Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 8718
Docket No. 8604
2-CR-EW-'81

The Second Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
(Consolidated Rail Corporation

Dispute: Claim of Employes:

1. That under the controlling Agreement, Electrician Robert E. Seeley was unjustly dismissed from service on February 1, 1979, at Cleveland, Ohio.

2. That, accordingly, the Consolidated Rail Corporation (CONRAIL) be ordered to compensate Electrician Seeley for all time lost from February 1, 1979 and to reinstate him with service rights unimpaired and all other rights unimpaired, that is afforded under the controlling agreement.

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, an electrician, was employed at the carrier's Collingwood Diesel Shop in Cleveland, Ohio. On November 17, 1978, claimant was notified that he was charged with assuming a position to induce sleep at 8:10 p.m. on November 2, 1978. After a hearing held on January 10, 1979, claimant was dismissed from service.

The organization first objects to the hearing officer's decision to limit the scope of testimony concerning the alleged animosity between the claimant and his immediate foreman. In order to sustain the objection, we must find not only that the hearing officer prevented the claimant from tendering relevant evidence but also that the error resulted in some prejudice to claimant's due process rights. Here, evidence showing ill will between claimant and his foreman is relevant to the credibility of the foreman. If such ill feeling exists, the foreman may unconsciously color his testimony or present a biased account of the events surrounding the charge. However, the hearing officer appropriately limited testimony when the claimant attempted to testify about an incident which occurred six months prior to the hearing. Such testimony is too remote from the events underlying the charges. In any event, the transcript of the investigation and the transcript of the appeal hearing clearly discloses the existence of a high level of animosity between the claimant and his foreman. The superintendent of labor relations intimated that claimant's foreman threatened to resign unless claimant was discharged.

Since the organization proved the presence of animosity between the claimant and his foreman, there is no justification for sustaining the organization's objection.

On the merits of the charge, the organization argues that the record lacks substantial evidence that claimant was sleeping because he was in his assigned area, a rest period had just concluded and only one witness testified claimant was sleeping. The carrier contends it conclusively proved the charges since claimant was observed in a reclined position in a locomotive cab and he admitted he failed to hear the return to work whistle.

When faced with a clear conflict in the testimony of two principle witnesses, we are precluded from resolving the conflict unless the narrative of one witness is so inherently contradictory, speculative or suspect that a reasonable mind could simply not attach much weight to the testimony. In this case, the claimant denies he was sleeping while the foreman said he looked in the cab and observed him sleeping. Where the conflict in testimony is aggravated by tension or animosity between the claimant and his foreman, the carrier cannot rely on the foreman's testimony alone to prove the charge. Second Division Award No. 7592 (Wallace).

There is no direct, reliable evidence in the record demonstrating that claimant was sleeping on November 2, 1979. We find so little evidence to support the sleeping charge that the carrier has fallen short of satisfying its substantial evidence burden. The foreman observed the claimant only for an instant. The next employe to observe the claimant found him awake. The claimant was in his assigned area and there was no evidence offered by the carrier to show precisely what duties claimant should have been performing at the time of the alleged sleeping incident. Thus, we find claimant did not commit the sleeping infraction.

Rule 7-A-1(d) of the applicable agreement provides the scope of claimant's remedy. The claimant shall be reinstated with seniority unimpaired and with back pay based on his assigned work hours actually lost at the rate of pay in effect during the time he was out of service. Amounts earned by the claimant from outside employment and any unemployment compensation shall be deducted from his back pay award. While claimant's insurance, vacation and other benefits shall be restored without impairment, the claimant is not entitled to retroactive benefits.

A W A R D

Claim sustained to the extent consistent with our findings.

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 May, 1981.