

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13443

Docket No. 13284

99-2-97-2-42

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

**(International Association of Machinists and
(Aerospace Workers
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago
(North Western Transportation Company)**

STATEMENT OF CLAIM:

1. That the Union Pacific Railroad Company (formerly the Chicago and North Western Transportation Company hereafter referred to as the Carrier) violated the applicable provisions of Rule 35 of the July 1, 1921 Joint Agreement, as specifically amended by agreement dated July 1, 1979 when, subsequent to an investigation held on May 24, 1996 the Carrier unjustly and improperly dismissed from service Diesel Shop Machinist employee Frederick J. Arndt (hereafter the Claimant).

2. That, accordingly, the Carrier be ordered to: (a) restore the Claimant to service with all seniority and vacation rights unimpaired; (b) that it compensate the Claimant for all time lost from service commencing May 17, 1996; and (c) that it make the Claimant whole for all health and welfare and insurance benefits lost while dismissed from service.

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.

The Claimant was advised to attend an Investigation to determine facts and place responsibility, if any, in connection with a number of charges which were levied against him by the Carrier. The Claimant was observed by his supervisor sleeping on the date of May 16, 1996. The Claimant could not be found in his work area from 3:50 A.M. to 6:50 A.M. Claimant allegedly failed to comply with instructions to take oil samples from locomotives and then allegedly both stated to his supervisor that he had done this work, and signed off for having done it. Lastly, the Claimant is charged with being discourteous and quarrelsome to supervision of the Carrier when he was confronted with these charges. After an Investigation was held on the dates of May 24 and May 29, 1996 the Claimant was advised that he had been dismissed from service. This discipline was appealed by the Organization in the proper manner under Section 3 of the Railway Labor Act and the operant Agreement up to and including the highest Carrier officer designated to handle such. Absent settlement of this claim on property it was docketed before this Board for final adjudication.

According to testimony at the investigation by the Foreman he took some folders with the paperwork for a number of units to the T room of the shop on May 16, 1996 at about 2:50 A.M. to check to see if the Claimant had taken oil samples from the units on the B track as he had been instructed to do. When the Foreman arrived, he testified that he found the Claimant “. . . in a reclined position and his eyes were closed” The Foreman called the Claimant’s name but he did not respond. The Foreman then poked the Claimant’s shoulder with the folders and the Claimant then responded that he had taken the oil samples when asked about this by the Foreman. Upon attempting to find the samples, and unable to do so, the Foreman returned to where the Claimant was and again found him in a reclining position. When asked where the oil samples were the Claimant stated that he had put them in the cabinet on the platform but they were not there. Thereafter the Foreman stated his concerns to the Coordinator. The Foreman then discovered that the oil lab was not in operation, advised the Coordinator of this and then the Foreman went to lunch. Thereafter the Coordinator saw the Foreman in the lunch room and advised the latter that he had just observed the Claimant taking oil samples from units on the B track. After the Foreman returned to work after lunch, at about 3:50 A.M., he paged the Claimant at that time and at intervals of approximately

45 minutes until 6:50 A.M. but the Claimant did not respond. The Foreman finally saw the Claimant at 6:50 A.M. when time cards were being signed. When the Foreman tried to discuss the oil samples and the Claimant's failure to respond to pages the latter, according to the Foreman, became "... very defensive ...". According to testimony at the Investigation by the Coordinator, the earlier oil samples which the Claimant alleged had been taken were never located. Testimony by the Manager of Train Operations, who had been informed by the Foreman that the latter had found the Claimant asleep, was that when he met the Claimant about 6:55 A.M. and told him to stay in the lunch room. According to this witness, the Claimant became very argumentative and when told he was to be tested he threw a chair up against the wall. According to testimony by the Senior Manager the Claimant had a "... discourteous, boisterous, argumentative voice and attitude ..." when he was advised at about 6:55 A.M. that he had to take a test and remain where he was told to stay. A Special Agent was called and the latter remained with the Claimant unit he took the test.

Testimony by the Claimant was that he was not asleep when the Foreman alleged that he was and that he took a second set of samples since there was a claim that the first set could not be found. He testified that he did not have "... any knowledge of who took them or where they were and (he) was not about to question (this) because (he) figured it was a setup ...". The Claimant stated that he did not feel well after that so he went to the bathroom "... for a period of time ...," then came back to track B where he had taken the samples, and then went outside on the west end of the engine house. He testified that he did some inspection work on units in the yard. He claims he did that for an hour and a half or two hours and then came back into the shop at about 6:00 A.M. He could not explain why no one saw him until about 6:50 A.M. and he stated that he had not heard the loudspeaker calls for him by the Foreman. The Claimant says that he bumped into a chair but did not kick it after being confronted by the Foreman and the Coordinator. The Claimant states that a witness was present who could testify that he was not asleep when the Foreman stated that he was. But the Claimant did not produce such witness even after the May 24, 1996 Investigation was adjourned until May 29, 1996 specifically for the Claimant to develop corroborating testimony.

A review of the full record before the Board warrants conclusion that the preponderance of substantial evidence test has been met by the Carrier in this case, as is its burden as moving party. The Claimant denies that he was asleep, and he states that he had taken oil samples from units on the B track on the date of May 16, 1996 as he had been instructed. Yet he was not able to bring forth a witness, even though he

states that one was present at the work site on the day in question, to contradict the testimony of the Foreman with respect to the sleeping issue, nor could the Claimant explain the disappearance of the first oil samples the Claimant alleged he took from units on B track on the day in question. In view of the full record before it the Board can only reasonably conclude that the oil samples could not be found because they did not exist. Nor is it reasonable for the Board to accept the Claimant's explanation of not having heard the pages from the public address system which uncontroverted testimony by Carrier's officers state could to be heard both inside and outside of the shop when the Claimant was being paged. It might be understandable if he had missed one page. But the Claimant missed all of them which were announced over the address system every three quarters of an hour during the latter part of his shift. Further, the Claimant himself testifies that he was back in the shop for the last hour of his shift when the pages should have been easily heard. There is also corroborating testimony by a number of Carrier witnesses that the Claimant's behavior was less than polite when he was confronted by supervision at the end of the shift about his sleeping on the job, about not having taken the oil samples, and about his disappearance during the latter half of the shift.

On the merits the conclusion is reasonably warranted that the Claimant was in violation of Rule 1.11 which deals with sleeping while on the job. He was in violation of Rule 1.5 which deals with safety, and with quarrelsome and discourteous conduct. The Claimant was guilty of violation of Rule 1.13 since he did not comply with instructions. And he was guilty of violation of Rule 1.15 which deals with reporting for duty since he absented himself from his work area during the latter part of his shift and, effectively, disappeared from the purview of supervision altogether on the second half of his shift on the date of May 16, 1996.

In view of the Claimant's prior discipline dealing with sleeping while on the job the Board is in no position to conclude that the Carrier's determination in this case was arbitrary or capricious and it will rule accordingly.

AWARD

Claim denied.

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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 25th day of August 1999.