Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13077
Docket No. 12896
96-2-94-2-38

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Firemen & Oilers,
(System Council No. 6, AFL-CIO
(
(CSX Transportation, Inc. (Former
(Baltimore and Ohio Railroad Company)

STATEMENT OF CLAIM:

"1. That under the current and controlling agreement, Firemen and Oiler R. L. Athey, ID# 1522053, was unjustly suspended from service on June 7, 1993 through July 7, 1993.

2. That accordingly, Firemen and Oiler R. L. Athey be made whole for all lost time, with seniority rights unimpaired, the payment of 10% interest added thereto, and his personal record be 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 were given due notice of hearing thereon.

As a result of a formal Investigation held on May 18, 1993, Claimant was notified that he was found guilty of being outside his regular assigned work area and sleeping while on duty, at approximately 4:15 P.M. on May 9, 1993. As a result, he was assessed a 30 calendar day suspension.

Claimant, a Laborer with 12 years seniority at the time, was working at the Cumberland Locomotive Facility in Cumberland, Maryland, on the 3:00 P.M. to 11:00 P.M. shift on May 9, 1993. A review of the record reveals that Carrier's charges are based upon Supervisor Derryberry's testimony in the Investigation that he discovered Claimant in an unlit, material supply shanty, away from his assigned work area at approximately 4:15 P.M. on May 9, 1993, sitting behind the desk with his head back and eyes closed for several minutes. He noted that Claimant's head was moving back and forward down to his chest and then back again, and testified that he was certain that Claimant was sleeping and then awoke when he entered the room. It is undisputed that the Claimant offered to work through his break time. Derryberry recalled Claimant indicating that he had come into the shanty to call and check on his babysitter. Derryberry admitted not wearing a watch at the time, but indicated that he discovered Claimant sometime between 4:15 P.M. and 4:30 P.M.

Claimant was the only Laborer on the shift, and was first assigned to the car yard and then to do a vee on an engine outside. Claimant recalled going to the material shanty to get a drink of water and to have the Machinist Helper bring him a hopper so that he could shovel the pit. It is undisputed that on May 9, 1993 it was 94 degrees with high humidity. Both Claimant and Machinist Helper Smith testified that he arrived at the shanty at 5:20 P.M. and asked both for the hopper and some water, which he placed on his forehead and neck to cool down and drank. Claimant admitted sitting down and having a long drink from the water bottle, putting his head back to sooth the pain in his head, and perhaps closing his eyes for a minute; he denied sleeping. Claimant recalled Derryberry coming into the shanty, accusing him of sleeping and denying it. Claimant stated that he was disoriented, but did not tell Derryberry or any Supervisor about feeling hot or dizzy. Carrier's Facility Heat Stress Action Plan was placed into evidence indicating the appropriateness of taking breaks and drinking lots of water on hot days. The record reflects that this is a self-management area, where employees are often required to get their own materials or choose their assignments.

Machinist Helper Smith was certain that Claimant came into the shanty for materials at 5:20 P.M. and that he had not been there earlier that afternoon. He recalled noticing the time on the clock because Claimant had indicated that, because it was close to break time (5:30 P.M.) he could bring the hopper after break. Smith testified that he left Claimant in the shanty with a bottle of water and was gone for less than five minutes, and Claimant was not inside when he returned. Smith stated that he met Claimant at his work area with the hopper and was informed that Derryberry had accused him of sleeping in the shanty.

While long established precedent reveals that this Board cannot set itself up as trier of fact when confronted with conflicting testimony and may not resolve credibility disputes, (Second Division Awards 7542, 8280, 8566) it also recognizes that it is the responsibility of the Carrier to adduce substantial evidence in support of any discipline imposed. (Third Division Awards 25411, 11626.) Under the circumstances of this case, we are unable to conclude that Carrier met its burden of presenting substantial evidence to prove that Claimant was improperly away from his work area at 4:15 P.M. on May 9, 1993. This is especially true in light of the clear discrepancy between when Derryberry said he saw Claimant in the shanty and when both Smith and Claimant were certain he was present. Despite Claimant's assertion that the log book would prove that he was working on the vee or in the car yard at the time, Carrier failed to produce this record. Further, Derryberry admitted that Claimant returned from the car yard around 4:00 P.M. and that he was assigned to do the vee thereafter. Derryberry also admitted not being sure about the exact time and not wearing a watch, while Smith explained that he checked the clock in the shanty when Claimant said it was almost break time. It is also clear that a trip to the material shanty would not be outside of Claimant's normal work area if he was seeking water or materials necessary to perform his job.

However, while there is insufficient evidence to support the contention that Claimant was away from his work area at 4:15 P.M. on the day in question, there is no dispute that Claimant was sitting in the shanty prior to break time with his head back and his eyes closed when his Supervisor entered, or that he offered to work through his break. On the basis of these admitted facts, the Board does not deem it appropriate to substitute its judgment for that of the Hearing Officer who found that Claimant was sleeping while on duty. Public Law Board No. 5241, Award 10; Second Division Award 6372. Thus, we find substantial evidence in the record to support that aspect of the charge.

With respect to the issue of the arbitrariness of the penalty imposed, because only part of the charge was substantiated, albeit the more serious aspect, and there is nothing in the record indicating what part of the penalty was attributable to which part of the charge, we believe it proper under these limited circumstances, to reduce the penalty to a 20 calendar day suspension. This action does not undermine the Carrier's right to impose a 30 day suspension or a higher penalty for a sleeping on duty offense in otherwise appropriate cases.

Finally, we find no Rule in the Agreement supporting the Organization's request for interest on time lost. (Second Division Awards 5672, 11914, 9362, 7765, 7064.) Thus, we direct that the suspension herein be reduced to 20 calendar days and that the Claimant be compensated for time lost during the other 10 calendar day period.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders than award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 9th day of December 1996.