

The Second Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

Parties to Dispute: (International Association of Machinists and
(Aerospace Workers
(Chicago and North Western Transportation Company

Dispute: Claim of Employees:

1. That under the current Agreement and the Chicago and North Western Transportation Company schedule of rules, the Carrier unjustly suspended Machinist Helper G. Heatherly from service effective April 26, 1979, for a total of 55 days.
2. Accordingly, the Chicago and North Western Transportation Company compensate G. Heatherly for payment of all wages lost while suspended from service during the period April 26, 1979 through May 26, 1979, including credit for time lost during this period for vacation and other rights.

Findings:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

On March 5, 1979, M. L. Volkmar, Trainmaster and Traveling Engineer, was on special assignment as a student hostler at Carrier's M-19A Diesel Shop, Chicago, Illinois. As a part of this special assignment Mr. Volkmar was to perform surveillance, take notes of all exceptions to company rules and regulations and make up a written report at the end of the assignment.

According to Mr. Volkmar, on two separate occasions at approximately 3:30 A.M. and 6:35 A.M. on the day in question while he was walking eastward between Track Nos. 5 and 6 he observed Claimant, a machinist helper who was assigned to the midnight to 8:00 A.M. shift, asleep sitting in the engineer's seat on two different engines. Mr. Volkmar maintains that his observations of Claimant lasted "four or five seconds on each occasion"; that he was standing 5 or 6 feet away from Claimant and "could clearly see at that time (Claimant's) eyes in both cases were closed"; that he made no attempt to awaken Claimant, get his attention or secure a witness; and that on each occasion Claimant was sitting straight up, facing forward with his eyes closed.

No immediate action was taken in this matter, however, on March 12, 1979, Claimant was notified that he was to attend a formal investigation hearing on March 21, 1979, for the purpose of determining:

"Your responsibility for sleeping while on duty as a Machinist Helper at M19-A Diesel Shop at approximately 3:30 AM and 6:35 AM on track No. 6 on Monday, March 5, 1979, in violation of Rule 23 of the General Regulations and Safety Rules Edition 1967."

Pursuant to said hearing, Claimant was adjudged guilty as charged and was assessed a 30-day suspension without pay effective March 27 through April 25, 1979, inclusive. At that same time, however, Claimant was informed that he would be required to serve an additional 25-day suspension without pay which had been assessed on January 23, 1979, as a result of a previous incident, but which was deferred at that time and was to have been dropped had Claimant not committed any further infractions within a one year period of time. Said suspensions are now the basis for the instant claim which is before the Board.

Organization's basic contention in this dispute is that Carrier's charges against Claimant "... were not supported in any way ... even with the most rudimentary of tests or testimony to offer validity to the charges"; and that "... Carrier chose to accept uncorroborated, indefinite and vacillating testimony (solely from Mr. Volkmar) alleging the Claimant was sleeping even when no supportive information was available backing up the allegation". According to Organization, such an evidentiary showing as that which has been adduced by Carrier in this matter, is insufficient to fulfill the "burden of proof" which is necessary to sustain the charge of "sleeping on duty" (Third Division Award 14439; Second Division Awards 6459, 7006, 7219, 7331, 6509 and 7896).

In support of its basic contention Organization further argues that: (1) Mr. Volkmar's vacillating and inconsistent testimony impairs the validity of same; (2) the testimony of one sole witness who merely testified that he observed Claimant for 4 or 5 seconds on two occasions can hardly be considered as being "substantial evidence"; (3) on the particular evening in question Claimant was performing work which was normally assigned to two employees and he, therefore, did not have time to sleep; (4) Carrier never disputed the fact that Claimant had completed his assignment; and (5) since Claimant was not "lying down or in a reclined position" then his actions could not have been in violation of Rule 23 which makes such a specification.

As its final significant area of argumentation Organization also contends that Carrier's handling of this matter is procedurally defective because: (1) Carrier's Statement of Charges was not precise and thus Claimant could not prepare a defense; and (2) said Statement of Charges indicates Carrier's predetermination of Claimant's guilt.

Carrier's position, stated simply, is that "(T)he record is clear that Claimant failed to comply with the rule against sleeping while on duty" and "... was observed twice during a tour of duty by a Company officer on a surveillance assignment seated in an operating cab seat, not performing any assigned duties

and with his eyes closed". Thus Carrier argues that Claimant was not unreasonably or discriminatorily assessed discipline, and that Organization's claim is without merit and should be denied.

Regarding Organization's procedural contentions, Carrier simply argues that the Statement of Charges was sufficiently precise so as to inform Claimant as to the charges which had been brought against him; and that the record indicates that Claimant was aware of the "clear and precise" charge.

Before delving into the merits of this dispute, Organization's argument concerning the specificity of the Statement of Charges must be addressed. In this regard the Board is of the opinion that said Statement was sufficiently precise so as to afford Claimant and his Organization the opportunity to prepare an adequate defense on his behalf. This particular conclusion is indeed confirmed by the following exchange which took place between the Hearing Officer and Claimant at the investigation:

Hearing Officer - "Mr. Heatherly do you feel you have
had sufficient time to prepare yourself
for this investigation?"

Claimant - "Yes, I do."

Hearing Officer - "And are you now ready to proceed with this
investigation?"

Claimant - "Yes, I am."

Turning next to the merits portion of this dispute, suffice it to say that the Board is of the opinion that the evidence which has been adduced by Carrier as proof that Claimant was sleeping on duty as charged is woefully lacking, both in terms of quality and quantity, to satisfy the "sufficiency of evidence" standard which has been established by innumerable Boards on this and each of the other Divisions of the National Railroad Adjustment Board (First Division Awards 12953 and 20471). Although the Board is totally unpersuaded by Organization's assertion that Rule 23 was not violated in the instant case because Claimant was not "lying down or in a reclining position with eyes closed", the Board is persuaded, however, that regardless of whether or not Claimant was in fact sleeping as charged, Carrier's evidence as presented herein is insufficient to substantiate any such conclusion. Given the evidence of record, the Board can only conclude that such a determination by Carrier was an arbitrary and capricious assumption, and therefore was improper. This particular conclusion was perhaps best summarized in Employee's Exhibit G wherein it was stated that:

"Based on the whole of Mr. Volkmar's efforts it is apparent that the maximum physical effort put forth by Mr. Volkmar to determine if claimant was indeed sleeping as he alleges he was, was a visual observation for a 'four or five' second period of time made from a distance of 'five or six' feet away -- hardly conclusive or substantial evidence to say the least.

Substantial evidence, it has been found, is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

It is apparent in this case the Carrier, by rendering the type of discipline it did based upon the testimony of Mr. Volkmar, has strayed from the above concept. Rather than follow any normal plan to fulfill the Carrier's burden of proof in this instant situation, the Carrier proceeded to assess discipline with the allegation of sleeping on the job with one man's testimony based on a 'four or five second' observation."

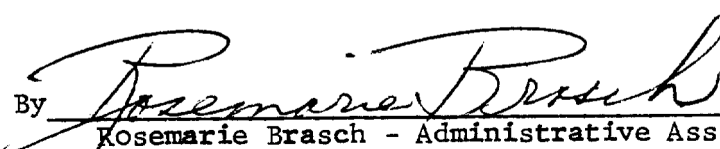
A W A R D

The claim is sustained .

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 28th day of April, 1982.