NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 30049
Docket No. MW-30131
94-3-91-3-563

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(Houston Belt & Terminal Ry.

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

1. The dismissal of Machine Operator B. T. Criner for alleged violation of General Rules A, B, I and Rules 602 and 604 on August 14, 1990 and alleged violation of General Rule A and Rules 600, 604 and 607 on September 6 and 7, 1990, was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System Files 90082/1142 and 90081/1142).

2. The Claimant shall be reinstated to service with all benefits and seniority unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

This claim is a combination of discipline actions each of which resulted in dismissal of the Claimant from Carrier's service. The fact situation which precipitated the first action shows that Claimant had been employed as a Machine Operator by the Carrier. On August 14, 1990, at approximately 1:10 P.M., while on duty and under pay, Claimant was observed by the General Foreman to be in an alleged reclined position ostensibly asleep in the operating cab of the piece of machinery to which he was assigned. This observation

led to a notice of Investigation being issued to Claimant on September 7, 1990, instructing him to appear for a hearing on September 14, 1990, on a charge of being asleep while on duty.

The second episode concerned Claimant's actions on September 7, 1990, when he marked off from his assignment sometime between 6:30 AM and 7:00 AM on that date after having previously been denied permission to take a personal leave day to be off duty. The second notice of Investigation was issued on September 7, 1990, on a charge of failure to protect his assignment, insubordination, and failing to comply with the Roadmaster's instructions.

The two separate hearings were held as scheduled. At each hearing Claimant was present, represented and testified on his own behalf. Following completion of the individual hearings, Claimant was notified by two separate notices each dated September 27, 1990, that he had been found at fault on each charge and was dismissed from Carrier's service.

During the on-property handling of these disputes, the Organization contended that the Carrier had failed to support either of the charges with substantial evidence. It also argued that the sleeping charge was defective because it had not been made until approximately 23 days after the alleged incident occurred which was in violation of Rule 12 of the Agreement. In both instances, the Organization argued that the discipline of dismissal was harsh and excessive punishment.

Before this Board, the Organization additionally argued that there were obvious unresolved conflicts in the testimony of the witnesses in the hearing involving the alleged sleeping issue; that the discipline was defective because the decision to discipline was rendered by other than the Carrier officer who had conducted the investigatory hearing; that there was prejudgment on the part of the Carrier officers who assessed the discipline; that the issuance of the discipline notices by Carrier officer Cavanaugh "effectively removed a step in the appeal process" and therefore the entire proceeding was not fair and impartial; and that the absence from duty on September 7 was supported by a "billing statement" from the attending physician which statement was made public for the very first time in the Organization's Ex Parte Submission to this Board.

Before we address the merits, or lack thereof, of each of the charges, we are compelled to remind the parties once again that this is an appellate review board. In our deliberations and determinations we are limited to the testimony, evidence and arguments which the parties have developed in their handling of the dispute during the normal progression of the dispute through the usual manner of handling grievances on the property. We do not

consider de novo arguments or evidence. We do not resolve conflicts in testimony. We do not make credibility determinations. We review the testimony as developed at the hearings and consider the arguments and evidence as presented during the on-property appeals procedures. It is abundantly clear, therefore, that the several arguments, contentions and evidence as advanced by the Organization in this case for the first time before this Board are not proper material for our consideration and are hereby rejected.

From our review of the charges, testimony and argument which is properly before us for consideration, it is our conclusion and belief that either of the charges, standing alone, if supported by substantial evidence, is sufficient to support discipline by dismissal.

On the first charge, that is allegedly sleeping on duty, we do not find that the charge as made was defective or untimely. While we do not understand why the Carrier waited so long before making the charge and conducting the Investigation, we do not find in the Agreement any restriction or limitation on the time from occurrence to notice of hearing. The only stated limitation is from the notice of charge to the date of hearing which limitation was not exceeded in this case. The framers of the Agreement did not see fit to include a limitation on the time from incident to notice of charge. This Board cannot provide such a limitation for the parties. Absent an obvious violation of good or common sense in this regard, we do not find any defect on this issue in this instance.

As to the testimony of the parties relative to the alleged sleeping issue, we are confronted with the Carrier officer's clear, consistent and convincing statement of what he saw and what he did versus Claimant's denial of everything. This is not unusual in a discipline case. This is why our Board has consistently refused to attempt to make any determination of credibility and has held that such determination must be made by the trier of facts. We cannot substitute our judgment for that of the Hearing Officer and will not do so in this instance. The Carrier's action of accepting the Foreman's version of the events is not, per se, a violation of Claimant's rights or an improper application of discipline.

As for the second situation, that is the September 7, 1990 incident, we find from the record convincing testimony that the request for a personal leave day had been made by the Claimant well short of the required 48 hours advance time and that at the time such request was made the Claimant made no reference to a need to see a physician. However, in any event, when he made his request, another employee of the same class had already made a timely request and had been granted personal leave time. The Agreement

language in question clearly gives the Carrier the right of determination on whether or not the requested absence is "consistent with the requirements of the carrier's service." In this case, the refusal of the personal leave day request was justified. It is also significant to note that at the time Claimant made his request for a personal leave day and had his request rejected, he clearly stated that he would be marking off sick on the date for which the personal leave day had been requested. This statement of intent is convincing proof that he planned to be absent on September 7 regardless of the Carrier's decision on his personal leave day request. Additionally, his medical evidence which was submitted at the hearing on September 14, 1990, is also less than convincing. Claimant stated initially that he had the medical statement when he reported for service on September 10, and yet it is obvious that the medical statement is dated September 10, 1990, and makes reference to an ailment which occurred on August 7, 1990, not September 7, 1990. He later stated that he procured the statement after he had attempted to return to service and was not allowed to return. Both the timing and the content of the medical statement are less than convincing to this Board. In short, the relative convincing force of testimony and evidence in this case supports the action taken by the Carrier.

On the basis of the sum total of the two hearing records as developed in these cases, the Board is convinced that the actions as taken by the Carrier were supported by substantial evidence and were not arbitrary, capricious or excessive. The request for reinstatement is, therefore, denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.