NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24695

THIRD DIVISION Locket Number MW-24686

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation (former
(Penn Central Transportation Company)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The discipline of Assistant Foreman P. C. Yothers for allegedly sleeping on duty on November 28, 1979 was unwarranted and on the basis of unproven charges (System Docket 549).

(2) The claimant's record shall be cleared and he shall be compensated for all wage loss suffered.

OPINION OF BOARD: An investigation was held on January 11, 1980 to determine whether Claimant was asleep while on duty on November 28, 1979 at 10:40 A.M. The situs of the asserted incident was the East Wusway Project at Pittsburgh, Pennsylvania. Based on the record of investigation, **Carrier** concluded that he was guilty of the charge and dismissed him from service, effective February 1, 1980. This disposition was appealed in accordance with the applicable provisions of the controlling Agreement and the Manager, Labor Relations subsequently reduced this penalty to a suspension **with** time held out of service to apply. Claimant returned to his position on February 19, 1980.

In defense of his petition, Claimant contends that he was erroneously charged with a Rule G violation which was not established by the record evidence. We asserts that **Carrier** failed **to** prove he violated this Rule, and predicated its disciplinary determination solely upon the testimony of one witness, namely Project Engineer, J. F. Lesjack. He argues that Carrier was obligated to examine the two other witnesses who allegedly viewed him sleeping and its failure to call them to testify denied him the required essentials of due process. In effect, he maintains that an employee should not be found guilty of an alleged offense on the basis of testimony by one witness.

Carrier contends that he was afforded a fair and impartial trial. It acknowledges that he was erronously charged with a Rule G violation when it should have been a Rule E violation, but asserts that the notice of investigation specifically indicated that the trial would center on determining whether he was asleep while on duty. It asserts that the unrebutted testimony of Project Director J. F. Lesjack and the photographs taken by Mr. Lesjack showing Claimant sleeping are conclusive proof that a serious infraction was committed. It maintains that he was on duty at the time and should have been attentive to his work.

In our review of this case, we concur with Carrier's position. We find no evidence that Claimant was denied a fair and impartial trial, notwithstanding his contention that he was not found guilty of a Rule G violation since he was under no illusion or misunderstanding as to the focus of the investigation. Instead

we find that he was fully informed as to the direction of the investigation, and afforded every reasonable opportunity to prepare a thoughtful defense. His assertion that Carrier should have called the two other witnesses who ostensibly saw him sleeping is without persuasive effect since the testimony of Project Director J. F. Lesjack and the undisputed incriminating photographs pointedly establish Claimant's guilt. Their testimony under these circumstances is academic. In order to prevail, Claimant was obligated to show that he was not asleep as charged or that it occurred at a time when he was not on duty. He had not established such facts and the proof burden was his when he asserted an affirmative defense. The evidence is clear that he committed a very serious offense which potentially could affect the safety of rail operations. He was assigned that morning to provide flag protection at the East Wusway Project and his sustained attention was required. His averment that he was sitting down for a 10 to 15 minute break is totally unsupported. Claimant should consider himself fortunate tht Carrier modified its initial dismissal decision since his deportment could readily warrant termination. We will 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 Employes involved in this dispute are respective? Carrier and Employes 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 the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever, Executive Secretary

Dated at Chicago, Illinois this 24th day of February, 1984