell's letter of July 21, 1964 to Shop Superintendent W. C. Horst, quoted at page 9 of the transcript. The letter reads in part —

"When Mr. Warth came up out of the well, I asked him, 'What on earth were you doing sitting down in the well asleep?' and he advised that he was waiting for Machinist J. W. Darnold to return with wrench to remove plug from bottom of machine. I told him to get his timeslip and give it to me as I was taking him out of service for sleeping."

\* \* \* \* \*

"99. Q. Mr. Bignell, after you questioned Mr. Warth, and I quote from the 6th paragraph of this letter, 'What on earth were you doing sitting down in the well asleep?', did Mr. Warth state that he was not asleep?

A. He did not."

Also at page 10 of the transcript Mr. Bignell testified about the letter of dismissal given Mr. Warth on July 20, 1964, which also stated that he was "found asleep in pit of boring mill". Mr. Bignell testified —

"101. Q. Did Mr. Warth sign this letter in your presence?

A. He did.

102. Q. Did he read this letter before he signed it?

A. He did.

103. Q. Did he in any way protest the wording or the term "asleep" in this letter?

A. He did not."

The testimony of Lead Machinist J. L. Sink corroborates Mr. Bignell's version of the facts that Mr. Warth did not deny being asleep when first accused of this. Please see page 13 of the record where Mr. Sink testified —

"142. Q. Did you hear conversation between Mr. Warth and Mr. Bignell regarding the fact that Mr. Bignell said that he was taking him out of service account he was asleep?

A. Yes, I did.

143. Q. Did Mr. Warth at that time deny that he was asleep?

A. No.

144. Q. Did Mr. Warth in any way disagree with Mr. Bignell?

A. No."

The testimony of the claimant confirms Mr. Bignell's version of what occurred when he came out of the pit. This testimony appears at page 18 of the record in the following words:

"206. Q. What did Mr. Bignell say to you when you came out of the pit?

A. I don't recall the exact words, he accused me of sleeping and told me to turn in my timeslip.

207. Q. When Mr. Bignell accused you of sleeping, did you tell him you weren't sleeping?

A. no."

The carrier submits that it is simply human nature to deny an unfair accusation immediately at the time it is leveled, if the accusation is untrue. Machinist Warth's failure to deny that he was asleep immediately upon being accused of this offense by Assistant Shop Superintendent Bignell the morning of July 20 must surely be considered as evidence pointing to his guilt of that offense. If he had been awake his immediate response would have been,

"I was not asleep". Silence in these circumstances, where any reasonable person would speak is a form of admission which the Organization cannot minimize. In close proximity to the situation, Machinist Warth failed to do what any ordinary person would do, if they were awake; failed to deny the accusation that he was asleep on the job.

This failure to deny the accusation, couples onto and corroborates the testimony of Messrs. Horst, Bignell and Sink. The shop superintendent and assistant shop superintendent were definite in their statements that the claimant was asleep on the morning of July 20, 1964. Lead Machinist Sink's testimony was to the effect that the claimant did not move during the time he watched him, and gave every indication of being asleep. In complete agreement with these three witnesses, and pointing up the truth of their statements, is the claimant's own conduct when awakened by Machinist Sink, and when accused of being asleep by Assistant Shop Superintendent Bignell. The cumulative total of all of this evidence completely overshadows his denial of the offense at the investigation, 15 days after it was committed.

The organization will concede that in any event, Machinist Warth was not performing an active service for the Company during the period of approximately 15 minutes from 10:00 A.M. to 10:15 A.M. on July 20, 1964. This is obvious from his own testimony at page 17 of the record. Here Machinist Warth stated —

"201. Q. Did you previously state that you sat in the pit waiting for Mr. Darnold?

