

Referee Irwin M. Lieberman

PARTIES TO DISPUTE: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees  
R. C. Haldeman, Trustee of the Property of Lehigh Valley Railroad Company, Debtor.

STATEMENT OF CLAIM: Claim of the Security Officers and Patrolmen Section, BRAC (P-29) that:

1. Carrier violated the Agreement between the parties when it improperly and unfairly dismissed Patrolman Leonard J. Yanick from service effective May 16, 1974.
2. Carrier shall reinstate Patrolman Yanick to his former position; clear his record of the charge, and compensate him for all lost time plus any hospital or medical expense incurred as a result of loss of benefits.

OPINION OF BOARD: Claimant, a patrolman in Carrier's Police Department, was regularly assigned to a Shift starting at 11:59 P.M. running to 7:59 A.M. He was dismissed from service on May 16, 1974 after being found guilty on the following charges:

"NEGLECT OF DUTY

"(1) Failing to properly patrol and protect your assigned post, Post No. 22, assigned hours: 12:00 Midnight - 8:00 A.M., location: Oak Island piggy-back installation, Friday 4/19/74.

"(2) Failing to make prescribed one-hour calls to desk sergeant.

"(3) Sleeping while on duty."

Petitioner alleges that the Claim should be sustained for a series of reasons: 1. Claimant was not afforded a fair and impartial hearing: a. Claimant was called as the first witness prior to testimony by the accuser and other Carrier witnesses; b. the final decision was rendered by the Captain of Police and not the hearing officer; 2. there was no affirmative proof that

Claimant failed to properly patrol on the night in question; 3. Claimant's failure to report to the desk sergeant was caused by a failure of his portable radio unit (a common problem); 4. Claimant denied he was sleeping and it was not established by credible testimony.

Carrier argues that it is customary on this property to question the Claimant as the first witness with many Organizations by agreement and further that there is nothing in the rules which precludes such procedure. Additionally, Carrier claims that the testimony adduced at the hearing was ample to support the conclusion of guilt and hence there is no basis for the Board to substitute its judgement for that of Carrier.

With respect to the procedural questions raised we note first that these hearings are not criminal trials and differ in many respects from such trials: e.g. witnesses are not sworn; strict rules of evidence are not followed. The differentiation has been noted in many awards of all Divisions of this Board as well as by the courts. In many disciplinary hearings the only witness is the Claimant, and this is not considered a fatal flaw. In the dispute before us we find nothing in the rules requiring testimony in any particular order. Claimant was aware of the charges and was afforded opportunity to produce evidence in his own behalf as well as cross examining Carrier's witnesses. His rights were not impaired by the order of proof (see 2nd Division Award 3900 which is directly in point). As to the question of the determination of guilt, we do not find that the hearing officer must sign the penalty letter. Further it would be an unsupported inference to assume that the hearing officer made no determination of credibility or other recommendations in this case. For the reasons indicated, we find no merit in the procedural questions raised by the Organization.

The Carrier's conclusion of Claimant's guilt is supported by probative evidence, with respect to all three charges. Although there was a denial by Claimant, we may not make findings of credibility; that prerogative is retained by Carrier's hearing officer. It must be concluded that the penalty was appropriate in the circumstances and should not be overturned.

#### FINDINGS:

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

The carrier and the 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.

The parties to said dispute waived right of appearance at hearing, but were granted privilege of appearing before the Division with Referee sitting as a member thereof, to present oral argument.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Fourth Division

ATTEST: Executive Secretary  
National Railroad Adjustment  
Board

By: *James J. Decker*  
Assistant Executive Secretary

Dated at Chicago, Illinois, this 16th day of September, 1975.