

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 21377
Docket Number CL-21315

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**
(
(Southern Pacific Transportation Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-7942)
that:

(a) The Southern **Pacific** Transportation Company violated the current Clerks' Agreement when it dismissed Mr. L. A. Gales from service following investigation at which the evidence adduced failed to sustain the charges; and

(b) The Southern Pacific Transportation Company shall now be required to reinstate Mr. Gales with full seniority rights, all hospital and insurance benefits unimpaired, full back pay and allowances for each day held out of service, and with all other rights and benefits unimpaired.

OPINION OF BOARD: Claimant, Mr. L. A. Gales, at the time this 'claim arose was employed as secondshift clerk at Carrier's Homestead Yard, Oakland Terminal. Following a hearing and investigation into an incident of August 1, 1974 Claimant was dismissed from all service by letter dated August 28, 1974 reading as follows:

"Evidence adduced at **formal** investigation held at Oakland, California, on August 20, 1974, established your responsibility for failure to properly discharge your duties and for sleeping during your tour of duty the morning of August 1, 1974.

'Your actions in this case constitute violation of that portion of Rule 810 of the General Rules and Regulations of the Southern Pacific Transportation Company, reading:

'Employees must report for duty at the prescribed time and place, remain at their post of duty and devote themselves **ex-**clusively to their duties during their tour of duty.....'

'**Employees** must not sleep while on duty. Lying down or assuming a reclining position with eyes closed, or eyes covered or concealed, will be considered sleeping.'

"For reasons stated you are hereby dismissed from the service of the Southern Pacific Transportation Company.

"Acknowledge receipt of this letter on duplicate copy and arrange to turn in any Company equipment and passes in your possession."

The basis for the charges against **Claimant** were that on August 1, 1974 he allegedly was caught sleeping on the job by the Assistant **Trainmaster** and also he allegedly failed to roll or check two trains that night, the **BAX** and the **RGSFF** before they departed the yard.

Review of the record reveals an absolute conflict in **testimony** regarding the question of whether Mr. Gales was sleeping on duty on August 1, 1974. The Assistant **Trainmaster** D. J. Payne, was in the yard office on August 1, 1974 and testified at the hearing to the following: 1) The **Yardmaster** tried twice to reach **Claimant** by intercom without success about **2:45** A.M.; 2) Payne went to Gales' office and found the latter in his desk chair, feet on the desk, eyes closed and dosing; 3) Payne called Gales' name loudly twice without receiving a response; on the third yell Gales awoke; 4) Payne admonished Gales for sleeping and told **him; the Yardmaster** was trying to reach him; 5) Gales apologized for sleeping and told Payne he had heard nothing from the **Yardmaster**; 6) The Yardmaster called Gales again regarding the **RGSFF** train for 3:00 A.M. departure; 7) The Yardmaster called Payne about **3:45** A.M. to complain that Gales had checked neither the **RGSFF** nor the **BAX** which had departed about 2:00 A.M.; 8) Payne confronted Gales at about 4:00 A.M. regarding failure to check the trains, Gales confirmed he had not done so but stated this was because the Yardmaster **had** not told him they were made up. The testimony of **Claimant** Gales contradicts that of Payne on every material **point, to wit:** 1) He was not sleeping at any **time** while on duty and that when Payne came into his office he was not at the desk but sitting at a chair behind the door; 2) That his feet were on the floor, his eyes open and that Payne did not call his name at all but began **immediately** to talk with him; 3) That he did not **apologize** for sleeping and that he denied sleeping and told Payne he had not checked **RGSFF** and **BAY** because no one told him to.

We have analyzed the evidence in this case carefully, confining our consideration to the points raised and argued on the property. Several interesting arguments were raised de novo at the Board level but we cannot consider them herein. gather, the discipline of Mr. Gales has been appealed by the Organization as stated supra in the claim on the sole question of "evidence adduced failed to sustain the charges." We do note that Claimant was not informed by the **Yardmaster** to check **BAY** on August 1, 1974 and, if this were the only charge herein, the Organization might have prevailed on appeal. But the other two charges, viz., sleeping on duty and failure to check RGSFF are supported **amply** if the testimony of Assistant **Trainmaster** Payne is believed rather

than Claimant's flat denial. The testimony is directly contradictory on the central **determinative** fact of this case. To sustain this claim we would **have** to determine the credibility of the two conflicting **uncorroborated** witnesses.

It is well established that this appellate tribunal ~~es~~ not assess de novo the veracity of witnesses. Nor as a practical matter is it possible to do so absent opportunity to observe demeanor and testimonial capacity first hand.

Rather, our **review** in discipline cases is restricted to determining:

- 1) Whether **Claimant** was afforded a **fair** and impartial investigation;
- 2) ~~Whether~~ the charges are supported by substantial record evidence; and
- 3) Whether, in all of the circumstances, the penalty assessed was so disproportionate to the offense as to be arbitrary, unreasonable or capricious.

When **an employee** or his representative alleges contractual violations in a discipline discharge case it is our responsibility to focus on these three areas of appellate review **and** determine if the managerial action is supported by the record. **Notwithstanding** our limited **appellate** scope, the employer in our discipline cases, **as in all** of American labor-management arbitration both private and public section, bears the burden of persuasion when challenged under the contract with disciplining an **employee** on insufficient evidence.

We have **reviewed carefully** the record before us in light of the foregoing elementary and well established principles. There is **no** indication in the record developed on the property that the hearing and investigation was other than fair and impartial. The record evidence, if believed, is substantially supportive of the charges **against** Claimant. We do not resolve credibility issues per se but we can and do determine if evidence is so wholly inadequate that its acceptance by Carrier officials as a sole basis for discipline is palpably unreasonable. We are unable to so conclude with respect to the testimony of the Assistant **Trainmaster** herein. Finally, in light of the proven charges against Claimant, and his **overall** personnel record, we cannot say that discharge is arbitrary, unreasonable or capricious. **Accordingly**, we are constrained to deny the Claim.

FINDINGS: The Third Division of the Adjustment **Board**, upon the whole record and all the evidence, finds and holds:

That the **parties** waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** within the **meaning** of the Railway Labor Act, as approved June **21, 1934**;

That this Division of the Adjustment **Board** has jurisdiction over the dispute **involved herein**; and

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That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By **Order** of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1977.