A. Yes, 10 or 15 minutes.

202. Q. Was there any other work you could have been doing while Mr. Darnold went after the wrench?

A. We had to drain upper cavity before we could do any work.

203. Q. I asked you if there was anything else you could have done?

A. We possibly could have taken lower plate off machine.

204. Q. Why were you not in process of removing this plate?

A. I was letting remaining 2 and 3 gallons of oil drip into bucket."

The claimant's denial of being asleep must be subject to question by any version of the facts. He was unable to account for any other productive work during this period, other than "letting remainder 2 or 3 gallons of oil drip into bucket.

Surely the carrier has a right to expect its journeymen machinists to be more productive, when they are on duty, if they are awake.

The principal contention of the organization, in arguing this case on the property, was that none of the witnesses observed Machinist Warth's face and therefore could not testify that he was asleep. This charge was contained in the general chairman's letter of October 6, 1964 to the chief mechanical officer, expressed in the following language:

"It was also fully established that no one observed his face and therefore were completely in the wrong on accusing him of sleeping based merely on assumption. One Company witness refused to even assume that he was sleeping based on such unfounded assumptions."

The carrier submits that it is not necessary to observe the face of a person sleeping in order to state with conviction that they are asleep. There are many indications of sleep other than closed eyelids.

The testimony of Mr. Horst was that he was standing six feet away from Machinist Warth for fifteen minutes, and his vision was over and down and at one angle toward him. From his position he testified that he could observe Machinist Warth's left ear. He also observed his head nodding during the 15 minute period he had him under observation. Mr. Horst was definite in his testimony: he said Machinist Warth was asleep.

Assistant Shop Superintendent Bignell testified that he was standing about five feet away from Mr. Warth, and noted that he did see a portion of the claimant's face. Please see page 7 of the record where Mr. Bignell stated:

"76. Q. Could you see Mr. Warth's body?

A. I could see his back on the left side, back of his head, and I would say the left side of his face to his ear."

Mr. Bignell's testimony was also definite and it was not based on assumption. He was asked —

"85. Q. Was Mr. Warth asleep in the pit?

A. He was."

The General Chairman obviously referred to Lead Machinist Sink as being unable to testify that Mr. Warth was asleep. This is correct. However, Mr. Sink did state —

"122. Q. Was Mr. Warth asleep?

A. He was in a still position."

This is positive testimony that was not impeached in any manner at any time. It is not based on assumption. It is based on the personal observation of these three witnesses.

Also in handling the claim on the property, the general chairman submitted a number of statements which purport to supplement the investigation record. These statements will no doubt be submitted to the Board as part of the petitioner's case. However, since all of the eye witnesses to the offense testified at the investigation, statements by other employes can add or detract very little. Furthermore, the decision must be made on the basis of the evidence taken at the investigation. Extra-investigation statements are not proper and this has been the consistent holding of the Board in all discipline cases. Please see, in this regard, First Division Awards 5555, 10312, 13604, 13606, 13844, 14445, 15319, 15745, 16134, 16301, 16411, 18327, 19394, 20164 and 20438. In Award 15745 the First Division without a referee stated —

"In Award 15319 it was held that in passing on the question of whether there is any evidence of guilt — "\* \* \* the scope of our review is limited to the testimony \* \* \* taken at the investigation."

The carrier submits that the record supports the discipline assessed against Machinist Warth by evidence which is overwhelming. In discipline cases the evidence of guilt need only be substantial. In another case of an employe sleeping on duty the Board held —

**Second Division Award 1979, Mach. vs. L&N, Referee Stone**

"Such hearing is not analogous to a criminal proceeding, requiring 'irrefragible evidence' of guilt, as urged by employes. We properly determine only whether there appears to be a decision without prejudice and penalty without caprice. A careful review of the evidence in the record before us convinces that carrier representatives decided fairly upon substantial evidence."

In Second Division Award 3430 a car inspector who was found asleep on duty denied that fact at the investigation. Two foremen testified they observed him sleeping, and the Board held —

**Second Division Award 3430, Carmen vs. St.LSW, Referee Murphy**

"We do not feel that this Board should substitute its judgment for that of the carrier unless the evidence proves that the carrier assessed an unjust or discriminatory penalty. The evidence here does not support such a contention."

