

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 14052
Docket No. 13921
12-2-NRAB-00002-100006

The Second Division consisted of the regular members and in addition Referee Lynette A. Ross when award was rendered.

(J. D. Self, Sr.

PARTIES TO DISPUTE: (

(Kiamichi Railroad Company (A RailAmerica Company)

STATEMENT OF CLAIM:

“This then is my appeal, pursuant to Article IX, Section G of the Agreement between Kiamichi Railroad Company and the Employees represented by The Employees’ Mechanical Department (Agreement), of your decision dated August 14, 2009 and received on August 15, 2009 to terminate me. Your decision is not acceptable and the termination should be overturned for the following reasons.... Given the above, I request that the termination be overturned, that I be restored to service with all seniority and other rights unimpaired and that I be paid for all time and benefits lost as a result thereof.”

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 Petitioner established service with the Carrier on May 2, 2003, as a Carman. By letter dated July 13, the Carrier directed him to report for a formal Investigation on July 20, 2009, in connection with the following alleged offenses:

- “1. That on Friday, July 10, 2009 it was reported that you were observed sleeping while on duty;
2. That on Friday, July 10, 2009 after leaving the office of the General Manager, you allegedly initiated a verbal confrontation with fellow employee Tim Coleman and conducted yourself in an inappropriate manner while still on Company premises.
3. That on Friday, July 10, 2009 you allegedly went to the residence of Tim Coleman and produced a weapon, engaged in hostile and threatening conduct and stated your intent to kill Mr. Coleman. Also, that you continued to call and harass Mr. Coleman after this action.
4. That as a result of this conduct an arrest warrant may [sic] been issued, in your name for felony charges, bringing discredit upon the good will and name of the company.

The above-described charges, if found to be valid, could constitute a violation of various company rules and policies, including but not limited to the following:

General Code of Operating Rules 1.6 Conduct, 1.7 Altercations, 1.9 Respect of Railroad Company, 1.11 Sleeping. RailAmerica Railroad Employee Handbook: Conduct Towards Fellow Workers, Workplace Violence Prevention and our Development and Accountability Policy.”

By letter dated July 15, 2009, the Representative for the Mechanical Department, Joe Brisco, requested a postponement of the matter for at least 30 days. General Manager Matthew Long approved the postponement request by letter dated July 17, and subsequently re-scheduled the Investigation for July 28, 2009.

By letter dated July 20, 2009, addressed to General Manager Long, the Petitioner set forth his version of the events culminating in the Carrier’s issuance of

the Notice of Investigation. In that letter, the Claimant requested “a speedy formal investigation meeting” because he was out of service and wanted the matter resolved.

The Investigation was convened on July 28, 2009, before Hearing Officer Tommy Gibson, Manager of the Missouri Northern Arkansas Railroad. Because the Kiamichi Railroad is a small property employing few managerial employees, Gibson agreed to conduct the Investigation in order to ensure the Petitioner’s Agreement due process rights. At the commencement of the Investigation, the Petitioner appeared with his cousin, Frank Hinton, whom the Petitioner had selected as his representative. Because Hinton was neither a member of the craft, nor an employee of the Carrier, the Hearing Officer denied the Petitioner’s representation request.

In response, the Petitioner presented a July 28, 2009 letter addressed to General Manager Long, in which he requested a postponement of the Investigation for at least ten days because his legal counsel was presently unavailable. Hearing Officer Gibson denied the Petitioner’s request, after which the Petitioner and his cousin both exited the Investigation. The Carrier proceeded to conduct the Investigation in absentia.

By letter dated August 14, 2009, General Manager Long notified the Petitioner that as a result of the formal Investigation his employment relationship with the Kiamichi Railroad was terminated, effective immediately. The Petitioner was found guilty of having violated each of the above-cited provisions of the General Code of Operating Rules (GCOR) and the Railroad Employee Handbook – Workplace Violence Prevention Policy, of the Kiamichi Railroad.

By letter dated September 8, 2009, addressed to General Manager Long, the Petitioner appealed the Carrier’s disciplinary action on various procedural and substantive grounds. By letter dated September 14, 2009, Kiamichi Railroad Regional Vice President Ray Stephens denied the appeal. The Petitioner rejected the Carrier’s appeal response in a letter of rebuttal dated September 21, 2009. The Carrier stood by its earlier position denying the appeal in a letter of response dated October 9, 2009. The Petitioner responded to the Carrier with another rebuttal letter, dated October 14, 2009, in which he requested a conference with General Manager Long.

