

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 2431.6
Docket Number CL-23977

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: { (Brotherhood of **Railway, Airline and Steamship** Clerks,
(**Freight Handlers, Express and Station Employees**
(**Norfolk and Western Railway Company**

STATEMENT OF CLAIM: **Claim** of the **System Committee** of the Brotherhood (GL-9405)
that :

1. **Carrier** violated the Agreement between the parties when it **arbitrarily, capriciously and with abuse** of discretion **essessed** Clerk **G. Medlock** 60 days **actual suspension**, on September 1, 1979 and dismissed him **from** service, October 12, 1979, for attempting to defend himself **from** the charge **in** the **initial** hearing.

2. Mr. **Medlock** shall be ret-d to service with all rights and privileges **unimpaired** end **compensated** for **all** lost **time**.

OPINION OF BOARD: This case involves two separate **disciplinary actions**. The first **one** involves e **60-day suspension** which **was** comprised of a 30-day **actual** suspension for sleeping **on** the job and a 30-day deferred **suspension** which **was** then activated. The **second** involves dismissal for alleged misconduct during the **investigation into** the **charges regarding** sleeping **on** the job. We will consider **each incident separately**.

Regarding the portion of the 60-day suspension reletedtothe 30-day deferred **suspension**, the Boerd notes that it wee **considered** by Public Law Boerd 1790 and it was denied **in** Award No. 122 of that Boerd. Thus, this Board has no **jurisdiction** end will **consider** the 30-day **actual suspension** only.

On August 21, 1979, the Claimant **was** directed to **attend an** investigation scheduled for August 24, 1979. The letter of **charge** reed **in** **pertinent** pert es **follows:**

"You are hereby charged with sleeping while on duty and under pay in the Yard Office Building. North Kansas City, Missouri, at ● pproxfmetely 6:20 a.m., August 13, 1979, during the assigned hours of your regular position #108 MBY&T Clerk MO - 11:00 p.m. to 7:00 ● .m."

The investigation was held es scheduled and es previously noted, the Claimant received ● 30-day **suspension**.

In considering the evidence **on** the 30-day suspension, the Board concludes that there is substantial evidence to support the charge. Mr. J. O. Clements testified **as follows:**

"Yes, sir, at 6:05 a.m. the Yardmaster Osborn called down to the Chief Clerk in the IBM room to carry the KCS bills to the light tower. There was no answer at that time. I left the tower end went down to the Operator's room and I noticed that the KN operator and KN helper were in the operator's room. I walked into the IBM Chief Clerk's room and the only person that was in there was Mr. Medlock sitting at the keypunch machine on the north well with his eyes closed, arms crossed, head bowed, snoring."

"As I was stating, when I walked into the room I saw Mr. Medlock at the machine with his arms crossed with his head bowed, snoring. I stood by the keypunch at the door and I looked at my watch. It was 6:17 a.m. and then I walked over to the PYCIE clerk's desk and I was looking at him straight towards him and noticed that there was still bills to be worked up and I set in the Chief Clerk's chair. At 6:27 a.m. Mr. Medlock raised up and looked up and saw me sitting by him. At that time I asked him if he had a nice nap. He said 'I must have.' While he was saying that he picked up his watch and was looking at the time. I went over to the IBM copier and made a copy of the list and I came back and asked what I must do and he said, 'Do what you have to do.' I looked at my watch at this time, which was 6:40 a.m. At this time I relieved Mr. Medlock of his duties."

The Claimant denies being asleep and having said anything to Clements except that he was not sleeping. He admits to not performing his duties during this period of time and to having his glasses off, but contends that he was not in a slouched position. It is noted that he did not deny that he remained in the same position during this period. The Claimant accounts for the ten-minute period as follows:

- '9. Mr. Medlock, Mr. Clements stated that he observed you from 6:17 a.m. to 6:27 a.m., a period of ten minutes, a time at which time your position did not change in the chair. How do you account for these ten minutes?
- A. The ten minutes that he observed me I don't know about. The position he is talking about, being in a slouched position, that is not true, however, I did sit in the chair for ten minutes and he did observe me for ten minutes as I observed him for ten minutes."

While the evidence conflicts, it is not our function due to the appellate nature of the Board, to resolve conflicts in evidence or to assess credibility. We are limited in reviewing the evidence as a whole to determine that there is substantial evidence to support the hearing officer's findings including credibility and conflicts in evidence. It is the Board's conclusion that there is substantial evidence to support the hearing officer's decision to believe Mr. Clements. Mr. Clement's testimony was clear and specific in comparison with the Claimant's which failed to adequately explain the ten-minute interval. The Claimant does not deny that Mr. Clement set in the chief clerk's chair and observed him but says only

thst he wasn't **asleep** end that he was watching **Mr. Clements** in return. There is **a substantial basis** not to believe this es it is not **reasonable** to believe that anyone **would** remain in the **same** position for **ten minutes** if they were **aware** (thus **not** sleeping) **that** they were being observed by a supervisor. A person who **was** in **fact** not **asleep** and who noticed that they **were** being observed by a supervisor **in most** probability **would** have brought **immediately** to the **•** ttentiono of the supervisor that they were not **asleep**.

The **second** charge relates to the Claimant's behavior during the first **investigation**. He was charged with **"... unbecoming and disrespectful conduct . . ."** The **investigation** was held on October 3, 1979, end the Claimant failed to appear after proper notice. The Board should first **note that in similar** circumstances, the Board has held the **failure to appear** et the **hearing**, places the **employee** in peril. For **instance**, see Second Division Award 6499, Third Division Award 13127 end Third Division Award 20113. Thus, **we** conclude that the **hearing was conducted** in a **fair and impartial** manner. It is **also** the conclusion of the Board that the **facts** disclose **that** the **hearing** established that the **Claimant was** guilty es charged.

Regarding whether discharge **would** be Appropriate fur such **behavior**, the Board finds that it **is**, when viewed in light of the Claimant's past record which includes a deferred **suspension** for a very similar behavior. The past record indicates **that** the cause of the discipline was **"harrassing, using verbal slurs and insinuations, engaging in horseplay, and interferring with Clerk Nels in the performance of work."** He also had in addition to the **30-day** suspension for **sleeping**, a deferred **suspension** for playing cards **on** duty. The Carrier's **decision** not to tolerate an **employe** with the Claimant's record and attitude is not **arbitrary** or capricious.

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

That tie Agreement **was** not violated.

A W A R D

Claim denied.

Award **Number** 24316
Docket **Number** CL-2397

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, **Illinois**, this 14th day of April 1983.

