Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8100
Docket No. 7895
2-WT-CM-'79

The Second Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

Parties to Dispute: (System Federation No. 106, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Washington Terminal Company

Dispute: Claim of Employes:

1. That the Washington Terminal Company violated the controlling agreement when they removed Car Cleaner J. E. Dixon from service for five days starting on August 5, 1977 and later suspended him for fifteen more work-days from September 12, 1977 until October 3, 1977. This suspension was unjust and unwarranted.

2. That accordingly the Washington Terminal Company be ordered to compensate Claimant J. E. Dixon for twenty work-days at the going rate and his record be expunged of this charge and suspension.

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.

This is a discipline dispute in which Claimant was assessed a twenty working day (thirty calendar days) suspension for being found asleep on the job, according to Carrier. He had been removed from service pending the hearing (five days) and following the hearing returned to work at the request of his representative. When the transcript had been reviewed he was found guilty of the charges and the suspension included the five days prior to the investigation.

The testimony at the investigation reveals that Claimant was discovered sitting in a car apparently asleep at 4:50 A.M. and was awakened at 5:05 A.M. by his supervisor. Claimant denied that he was asleep but readily admitted he was resting at that time which he claimed was on his twenty minute lunch hour. The evidence indicates the lunch hour is usually during the fifth hour which would in this instance place it at sometime after 4:00 A.M. Claimant

insisted that he had not taken a lunch hour prior to being discovered and the supervisor was quite unsure of this fact.

Carrier argues that since Claimant was indeed asleep, this was a major offense which warranted his being removed from service prior to the investigation and could have resulted in his termination. Carrier states that only because Claimant was a good employe with a previously unblemished record was the discipline as light as a thirty day suspension. The Organization argues that Claimant was on his lunch break and was not precluded from resting or sleeping during that period by any known rule. In any event, according to Petitioner, the penalty was extremely harsh for the nature of the offense and in particular in view of Claimant's record. Petitioner also takes the position that Claimant should not have been removed from service prior to the investigation.

Petitioner's last point is well taken. It is well established in the industry, as well as by this Board, that a proper case for removal from service pending an investigation is one in which the employe's continued service could or would endanger company property, other employes or the public (e.g. Award #2175). In the instant situation we do not believe that the preliminary suspension was warranted.

Although we credit the hearing officer with the determination that Claimant was indeed asleep in this case, there remains an unresolved factual question. We cannot determine from the evidence whether or not the incident took place during the lunch break. However, even assuming that it did, as Claimant insists, he still should not have used that period to sleep. There are a series of awards which hold that sleeping is inappropriate during the lunch break: Award 1828, 2175 and Fourth Division Award 2882. In this dispute, as in Award 1828, Claimant never told his supervisor on the day in question that he was on his lunch break and simply insisted that he was not asleep.

In the absence of well defined rules, we have some question as to the validity of restricting employes activities during their lunch breaks, including prohibitions against resting or sleeping. However, in view of the lack of definition of the lunch period in this dispute, even that dispute is obscure herein.

Our conclusion is that Claimant was guilty of sleeping at the time specified (whether or not on his lunch period). And hence he is at least technically guilty of Carrier's charges. However, in view of all the circumstances herein including the initial five day suspension, we shall reduce the penalty in half; Claimant shall be made whole for the loss of ten days. This conclusion is based on the undue harshness of the penalty under the factual circumstances indicated.

A W A R D

Claim sustained in part as indicated above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of September, 1979.