

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION

Award No. 9767  
Docket No. 9309  
2-SP-EW-'84

The Second Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

Parties to Dispute: ( International Brotherhood of Electrical Workers  
( Southern Pacific Transportation Company  
( Pacific Lines)

Dispute: Claim of Employees:

1. That under the current Agreement, Mechanical Department Electrician S. B. Hoffman was unjustly treated when he was dismissed from service on November 16, 1979, following investigation for alleged violation of portions of Rule 810 of the General Rules and Regulations of the Southern Pacific Transportation Company (Pacific Lines). Said alleged violation occurring on October 2, 1979.

2. That accordingly, the Southern Pacific Transportation Company (Pacific Lines) be ordered to:

- (a) Restore Electrician S. B. Hoffman to service with all rights unimpaired including service and seniority, loss of wages, vacation, payment of hospital and medical insurance, group disability insurance, railroad retirement contributions, and loss of wages including interest at the rate of six percent (6%) per annum.

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 employes 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.

Claimant entered the employ of Carrier as an Electrician on February 9, 1971. Claimant was employed as an Electrician at Carrier's Los Angeles, California Locomotive Plant. His hours of assignment were 11:00 p.m. to 7:00 a.m.

On April 14, 1979, Carrier notified Claimant that he was to be present at the office of Plant Manager, Los Angeles Locomotive Maintenance Plant at 8:30 A.M., October 18, 1979, for formal hearing to develop facts and place responsibility, if any, in connection with certain actions alleged to have occurred during his tour of duty on October 2, 1979. The formal hearing was postponed once and was concluded on October 30, 1979. As a result of the investigation, the Carrier dismissed Claimant on November 16, 1979, on the following charge:

"Evidence .. established your responsibility for being away from your assigned post of duty, at approximately 5:15 a.m. on October 2, 1979, lying on floor of locomotive unit 8780 on Track 10, with shoes off and doors locked, during your tour of duty. Your actions in this instance constitute violation of the following quoted portions of Rule 810 of our General Rules and Regulations reading:

'Employees must ... remain at their post of duty and devote themselves exclusively to their duties during their tour of duty. They must not absent themselves from their employment without proper authority ... Employees must not sleep on duty. Lying down or assuming a reclining position, with eyes closed or concealed, will be considered sleeping.'"

The Organization maintains that Carrier has failed to prove the charges preferred against the Claimant; that Claimant was not guilty of the charge for which he was dismissed; and that Carrier's action in dismissing Claimant was arbitrary, capricious, unjust and not supported by substantial evidence.

The record in the instant case discloses that Claimant was away from his post of duty at approximately 5:15 a.m. on October 2, 1979, and that he was lying on the floor of locomotive unit 8780 on Track 10, with his shoes off and doors locked. The Employer contends that it was reasonable to conclude Claimant was sleeping on duty under the definition of such action contained in Rule 810, and was in violation of the quoted portion of Rule 810.

According to the Claimant, he was not sleeping in the locomotive unit. Instead, his explanation was that shortly after 5:00 a.m. on the day of the disputed incident, Claimant began to experience the onset of muscle spasms in his back. Claimant argues that he then searched for his supervisor to inform him of his immediate need to do exercises his doctor had recommended. His supervisor was not in his regular work area, Claimant asserts, so Claimant sought out the first quiet place he could find to do his exercises, as he knew it was important to do them immediately upon the onset of pain. The Organization contends that two health practitioners had given the Claimant a regimen of stretching, limbering and relaxation exercises as part of his treatment plan for back problems that had originally occurred on-the-job eight years prior to the current incident.

With respect to the merits, the Organization alleges that only one supervisor testified that he had seen Claimant's eyes "closed for a few seconds." It maintains that this supervisor's testimony and actions must be completely discounted. The supervisor's actual testimony during the hearing shows that he admitted that he was actually searching for some of his own men whom the supervisor would have aroused without advising the general foreman that he had found anyone sleeping. The Organization specifically argues that this supervisor's testimony and actions indicate a hostile and vindictive attitude toward Claimant and a desire to entrap Claimant. Accordingly, the dismissal from service in view of the facts surrounding this case must be considered discriminatory as well as excessive, arbitrary and capricious.

The Board has reviewed the record in this case carefully. It is the Board's judgment that substantive evidence fully supports the Carrier's conclusion that Claimant was sleeping on duty October 2, 1979, under the definition of such action contained in Rule 810. Claimant himself admitted being on Track 10 rather than Track 6, where he was assigned to work. He admitted to lying on the floor of a locomotive unit, with his shoes off and doors locked. It is unexplained in the record by Claimant why he, at the onset of pain, traveled five tracks away from his assignment to do exercises rather than doing these exercises at his work location. It is admitted by Claimant that there were no employees assigned to work on Track 10 at all times relevant to the instant dispute.

Claimant's medical contentions regarding his need for exercise, concededly never communicated to any supervisor before the incident involved in the present case, are an affirmative defense and, as such, the burden of proof was on Claimant and the Organization. In the present case, the necessary proof is lacking unless the Board overturns the credibility determinations of the hearing officer, accepts the Claimant's version of the disputed factual circumstances and rejects the Carrier's version. Prior Awards often note the fact that the Board is neither authorized nor constituted to make such credibility determinations, since issues of credibility must be determined by those who receive the evidence and testimony. On this record, we have no basis for substituting our judgment for that of the hearing officer and claim is to be denied. Third Division Award 22721 (Sickles). (See also Second Division Awards 8280, 7912, 7955, 8201 and 7973.)

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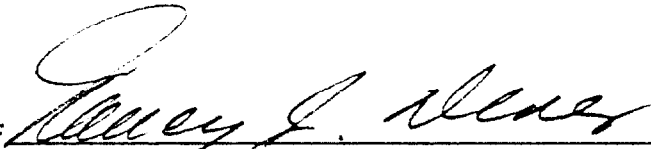
In our judgment there is no showing of unreasonableness, bias, prejudice or predetermination shown on this record to impeach the determination of the hearing officer that events transpired as essentially described by the general foreman and two other supervisors who testified on the property. That being the case, there is substantial evidence, albeit contradicted by the testimony of the Claimant, to support findings of sleeping on duty in violation of Rule 810. Contrary to the Organization's contentions, we can perceive no prejudicial procedural flaw on this record. We find no grounds upon which we should substitute our judgment for Carrier's relative to the penalty imposed. The record is adequate to support the penalty assessed.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

ATTEST:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 18th day of January 1984.