The Board has also consistently affirmed the principle that the carrier must judge the credibility of the witnesses, and on disputed points the Board should not set aside that judgment. Please see the findings in another case of an employe accused of sleeping on duty where the following was stated:

**Second Division Award 4123, Elect. vs. AT&SF, Referee Johnson**

"The principle is well settled that this Board is not a trier of facts and will not determine the weight of evidence, but will examine it to determine its sufficiency to sustain the discipline. We cannot, therefore, hold that the hearing officer should have believed the claimant's denial and disbelieved the testimony of two witnesses that the claimant was asleep on the job, and of another witness working in the same room who stated that he believed claimant was asleep, but explained that he 'couldn't see him directly.'"

This same conflict in evidence appears in this case. Two witnesses testified that claimant was asleep and a third one that he was in a "still position." The Board cannot accept claimant's denial, and disbelieve this affirmative testimony.

Another principle firmly established before this Board is that it will not set aside discipline assessed by the carrier unless an abuse of discretion has occurred. It must be remembered that this claimant was reinstated approximately four months after his discharge. The Board cannot hold this discipline to be so excessive as to constitute an abuse of discretion. The cases

on this point are numerous, and we will briefly review three additional sleeping on duty cases where this principle was followed:

In Second Division Award 1795 a carman was dismissed for sleeping on duty and was still out of service at the time his case was brought to the Board. The Board held —

**Second Division Award 1795, Carmen vs. T&P, Referee Wenke**

“Was dismissal unreasonable? The charge is a serious one and claimant admitted that on one other occasion, August 1, 1951, he had been off duty in a card game. For this offense his record had been assessed 45 demerits. We do not think it can be said, under these circumstances, that it was.”

In Second Division Award 1828 a coach cleaner was dismissed for sleeping on duty. This employe was likewise out of service and not reinstated at the time the case was decided by the Board. The Board found sufficient evidence to support the carrier's finding that the claimant had been lounging on a pile of mail sacks, and dismissal was upheld.

Award 4629 of this Board was decided on December 11, 1964. In that case an employe was dismissed for sleeping on duty, and the Board held —

**Second Division Award 4629, Elect. vs. C&NW, Referee Whiting**

“Claimant was charged with being asleep on duty. There was substantial credible evidence supporting the Carrier's decision that he was guilty of the charge.

Sleeping while on duty is generally regarded as an offense which justifies discharge and, since the claimant had only about three years' service with the Carrier, the penalty of discharge cannot be considered excessive.” (Emphasis ours)

In the light of these awards surely the discipline assessed here cannot be held excessive, arbitrary or abuse of the carrier's discretion.

It will be noted that in his Statement of Claim, as well as payment for time lost the claimant has included in part 2, “This to include premiums for hospitalization and life insurance.” Such an element of damage is not properly includable within Rule 31 of the agreement between the parties. In that rule the carrier is bound only to compensate an employe unjustly disciplined “for wage loss, if any, suffered by him, resulting from said suspension or dismissal, less any amount earned during such period of suspension or dismissal.” In this regard see Second Division Awards 3883, 4532 and 4557.

In view of all the evidence in this case, the Board has no alternative but to deny this claim in its entirety.

\* \* \* \* \*

**FINDINGS:** The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carrier and the employe or employes involved in this dispute are respectively carrier and employe 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.

This cause concerns the discharge of Machinist E. W. Warth, from the service of Carrier on July 20, 1964, at West Burlington, Iowa.

The Organization is requesting the claimant be restored to his former position with all service rights unimpaired. In addition request is made to require Carrier to pay premiums for Life and Hospitalization insurance to Travelers Insurance Company, for the period of said discharge, and to clear his personnel record of the charge preferred against him by Carrier.

He was reinstated to service of the Carrier on November 23, 1964. The period of time involved here is from July 20, 1964 thru November 23, 1964.

