Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 7047
Docket No. 6909
2-N&W-MA-'76

The Second Division consisted of the regular members and in addition Referee Louis Norris when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers, AFL-CIO
(Norfolk and Western Railway Company

Dispute: Claim of Employes:

1. That the Norfolk and Western Railway Company violated the controlling Agreement when it improperly assessed a five (5) day deferred suspension against the record of Machinist Helper G. J. Weiner as a result of an investigation held on October 8, 1973.

2. That accordingly the Norfolk and Western Railway Company be ordered to clear the record of Machinist Helper G. J. Weiner of all indications of the investigation and discipline as set forth in 1. above.

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.

Claimant is employed by Carrier as a machinist-helper, with seniority date of January 6, 1971. On September 28, 1973, at approximately 10:50 a.m. (the exact time is in dispute) Claimant was observed by Foreman Boyd and Foreman Salefski on a bench in the electrician's locker room apparently "asleep while he was on duty". This was the charge leveled against Claimant in the resulting Investigation held on October 5, 1973 pursuant to Notice. Carrier found Claimant guilty as charged and discipline of five days deferred suspension was assessed.

Petitioner contends that Carrier's assessment of discipline violated the controlling Agreement in that Claimant was not afforded a fair and impartial hearing and that the charge was not sustained by the evidence produced at the Investigation. Carrier asserts it complied with the Agreement on all counts.

Carrier contends initially that Petitioner's claim is jurisdictionally defective in that it was no more than "a request" and not a proper grievance and that Petitioner failed to cite any Rule of the Agreement in support of their "alleged appeal".

Our examination of the correspondence on the property, particularly Petitioner's appeal letter of November 30, 1973, does not lead us to the same conclusion. That letter, as well as Petitioner's contentions throughout the processing of this claim (and Carrier's replies), clearly establish that the Organization was protesting the findings of guilt and the discipline assessed against Claimant. This was a proper grievance under the Agreement and was so recognized by both principals. Moreover, this Board is clearly empowered to resolve "Disputes . . . growing out of grievances" under the plain mandate of Section 3, First (i) of the Railway Labor Act.

We acknowledge that no specific rule in violation was cited by Organization, but this element alone is insufficient to render the claim jurisdictionally defective, particularly in view of the obvious nature of the claim as a grievance. Nor can we conclude that Carrier's objection on this issue is of such impact as to bar this Board from resolution of this dispute on the merits.

On the merits, therefore, there are two factual issues involved in this dispute; one relating to the time factor and the other relating to whether Claimant was actually asleep.

Firstly, as to the time factor, Petitioner contends that the actual time of the alleged occurrence was 11:00 a.m. or later and that since Claimant's lunch period began at 11:00 o'clock, he was actually on his lunch period at the time in question.

On this issue, Foreman Salefski testified that he did not establish the time, that "the man was found asleep by Mr. Boyd. I was called down as a witness to see him in the slumped position". Foreman Boyd testified that he fixed the time by using his watch. He conceded, however, that there was a clock at the East end of No. 2 track and that this clock was more readily available to the employees than the one in the foreman's office, with which his watch was timed. He also stated:

> "I didn't notice the clock on the east end of No. 2 track that morning but it was about 13 or 18 minutes faster then the clock in the office. I reset it Monday about 1:00".

In response to the question as to what the latter clock would have been showing "when you first saw Mr. Weiner then", he stated:

> "I would say anywhere from 11:00 to 11:05. I really don't know if it was 13 or 18 minutes off."

Mr. Boyd also testified that a whistle is blown for lunch time, but that he did not know whether the whistle had been blown that day.

Mr. Salefski corroborated that this was so, that he did not recall whether the lunch whistle was blown that day.

Claimant testified that he "checked the time and it was 11:00 so I. . . went downstairs, washed up and went to the electrical corner. At this time my eyes were burning because of the fumes and I sat down and closed my eyes". That he went to lunch at 11:00 o'clock by the time shown on the wall clock at the east end of No. 2 track, and that no whistle was blown for the lunch period that day.

In view of the foregoing testimony, we cannot conclude that Carrier's witnesses established that Claimant was untruthful or inaccurate in his testimony that it was later than 11:00 o'clock when the two Foremen found him "slumped on the bench". If this be so, then Claimant was actually on his lunch period and committed no wrong. In fact, Salefski did not establish the time at all and Boyd admitted that according to the clock used by the employees (and Claimant) it could have been "anywhere from 11:00 to 11:05".

