

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12145
Docket No. 11921
91-2-90-2-27

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: ((Sheet Metal Workers International Association
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM:

1. The Carrier violated the provisions of the current controlling agreement when they improperly suspended Sheet Metal Worker John Korstange from the service of the Grand Trunk Western Railroad Company for a period of ten days beginning on June 30, 1989 as a result of an investigation conducted on June 8, 1989 at the Carrier's Battle Creek Facility.

2. That accordingly, the Carrier be required to compensate Mr. Korstange for all time lost, including Holiday Pay, overtime pay which may have been lost and any other benefit he may have been deprived due to his improper 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 employee or employees involved in this dispute are respectively carrier and employees 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.

Claimant was notified by letter dated May 18, 1989, to attend an Investigation to determine his responsibility, if any, for sleeping on duty and violating General Rule 3(b), which was subsequently dropped from the charges. After postponement, the Investigation was held on June 8, 1989, and the Claimant was notified thereafter that he had been found guilty of sleeping and assessed a ten day suspension from June 30 to July 9, 1989.

As a preliminary point, the Organization's Submission is replete with new arguments. By long established precedent, this Board will not consider lines of argument and new issues never raised and discussed while the dispute was on the property.

Turning to the merits, this case represents issues of credibility and probative evidence. The Enginehouse Foreman testified that the Claimant was sleeping, while the Claimant states he was not. Contradictory testimony is not unusual and must be resolved by the Hearing Officer who observes behavior and makes credibility decisions. This Board's determination is limited to a review of the evidence of record to assess whether or not the needed proof exists.

A careful review finds that the evidence of sleeping is insufficient for a conclusion of guilt. The facts of this case document an argument between the Foreman and Claimant over Blue Flag protection at 9:00 P.M. Unbeknownst to the Foreman, the Claimant had a diagnosed problem with hypertension, which was known by the Carrier, and which required medication. According to testimony, the medication had no side effects which would cause drowsiness. The Foreman states that he found the Claimant forty minutes later "with his feet up, his arms folded across his body, his chin resting on his chest with his eyes closed." The Foreman is not absolutely certain through his testimony that the Claimant was sleeping. When asked if it was possible that Claimant was trying to relieve high blood pressure, the Foreman states:

"... had I known John had a high blood pressure problem prior to 2140 hours, I might have assumed that or could have thought that to be a possibility, but he looked like he was sleeping to me."

Further testimony indicates that the Foreman was eight to ten feet away, did not recall if the Claimant had safety glasses on, or if a locomotive next to the Claimant was running, and admits that he was at some angle rather than directly in front of the Claimant. The Foreman initially stated he stood in front of the Claimant for one minute, but later indicated it was twenty to thirty seconds.

Study of the testimony does not provide substantial probative evidence to conclude that Claimant was sleeping. The record documents a heated exchange between the Foreman and Claimant after which a Machinist testified about the "confrontation" that Claimant inquired as to calling his Local Chairman, getting to a hospital and "he said his blood pressure was elevated and I could see that his face was flushed at the time." The Local Chairman was called and the problem of the Claimant's blood pressure was mentioned.

In the whole of this record, the Board is not convinced that the facts establish that the Claimant was asleep. There is an insufficient basis for us to conclude that the Claimant was sleeping on the job as charged, rather than attempting to compose himself after an intense argument. There is no evidence that the angle allowed a clear view of the Claimant's eyes or that the Foreman's voice was loud enough to be heard. There is nothing in the record suggesting that Claimant had been acting drowsy, looked tired, was observed yawning or dozing on the job or should have been asleep a short time after a heated exchange in which he was flushed with anger and calling his Local Chairman.

Form 1
Page 3

Award No. 12145
Docket No. 11921
91-2-90-2-27


Based on this record, we find that the Carrier failed to substantiate the charges. Claim is to be sustained and Claimant compensated as per Rule 31 of the Agreement.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of September 1991.