

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31909
Docket No. MW-32257
96-3-95-3-66**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Repairman L. Hiple for violation of General Rule E, Paragraph 3, in connection with the charge that he assumed the position of sleep at approximately 8:50 P.M. on January 3, 1994, was arbitrary, capricious, excessive and in violation of the Carrier's Discipline Guidelines (System Docket MW-3228-D).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall receive the benefit of the remedy stipulated in Section 4 of Rule 27 and the previous discipline stricken from his records effective September 1, 1993."

FINDINGS:

The Third 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.

This case arose when on January 3, 1994, the Claimant was observed by his supervisor assuming the position of sleep on the job. He was removed from the Carrier's service at the end of his shift that same day.

A hearing was held on January 11, 1994, in connection with the charges leveled against the Claimant and it was determined that the Claimant was guilty of violation of General Rule E which prohibits sleeping or assuming the position of sleep while on the job. The Claimant was dismissed from the Carrier's service by notice dated January 26, 1994.

The Organization appealed the discipline contending that the Claimant had lost consciousness and was stressed out on the date in question and was not sleeping. Moreover, the Organization contends that if the Claimant was sleeping, it was accidental and not premeditated. The Carrier argued in response that the Claimant admitted to his supervisor that he was asleep. The Carrier has denied the claim.

The parties being unable to resolve the issue at hand, this matter now comes before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of either sleeping or assuming the position of sleep on the date in question. Not only were there supervisors that viewed the Claimant asleep, but the Claimant himself admitted that he was not awake, sitting in his chair with his left arm against his head. The Claimant admits that he cannot remember being approached by the supervisors that evening.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its action to have been unreasonable, arbitrary, or capricious.

It is fundamental that sleeping on the job constitutes serious wrongdoing justifying discharge, even on the first offense. This Board has upheld discharge on the first offense in many sleeping-on-the-job cases. However, this case involves a Claimant who has been working for the Carrier for over 21 years. The Claimant has a relatively clean work record, having been disciplined only for accident-proneness and violation of a safety rule. This is not a case where the Claimant premeditatedly laid down to go to sleep. The record

reveals that this Claimant was suffering from some physical and emotional problems relating to some family situations and even admitted that he may have blacked-out instead of fallen asleep. The Claimant was contrite and apologetic for his wrongdoing and has stated that he would never do it again.

Although this Board recognizes that sleeping on the job is a dischargeable offense in many instances, this Board finds that the Carrier's action in terminating the Claimant in this case in response to this single incident of sleeping on the job was unreasonable, arbitrary, and capricious. Therefore, this Board orders that the Claimant be reinstated to service, but without backpay. The period of time that he was off shall be considered a lengthy suspension. The Claimant should recognize that any future incidents of this kind will almost assuredly lead to his discharge. However, given the Claimant's 21 years of service, this Board is of the belief that progressive discipline should have been made available to this Claimant.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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

Dated at Chicago, Illinois, this 4th day of March 1997.

**CARRIER MEMBERS' DISSENT
TO AWARD 31909 (Docket MW-32257)
(Referee Meyers)**

The Majority in this matter clearly stated:

"It is fundamental that sleeping on the job constitutes serious wrongdoing justifying discharge, even on the first offense."

Then the Majority concludes that because Claimant did not "premeditatedly laid down to go to sleep" and that "Claimant was suffering from some physical and emotional problems..." he is to be restored to service. Such is a judgement better left to the on-property review process. This Majority should have followed its own statement of the fact of Claimant's clear violation.


P. V. Varga


M. W. Fingerhut


M. C. Lesnik