Secondly, as to whether Claimant was asleep at the time in question, Mr. Salefski testified that when he saw him on the bench "he was sitting in a slouched position with his legs outstretched with his chin almost resting on his chest and his hard hat covering his eyes". That he did not know whether Claimant's eyes were closed, and that when he asked him "how long this was going on", Claimant replied that "he had just sat down". Further, that it was Claimant's "duty to be in the basement from time to time". As to how he knew Claimant was asleep, he stated:

> "At the time he raised his head and turned to look at us he opened his eyes and they were red and bloodshot <u>indicating that he had been asleep</u>." (Emphasis added).

Mr. Boyd testified that when he came through the basement "I noticed Mr. Weiner . . . sitting on a bench with his head down and his hard hat over his eyes". He did not speak to him but called Mr. Salefski and as they both stood there he "clicked his tongue" but said nothing to him and "never touched the man". That Claimant "had no comment at that time". Further, that he noticed Claimant's eyes: "His eyes were pretty red, I would say blood shot or similar to blood shot".

Mr. Boyd testified further that later in the day he had a direct conversation with Claimant and "his eyes were red."

> "I would say about 1:15, maybe 12:30 (? - obviously, 1:30), right after lunch. Mr. Weiner came to me and he complained that his eyes were burning and he didn't feel so good at that time. He mentioned something about soap. He told me his eyes were burning."
>
> "(Chabak) Has there been any previous trouble with employees working in the basement area with soap fumes irritating their eyes?
>
> (Boyd) We have several complaints on that."

Claimant testified that his eyes were burning so "I washed up and sat down at the bench and closed my eyes." He stated that there was "smoke and soap being used in the working area", and that he "was not asleep" at the time in question.

It is apparent from the testimony that neither Boyd nor Salefski testified conclusively that Claimant was asleep. They reached this conclusion by inference from the position in which they found Claimant and the fact that his eyes were bloodshot "indicating that he had been asleep". However, the testimony of all the witnesses shows that Claimant's eyes could have been bloodshot due to the smoke and fumes in the work area. In fact his eyes were bloodshot later in the day and he certainly was not asleep then. It appears that all this occurred a very short time after Claimant "sat down on the bench". Mr. Boyd stated it was "from 11:00 to 11:05". We must conclude, therefore, that Claimant fell fast asleep in a matter of a few minutes. Also, that the slight noise made by Mr. Boyd when he "clicked his tongue" was sufficient to awaken him. Hence, he was a very light sleeper or was not asleep at all. We are inclined to the latter conclusion on the basis of all the testimony.

We do not challenge the established principle that this Board will not disturb the action taken by Carrier nor reverse its determination as to the credibility of the witnesses, provided substantial probative evidence is present in the record, preponderating in Carrier's favor, supporting its findings of guilt on the precise charge, and providing, further, that the discipline imposed is not unreasonable or arbitrary nor in violation of due process.

However, the situation here does not involve merely the credibility of the witnesses. It involves inferences and conclusions drawn by Carrier witnesses based on inconclusive testimony as to whether or not Claimant was actually asleep, or whether his eyes were burning due to irritating conditions concededly present in the work area.

Additionally, and of far greater importance, the time factor was not conclusively resolved adversely to Claimant's contention that he was in fact on his lunch period. The time discrepancy is supported by Carrier witnesses, Mr. Boyd having testified that the clock used by the employees was "about 13 to 18 minutes" fast and that when he first saw Claimant it could have been "anywhere from 11:00 to 11:05. I really don't know if it was 13 or 18 minutes off." As to Mr. Salefski, he did not fix the time at all.

In these circumstances, we cannot conclude that Carrier has sustained the burden of proof; the evidence adduced does not preponderate in its favor. Indeed, the testimony on the time factor alone is of such nature as to support Claimant's contention rather than Carrier's. This being so, Claimant was in fact on his lunch period at the precise time in issue and the charge that Claimant "was asleep while on duty" has not been sustained on this record.

Carrier cites a number of prior Awards as precedent, each of which relate to a similar offense of "being asleep on duty". In each of these cases there was a specific finding of fact that Claimant was asleep based on the evidence presented. We do not question the gravity of the offense. We would point out, however, that rarely are two cases precisely the same and that each case must be resolved on its own peculiar facts. We find the factual evidence in this case insufficient to support a similar finding of guilt. Accordingly, purely from a factual standpoint, we cannot conclude that the cited cases have precedential value.

We stress further that in none of these Awards was the time factor involved, as it is here. Moreover, that our findings on this issue, standing alone, compel us to sustain the claim.

We acknowledge that the discipline here imposed is not severe, but where the record fails to establish Claimant's guilt the imposition of any discipline is excessive and unwarranted. We find that to be the case here.

Finally, in view of our findings on the merits, we do not deem it necessary to review the various procedural issues raised by Petitioner.

Accordingly, based on the entire record and the foregoing findings, we will sustain the claim.

A W A R D

Claim sustained.

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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 7th day of May, 1976.