

The Second Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

Parties to Dispute: { International Brotherhood of Boilermakers, Iron Ship
Builders, Blacksmiths, Forgers and Helpers
{ National Railroad Passenger Corporation

Dispute: Claim of Employees:

1. That the Carrier violated Rule 23 of the Current Agreement on December 8, 1978 on which date Boilermaker E. J. Henderson was terminated from the service of the National Railroad Passenger Corporation.
2. That accordingly, the Carrier be ordered to reinstate Boilermaker Henderson to service with his seniority rights, vacation rights, and all other benefits that are a condition of employment unimpaired, with compensation for all lost time, reimbursement of all losses sustained account loss of coverage under health and welfare and life insurance agreements during the time held out of service.

Findings:

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

The carrier or carriers 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 waived right of appearance at hearing thereon.

The claimant had been employed with the carrier since November 17, 1975. Prior to his dismissal, he was holding the position of Boilermaker at the Carrier's Wilmington maintenance facility in Wilmington, Delaware.

On November 24, 1978, the Carrier directed a notice of investigation. He was to appear on November 27, 1978, on the following charge:

"Violation of the National Railroad Passenger Corporation Rules of Conduct, Rule 'L', in that:

At approximately 1:40 p.m., November 17, 1978 at the pantograph repair location, north end, #4 Track, Locomotive Shop, in walkway behind parts rack, you were observed sleeping while on duty and under compensation."

For the record, Rule "L" reads as follows:

"Employees shall not sleep while on duty, be absent from duty, exchange duties or substitute others in their place, without proper authority.

As a result of the investigation the carrier dismissed the claimant effective December 8, 1978. The claimant was notified of such by letter of the same date.

The carrier argues that there is more than substantial evidence to support the charge and when the claimant's past record is taken into consideration dismissal is justified. The carrier's first witness was Mr. Roy L. Roop, General Foreman. Mr. Roop testified that at approximately 1:40 p.m. on November 17, 1978, he noticed Mr. Henderson sitting behind the parts rack and that he "appeared" to be sleeping. He then summoned Mr. C. J. Parke and Mr. R. J. Parke, both foremen, to observe Mr. Henderson. He recalled Mr. Henderson was "sitting down, leg raised position, his arm was on his leg and his head was resting on his hand in a downward position and eyes closed". Three minutes had lapsed between when first observing Henderson and when he got the Parkes. Henderson's position had not changed when he returned with the Parkes. Mr. Roop then shook Mr. Henderson "lightly" the first time, "vigorously" the second time. Mr. Roop testified he then asked Mr. Henderson what he was doing. Allegedly, his reply was "I guess I am getting up". Under cross examination, Mr. Roop indicated the first time he nudged Mr. Henderson he nudged him with his foot and the second time with his hand.

Mr. C. J. Parke testified that Mr. Henderson was observed by himself, Mr. Roop and Mr. R. J. Parke "apparently sleeping". At the time, Mr. Henderson was "sitting down ... with his head resting on his hand". Mr. Parke also testified that there was conversation between he and Roop at the scene but Henderson didn't apparently hear it. Mr. Parke also collaborated Mr. Roop's testimony that he had to shake Mr. Henderson twice. But according to his recollection Roop nudged Henderson both times on the arm.

Mr. R. J. Parke also testified that Mr. Henderson appeared to be asleep. He was in a sitting position with his feet off the ground with his head against his knee. He also stated that Mr. Roop nudged Mr. Henderson twice.

The organization argues the dismissal is unjust. They assert the claimant was not asleep. They also assert there is insufficient evidence as a result of discrepancies between the testimony of the carrier's witnesses and as a result of the uncertainty of their testimony to support the charge. As a result, they further argue, a fair hearing was not afforded.

Regarding discrepancies in testimony, they point primarily to the discrepancy between Mr. Roop and C. J. Parke regarding the manner in which Mr. Henderson was nudged. Roop testified he nudged Mr. Henderson first with his foot (apparently against Henderson's foot) and then with his hand. Mr. C. J. Parke testified Mr. Roop nudged him both times on the arm. Also, the organization points out the differences in the witnesses' recall regarding the position that Mr. Henderson was when observed. The Board notes C. J. Parke and Roop indicated Henderson's head was resting on his hand whereas R. J. Parke said his head was resting on his knee.

These arguments about the discrepancies essentially amount to an argument regarding the credibility of the carrier's witness. Also, according to the organization, the carrier witnesses cannot be believed because of the tentative nature of their testimony. For example, they feel the use of phrases such as "appear to be sleeping" and "apparently sleeping" are not positive evidence of the claimant's guilt.

The Board also notes a conflict in testimony. Mr. Henderson indicates he was not sleeping but "thinking". As for why he was sitting in an area away from his work station during work time he explained he was taking the rest of his lunch break. He had been deprived of his entire lunch break because he didn't hear the lunch whistle and worked into his break period.

In discipline cases, the Board's function is to consider whether there was a fair hearing, whether there is substantial evidence to support the charge and whether the penalty assessed was disproportionate to the offense to an extent to be considered arbitrary, unreasonable or capricious. Regarding conflicts in testimony and credibility issues, it is well recognized that as a result of the appellate nature of this tribunal these matters are to be considered by the initial trier of facts. The Board is bound to uphold the hearing officer's resolution of conflict and credibility issues so long as they are supported by substantial evidence.

In reviewing this case in light of our appellate role, we can say there is substantial evidence to support the hearing officer's decision. The meaning to be attached to the phrases "appeared to be asleep" and "apparently asleep" can only be successfully ascertained by observing the demeanor of the witnesses. This Board is not in a position to observe the demeanor of the witnesses, therefore we properly deferred to the hearing officer's judgement. The hearing officer also did not feel that the discrepancies in the carrier witnesses testimony were crucial or sufficient to lead him to disbelieve the fundamental veracity of their observations. Where the claimant was nudged and whether his head was on his knee or in his hand is essentially immaterial in determining whether he was asleep.

All things considered, the Board believes that there is substantial evidence to support the hearing officer's resolution of credibility and conflict issues in favor of the carrier's witness. We note here too, as it has been other places (see Third Division Award 21054 - Eischen) that carriers' witnesses such as foremen are not entitled to any greater credibility than a claimant per se but that the crucial issue is as if the resolution is supported by substantial evidence. There is presented in the record substantial and material evidence that the claimant was in fact asleep. Three men observed him in a position that is conducive to sleep. They all observed the claimant in some way nudged twice before his attention was obtained and that he appeared startled. As a result, they all believed he was sleeping. The hearing officer's conclusion that these three men's observations deserve more weight than the claimant's is not unreasonable and has substantial foundation in the evidence.

Regarding the quantum of discipline, the Board notes a deplorable past record including the previous suspension and a previous dismissal. This has convinced us that there is nothing arbitrary, capricious or unreasonable about the discipline. The claimant has successfully distinguished himself as neither desirous or worthy of continued employment.

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Award No. 8522
Docket No. 8504
2-NRPC-BM-'80

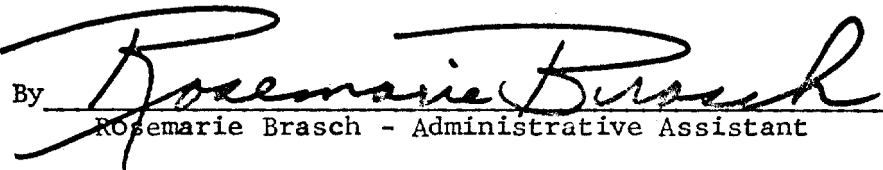
A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 3rd day of December, 1980.