Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12794
Docket No. 12608
94-2-92-2-185

The Second Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists
(and Aerospace Workers
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(Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the Employees:

1. That the Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as the "Carrier") violated the controlling agreement, specifically Rule 40, when it wrongfully dismissed Machinist F. H. Maness (hereinafter referred to as the Claimant) from service at Kansas City, Kansas, ensuing (sic) an investigation on January 3, 1992.

2. That, accordingly, the Carrier reinstate the Claimant to service with his seniority rights unimpaired with the payment of all time lost and all other rights and privileges restored due to his being wrongfully dismissed from 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 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 were given due notice of hearing thereon.

Until his dismissal, Claimant held the position of Machinist at Carrier's Argentine Maintenance and Inspection Terminal in Kansas City, Kansas. On February 4, 1990, at approximately 6:20 PM, Claimant slipped and fell while descending the stairs from the locker room and dislocated his shoulder. Following corrective surgery and physical therapy, Claimant returned to work on November 19, 1991, on a light duty basis. The light duty agreement was made between Claimant and the Director of Locomotive Maintenance and Inspection Terminal, in the presence of Claimant's Local Chairman.

By letter of December 19, 1991, Claimant was notified as follows:

> "Arrange to report to the office of Director, LMIT, Argentine, Kansas, at 9:00 AM, Friday, December 27, 1991, with your representatives and witnesses, if desired, for formal investigation to develop all facts and place your responsibility, if any, in connection with possible violation of Rules A, B, 1002, and 1007, of the Safety and General Rules For All Employees, Form 2629 Std., revised October 29, 1989, concerning your allegedly being found asleep at 3:10 PM, Thursday, December 12, 1991, in the lunch room. Also a review will be made of your personal record concerning your conduct, which has not improved, and your continuing to be "indifferent to duty" which requires constant supervision."

The investigation was initially postponed, and was ultimately held on January 3, 1992. Following the investigation, Claimant was notified by letter of January 24, 1992 of his dismissal from service. His dismissal was appealed by the Employees and that appeal was denied. The claim was then processed up to and including the highest authorized Carrier officer. After a conference on the property, the matter remained unresolved.

The Carrier maintains that it has long been a tradition of this Board to uphold the ultimate penalty of dismissal in cases of "sleeping on the job," and on that point it is entirely correct. In support of its position, Carrier cites several awards on this and other Boards. However, before assessing such a penalty, Carrier must first meet its burden of persuasion regarding the employee's actual commission of the misdeed.

The Employees have pointed out that there is only one witness to Claimant's alleged "sleeping." Moreover, unlike other cases of "sleeping on the job," Carrier did not withhold Claimant from duty pending investigation. Rather, there was more than a month and a half between the incident giving rise to this case and Claimant's actual dismissal. In addition, the Employees point out that it is unrefuted on the record that Claimant's supervisor was aware of the exercise regimen Claimant was engaged in, and had given no objection or direction concerning Claimant's performing of those exercises. In addition, there is confirming documentary evidence from his physician and physical therapist. Finally, the Employees point to numerous letters of commendation received by Claimant indicating his value as an employee.

At the heart of this case is the matter of burden of persuasion. In this instance the Carrier has not met that burden. Most adverse to its position is Carrier's own behavior in this case. Rather than disciplining Claimant on the spot for his alleged sleeping behavior, Carrier had arranged for Claimant to perform his exercises in the supervisor's office. This sends at best a mixed message to Claimant regarding his behavior. Moreover, Carrier did not notify Claimant of the serious charge against him until a full week after the incident occurred. If Claimant's supervisor believed Claimant had been sleeping, Carrier normally would have immediately removed him from service pending investigation (as in Third Division Award 28004).

Nowhere on the record before us did Claimant admit to being asleep, either prior to or during the investigatory hearing (as in Second Division Award 12489, and Third Division Award 29333). Moreover, there is no evidence on the record that Claimant was attempting to hide his behavior (as in Second Division Award 12155). On the contrary he was stretched out in an area where he was likely to be seen by fellow employees and supervisors. In summary, a careful weighing of all the evidence before the Board leads inexorably to the conclusion that Carrier has failed to meet its burden of proof.

Carrier is correct, however, that Claimant is entitled only to the remedy provided in Rule 40(i). Rule 40(i) reads as follows:

"(i) If the final decision shall be that an employee has been unjustly suspended or dismissed from service, such employee will be reinstated with seniority rights unimpaired and compensated for net wage loss, if any, resulting from said suspension or dismissal. With a valid receipt, such employee will also be reimbursed for any premiums paid, to maintain hospital association membership as provided in the rules of the respective hospital associations (but in no greater sum than the amount the Company would otherwise be required to pay the hospital association under the provisions of the Travelers Group Policy Contract GA-23000), and/or to obtain and maintain coverage available to the employee under Group Policy GA-23111 issued by the Travelers Insurance Company."

A W A R D

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 9th day of December 1994.