Correspondence between the parties confirms that a conference was scheduled for November 11, 2009. The Petitioner's letter of November 18, 2009 confirms that the conference was held for the purpose of discussing his termination, and that no settlement was reached in the matter. In that same letter, the Petitioner also requested the establishment of a Public Law Board pursuant to Section 3, Second of the Railway Labor Act, as amended.

By letter dated December 28, 2009, the Carrier denied the Petitioner's request on grounds that he was without jurisdiction to request the convening of a Public Law Board. Subsequently, by letter dated March 2, 2010, the Petitioner filed a Notice of Intent with the National Railroad Adjustment Board, stating his intent to file a Submission within 75 days concerning his unadjusted dispute with the Carrier. The Petitioner timely filed his Submission on May 24, 2010. The dispute is properly before the Board for final and binding adjudication.

The record evidence reveals that on July 10, 2009, the Petitioner and fellow Carman Tim Coleman were assigned to work the first shift, beginning at 7:00 A.M., at the Carrier's Car Shop located in Hugo, Oklahoma. According to Coleman's testimony, on instructions of Car Shop Foreman Joe Brisco, they began their tour of duty by driving approximately 20 miles to Antlers to check the air brakes on cars at that location. Coleman testified that the Petitioner slept in the truck all the way to Antlers, and after performing their duties, which consisted of changing brake shoes, the Petitioner suggested that they nap in the truck under a shade tree. Coleman testified that he declined that request and that while he drove the truck back to the shop, the Petitioner slept for the duration of the trip to Hugo.

According to Car Shop Foreman Brisco, at approximately 12:30 P.M., he met Tim Coleman at the tracks and asked him to find the Petitioner so that Coleman and the Petitioner could push box car AOK11194 out of the shop. Coleman testified that after retrieving his safety gear, he began looking for the Petitioner and "went hollering for Jack." Maintaining that after searching the area, he was unable to find the Petitioner, Coleman testified:

"Finally I looked underneath the car we'd done finished and he was asleep underneath the car. So, I holler at him again to get him to wake up. So then I go in there and I call Joe Brisco and I said,

“Jack’s asleep underneath the car you wanted me to move. And Joe Brisco said he’s [sic] be right over there.”

Coleman further testified that Brisco approached the car and shouted at the Petitioner three times, but the Petitioner did not wake up. Brisco testified that he had called the Petitioner’s name three times in a loud voice, but there was no response. Intending to call Assistant Chief Mechanical Officer Jonas Goodman to the scene, he (Brisco) essentially told Coleman to keep an eye on the Petitioner while Brisco summoned Goodman. Coleman then advised that the Petitioner was moving around under the boxcar. Brisco’s written statement reads:

“I then discontinued the call to ACMO Jonas Goodman and returned to the box car where Jack Self was. I found Jack Self sitting on the rail under the box car. He was groggy and disoriented. I then asked if he was OK. He said he was. I asked if he wanted to go home for the rest of the day. He said no, that his sinuses were giving him problems. I then called Jonas Goodman ACMO and advised him of the situation.”

Foreman Brisco reported the facts to his supervisor - Goodman - who, in turn, discussed the matter with General Manager Long. Goodman then instructed Brisco to bring the Petitioner to Long’s office. Coleman testified that prior to entering Long’s office, the Petitioner approached him and began to yell at him. According to Coleman, the Petitioner demanded to know why he had not awakened him, and asked why Coleman had not thrown something at him to rouse him. Long testified that, in the presence of Brisco, another employee named Layton Cox, and the Petitioner, he began to gather facts regarding the matter. Long concluded that the facts thus far indicated that the Petitioner had been observed sleeping under the box car, and that a formal Investigation would be necessary to uncover all of the facts.