The record before us disclosed that claimant was accused of being asleep while at work in the pit of the Boring Mill, West Burlington Shops, at about 10:00 A. M., July 20, 1964. Investigation and Hearing were furnished claimant by the Carrier on August 4, 1964, in the Shop Superintendent's Office at West Burlington Shop. Said Hearing was conducted by S. F. Kuzma, Assistant Master Mechanic, Galesburg, Illinois. Carrier produced testimony at the Investigation to support its charge that claimant was asleep, in the Boring Mill Pit where he was preparing to make necessary repairs on the Cutmaster Boring Mill, which required mechanics to work in the pit, in order to make repairs required by Carrier. Claimant was engaged in draining oil from the lower part of the machine. He was working with his Foreman James Darnold.

It became necessary while draining the oil from the machine, for claimant to require a special type wrench to drain the upper reservoir of the machine. Not being equipped with this wrench, Darnold went to the shop tool crib for this equipment. Claimant in his absence was in the pit draining the oil from the bottom of the machine. During the absence of Darnold, Superintendent Horst came near the pit, and decided claimant was asleep, but made no effort to talk to or wake claimant. The Superintendent came no closer than six feet from claimant, and observed him for about fifteen minutes. While observing claimant he sent word to C. R. Bignell, Assistant Shop Superintendent and J. L. Sink, Lead Machinist to come to the pit. Mr. Horst testified that claimant was in the pit but he could not recognize him from where he stood. He stated he could see a part of a man's back and the top of his head and was in a stationary position. This observation went on for about 15 minutes, before Mr. Bignell and Sink arrived in response to Mr. Horst's message. Mr. Bignell testified he and Mr. Sink arrived together, at 10:10 A. M., and observed claimant until 10:13 A. M. He stated claimant was asleep, he also stated he could see the back of claimant's head, and the left side of his face to the ear. That he was motionless except for one nod of his head, and was in a sitting position. All this observation was made from a distance of about 5 feet from the pit. Mr. Sink testified he observed claimant from a distance of 2 feet from the pit, where he observed his head and shoulder in the pit. He did not at any time say claimant was asleep, and that he

couldn't swear claimant was asleep. Also stated that claimant's head was observed and was about 5 to 8 inches below the floor level, also he was sitting on some 4 x 4 blocks.

From this evidence we must determine whether or not claimant was guilty as charged.

The Docket here shows that claimant had no witnesses present to testify in his behalf, altho Carrier asked him if he had any witnesses present, and his answer was "Yes". H. J. Henry, Local Chairman did testify on behalf of claimant as to his qualifications to work, but offered no testimony in reference to facts concerning the discharge of claimant.

It is noted that after the discharge of claimant and following the Investigation and Hearing date, the Organization in its submission attached Exhibits B, C, D, I and J, all purporting to be statements or testimony of employes, on behalf of the claimant. This Division has no authority to consider such exhibits, as evidence and will receive no consideration in arriving at an Award herein. Carrier had no opportunity to meet such information, and it is our view claimant had every opportunity to present such witnesses at the hearing held, which he failed to do.

The record shows that only the Shop Superintendent and the Assistant Shop Superintendent, testified the claimant was asleep during their observation of claimant on behalf of Carrier. The Lead Machinist made no specific statement the claimant was, and testified he could not swear claimant was asleep.

After reviewing the Docket here, and considering the facts as produced, we find that the claim should be sustained. Further the proof on behalf of Carrier, that their own witnesses, observing claimant from various distances from six feet to two feet, is not convincing that claimant was asleep, when the only witness Mr. Sink, testified he could not swear claimant was asleep, and he observed claimant a distance of two feet and testified he observed claimants head some 6" to 8" below ground level.

In view of all the record before us, we find the claim should be sustained, except that we make no finding in reference to insurance premiums for Hospitalization and Life Insurance. We can find no requirement in the Agreement between parties which makes any reference to payment of premiums by Carrier. Such claim for insurance premiums is not a wage loss as described in Rule 31 of the Agreement.

#### AWARD

Claim sustained in accordance with the foregoing Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy  
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of May 1966.

Keenan Printing Co., Chicago, Illinois

Printed in U.S.A.