Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9039
SECOND DIVISION Docket No. 9107
2-FW&D-MA-'82

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

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(
(Fort Worth and Denver Railway Company

Dispute: Claim of Employes:

1. That under the current agreement and the Fort Worth and Denver Railway Company schedule of rules, the Carrier wrongfully dismissed Machinist B. F. Smith, following investigation, effective July 22, 1980.

2. That the Fort Worth and Denver Railway Company accordingly reinstate Machinist Smith, compensate him for all wages lost as a result of said dismissal, and restore to him unimpaired all other rights and privileges of employment.

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, Mr. Smith, was notified by letter dated June 30, 1980, to appear for an investigation on July 8, 1980. He was charged with "failure to be alert and attentive while on duty at Childress, Texas, at about 6:00 A.M., Sunday, June 29, 1980". By agreement the hearing date was rescheduled and held on July 11, 1980. Following that investigation the penalty herein complained of was assessed.

The Organization raises the defense that the Carrier violated Rule 31 of the agreement because penalty was assessed on the basis of an investigation that was neither fair nor impartial. It points out that one of the Carrier's witnesses commenced his testimony as follows:

> "L. D. Tackett (the hearing officer), per your request for a statement concerning upcoming investigation of Ben Smith."

It views the foregoing as indicative that the hearing officer procured and injected testimony in the record. Further, it points out that the testimony was about events after the incident and, therefore, had nothing to do with the charges and, thus, the record is tainted. We find no merit to the claim. The

fact that a hearing officer requested a statement from one who might assist in developing a complete record does not constitute prejudicial action. It would be difficult to conduct a proper investigation without requesting that persons having knowledge of the events be present to testify. We agree with the Organization that the testimony of the particular witness was extraneous and had little bearing on Claimant's guilt or innocence. However, that fact does not taint the entire record. The records are often padded with immaterial testimony by both parties. It is the function of the hearing officer and this Board to determine the relevant evidence and make a proper decision.

Secondly, the Organization views the questioning of the Claimant by the hearing officer as indicative that he had prejudged the witness. A careful review of the record does not verify such a view. The questioning was lengthy but in view of the nature of the problem, it is understandable that a hearing officer would question in order to determine the veracity of the witness' statements. We find the investigation was conducted in accordance with contractual requirements and past practice.

The record with respect to the charge is clear. A Mechanical Foreman testified that on the day in question he attempted to find Mr. Smith to give him a new assignment. After searching for approximately thirty minutes he was alerted by another employee that Claimant was in the boiler room. He found Claimant at that location at approximately 6:00 A.M. He described his position as lying on the floor with his eyes closed and asleep. Three efforts to awaken him by calling his name were unfruitful. Accordingly, he left and called the Foreman of Engines to come to the scene. Approximately fifty minutes later the Foreman of Engines and the Mechanical Foreman returned to the boiler room and found the Claimant in the same position on the floor asleep. He awakened after loud calling of his name three times. The testimony of the Foreman of Engines corroborates the testimony of the Mechanical Foreman.

Contra the foregoing we have only the self-serving testimony of Claimant that he was only in the boiler room for fifteen minutes and was not asleep.

It is well understood that this Board is in no position to determine the credibility of witnesses. Based on the foregoing and the entire record, however, it is clear that the preponderance of credible evidence supports the position that Claimant was, in fact, asleep and the charge was sustained. Sleeping on the job has long been recognized as a breach of the rules which can result in dismissal from service. Claimant was a short-term employee of approximately eight months and, accordingly, the Carrier was within its legal rights to take the dismissal action.

A W A R D

Claim denied.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 21st day of April, 1982.