Carman Tim Coleman testified that, after reporting off work at 3:00 P.M., he had run several errands, including picking up a friend, Sam Oaks, for whom Coleman was going to pick up a tiller. Coleman testified that after having run an additional errand with Oaks, they arrived at Coleman’s house at approximately 4:00 P.M., and subsequently encountered the Petitioner. Coleman testified:

“So I was going out Ball Park Road, get about a mile out of town and there’s Jack Self sitting on the right-hand side of the road in his truck. So I told Sam, I said, ‘There’s fixing to be trouble.’ So I drove passed [sic] Jack and Jack just whips in behind me and starts following me. He follows me all the may [sic], all the way to my house. I get out of my truck, unlock the shop, told Sam, I said, ‘Stick around close.’ So Jack gets out of his truck, comes to the back of my truck, I meet him at the back of my truck. Wants to know what, what I had uh, told the railroad after he had left. I told him I hadn’t told them anything. And wanted to know how come I didn’t wake him up and everything, and uh, instead of getting in trouble. I said, ‘Jack, I just didn’t. I’m tired of your stuff.’ And he said, ‘Well, I come out here to settle this, but you got somebody with you right now.’ And I said, ‘What do you mean you come out here to settle it?’ I said, ‘You was [sic] the one that was asleep underneath the boxcar, not me.’ He said, ‘I come out here to settle it.’ So he started towards his truck. He gets in his truck and I said, ‘What do you mean, Jack, you come out here to settle this?’ And he pulls a gun out, sticks it out the window of his truck with a bottle taped to the end of it. He said, ‘This is how I come to settle it.’ He said, ‘But you got somebody with you right now.’ He said, ‘So I’ll be back later to take care of it.’ So, drives off.

Oaks prepared a statement in which he related a series of events that was similar to Coleman’s account of the incident and testimony. According to the record, Oaks advised Coleman to report the incident to the sheriff’s office. Coleman subsequently contacted the Choctaw County Sheriff’s Office and filed a report. According to that report, at 6:10 P.M., Deputy Williams was dispatched to Coleman’s residence. Williams filed a report, which contained a Public Narrative prepared by Williams concerning the events at work, which preceded the Petitioner’s alleged threatening behavior and brandishing of a handgun at Coleman’s residence.

According to Coleman, between 8:00 and 8:30 P.M., the Petitioner called him at home and apologized for coming to his house. Coleman alleged that the Petitioner told him he would “get even in some other way.” Coleman testified that

he reported the phone call to General Manager Long and to the Sheriff's Office. Coleman also testified that the Petitioner had called him several more times; however, he had refused to answer the calls. On July 13, 2009, Coleman filed for and was granted a Protective Order against the Petitioner.

On October 20, 2009, and while the instant claim was being handled on the property, Coleman and Oaks gave testimony at a Preliminary Hearing held in the Choctaw County District Court before the Honorable Gary L. Brock, who presided over the matter as Trial Judge. At the conclusion of the Hearing, the Court found probable cause to bind the Petitioner over on the charge of unlawful intent to carry a firearm, and set November 10, 2009 as the date of arraignment. On March 2, 2010, the Petitioner pled guilty to the charge of reckless conduct with firearm, a misdemeanor, and was sentenced to 18 months' probation, until September 2, 2011.

In his on-property correspondence with the Carrier and in his Submission to the Board, the Petitioner asserted several procedural arguments purportedly warranting the Board's overturning of the discipline on grounds that the Carrier failed to accord him Agreement due process. In response, the Carrier argued that the Petitioner's procedural exceptions were without merit, and simply amounted to a futile attempt by the Petitioner to distract the Board from the merits of the case.

The Board carefully considered the Petitioner's procedural objections and the Carrier's rebuttal arguments. The Board finds that none of the objections is sufficient so as to preclude the Board's review of the substantive issues. Initially, the Board finds that the Petitioner failed to demonstrate how an eight-day delay in the scheduling of his formal Investigation was prejudicial to him or his defense. As mentioned above, on the date of the Investigation the Petitioner requested that the matter be further postponed so he could arrange to have his attorney attend the proceeding. The Petitioner's argument that the Carrier violated the time limit in which to hold the formal Investigation lacks merit given his request for further delay, the Board rules.

The Board also finds no merit to the Petitioner's objection that he improperly was denied a representative of his choosing at the Investigation. According to the record, Union representative Joe Brisco could not serve as the Petitioner's representative because Brisco had also witnessed the Petitioner in the apparent act

of sleeping. Hence, the Carrier required Brisco to testify at the Investigation. The record shows that prior to the Investigation, Brisco had given the Petitioner the names of individuals who could fulfill the role of Union representative and thereby assist him in his defense.

