

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12777
Docket No. 12731
94-2-93-2-75

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Firemen & Oilers
(System Council No. 6
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(Norfolk & Western Railway Company

STATEMENT OF CLAIM:

"1. That under the current and controlling agreement, Firemen and Oiler J. M. Harter was unjustly suspended from service on November 2, 1991, by General Foreman, Mr. R. Bryant after a formal investigation was held on October 9, 1991.

2. That accordingly, Firemen and Oiler J. M. Harter be restored to service, be made whole for all lost time including holidays and overtime he would have been available for, with seniority rights unimpaired, the payment of 10% interest rate added thereto and his personal record expunged of any reference to this discipline."

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 waived right of appearance at hearing thereon.

Following a formal Investigation the Claimant was found guilty of violating Rule GR-26 for sleeping on duty. The Organization has progressed this Claim arguing that the Carrier failed to prove the charges and assessed excessive discipline. The Organization further argues that the Carrier was procedurally deficient in its review and denial on appeal.

The Board has reviewed the declination of the first-level appeal officer and finds no evidence of a procedural violation. The Board has therefore turned to the on property correspondence and transcript to determine the merits of the instant case.

A complete review of the record convinces this Board that there exists sufficient probative evidence to substantiate Carrier's findings of guilt. The Senior General Foreman testified that he was certain of his observations. The Claimant was observed sitting in the cab of a locomotive where he had been instructed not to sit. The Foreman stated that just before 4:00 a.m. he observed the Claimant slouched down with his eyes closed in the engineer's seat of Locomotive 3195. The Foreman testified that he had noticed this upon passing and walked back to verify. The record indicates that the Foreman was three feet away with the shop light directly on the Claimant's eyes and there was no obstruction of his view. There is no evidence of record that the Claimant's safety glasses, position, or other factors interfered with the General Foreman's observations.

We have carefully reviewed the testimony of the Claimant and his witness. The primary argument of record is that since both indicate they were having a conversation in the cab and this contradicts the only Carrier witness, there is insufficient proof to sustain the Carrier's burden. The Board has reviewed the testimony of both as it pertains to the Carrier's charges and sole witness. This is not a case of two against one, but a question of proof. The two never dispute the central issue at bar. Although they claim they were talking and the Claimant maintains that he wasn't sleeping, the Rule holds that:

"Sleeping on duty is prohibited. An employee lying down or in a slouched position with eyes closed or covered will be considered sleeping." (emphasis added)

Nowhere in the testimony of either the Claimant or the Machinist also found in the locomotive was there a denial that the Claimant had "his head bent down on his chest" or "was slouched down" as the General Foreman testified. Similarly, neither the Claimant, nor the Machinist testified that the Claimant's eyes were open.

Claimant was charged with having his head tilted forward and his eyes closed and he never denied either statement. The Board finds that the Carrier's burden has been met. There is sufficient probative evidence of record to substantiate that the Claimant was sleeping on duty. As such, the only issue left before this Board is whether the discipline imposed by the Carrier is arbitrary, capricious or excessive. Sleeping on duty can and has resulted in dismissal. There is no evidence presented in this record to substantiate an argument that on this Carrier's property or in general in this industry the penalty imposed was inappropriate. This Board will not disturb the Carrier's judgement when, as here, there is proof of the charges, the violation is very serious, the on property record fails to demonstrate violation is very serious, the on property record fails to demonstrate differential treatment toward the employee and there are no mitigating factors. The Claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 17th day of November 1994.