The record further shows that Brisco had advised the Petitioner that the Carrier was unlikely to allow an outside individual to represent him at an internal Company proceeding typically closed to individuals outside the Company or Union. Consequently, the Board finds no evidence that the Petitioner's Agreement due process rights were violated by the Hearing Officer's rulings disallowing the Petitioner's request that his cousin be permitted to represent him and declining his request for further postponement so that the Petitioner's attorney might attend. If the Petitioner's postponement request had been for the purpose of obtaining representation in a manner consistent with the parties' customary application of Article IX, Section D of the Agreement, then it is likely the Carrier would have granted such request, the Board finds.

The Petitioner also objected to the multiple roles performed by General Manager Long, who issued the Notice of Investigation, testified at the Investigation, reviewed the record and was designated to receive the Petitioner's appeal. The Board understands that the Kiamichi Railroad, a RailAmerica subsidiary, is a small interchange railroad operating over approximately 261 miles of track. Consequently, the Carrier's argument that it was necessary for Long to assume multiple roles in the Petitioner's disciplinary process is supported by the record. Moreover, the Board finds nothing in the parties' Agreement that prevented Long from serving in multiple capacities, as was the custom on this Carrier's property. The Board also reviewed the record to determine whether Long conducted himself in a manner that might have undercut the Petitioner's Agreement due process rights. We find no evidence in that regard, and note that the Petitioner's decision to absent himself from the Investigation, leading to the Hearing Officer's correct determination to proceed in absentia, resulted in an Investigation record that lacked the Petitioner's testimony or testimony by witnesses that might have been obtained through cross-examination.

Lastly, the Board finds that the Carrier's omission of the exhibits from the Investigation transcript mailed to the Petitioner constitutes insufficient basis for

voiding the discipline. The record shows that upon notifying the Carrier of the missing exhibits, Long promptly sent them to the Petitioner. Without delay, the Petitioner was furnished a complete record of the proceedings. The Petitioner failed to demonstrate any harm or deprivation of Agreement due process stemming from the Carrier's apparently inadvertent exclusion of the exhibits from the transcript mailing.

Finding no procedural bar to the Board's adjudication of the claim, we now turn to the merits. The Board carefully reviewed the extensive record, as well as the parties' respective arguments and arbitration Awards cited in support of their respective positions. The Board finds that the Carrier's determinations as to the Petitioner's guilt of each charge in violation of the specified GCOR Rules and the Railroad Employee Handbook – Workplace Violence Prevention Policy, of the Kiamichi Railroad are supported by substantial evidence of record.

The record supports the Carrier's finding that the testimony of Carman Tim Coleman and Foreman Joe Brisco established that they had observed the Petitioner in the dangerous and prohibited act of sleeping under box car AOK11194, in obvious violation of GCOR Rule 1.11, Sleeping. The record well supports the Carrier's determinations that Coleman and Brisco were credible witnesses and that their eyewitness accounts of the Petitioner sleeping under the boxcar were factual. The Board also finds no evidence in support of the Petitioner's contention that Coleman and Brisco had conspired against him by fabricating the sleeping incident in order to get him fired. Moreover, the evidence shows that the Petitioner, Coleman and Oaks were well acquainted, and that the Petitioner and Coleman were known in the small community of Hugo, Oklahoma, as employees of the Kiamichi Railroad.

The Board likewise finds that the Carrier satisfied its burden of proving the Petitioner's misconduct under GCOR Rules 1.6, Conduct; 1.7, Altercations; 1.9, Respect of Railroad Company, and the RailAmerica Handbook Policies setting forth the acceptable conduct standards for employees and prohibiting employees from threatening or harming one another. The Investigation record and other documentation developed during the on-property handling of this dispute establish that the Carrier properly adjudged the credibility of the witnesses as they testified regarding the additional three charges. The Board finds no evidence refuting

Coleman's testimony regarding the harassment and threats that the Petitioner subjected him to, including, badgering him at work after he discovered the Petitioner asleep under a box car, stalking him on his way home from work, and ultimately pointing a gun at him and levying threats that Coleman reported to local law enforcement and to the Carrier.

As regards the level of discipline assessed, the Board finds that the Carrier's dismissal action was warranted. It is axiomatic that each charge imposed upon the Petitioner was serious and, standing alone, arguably carried the penalty of termination. The Board finds from the record that the Petitioner's termination was for just cause, and that the discipline was not arbitrary, capricious or harsh under the circumstances. The Board finds no factors that serve to mitigate the Petitioner's proven violation of the charges, or the discipline as imposed by the Carrier. The Board concludes that the Petitioner's termination shall not be overturned, and that the instant claim must remain 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 22nd day of October 2012.