

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32431
Docket No. MW-32763
98-3-96-3-68**

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty (30) working days’ actual suspension] imposed upon Machine Operator J. S. Bond for alleged violation of General Operating Rule D was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement [System File SPG-TC-9614/12 (95-330) CSX].**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant’s record shall be cleared of the charge 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 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.

The Claimant was issued a disciplinary suspension of 30 days as a result of an incident which occurred on January 15, 1995 when he was observed in the cab of his roadway equipment machine in a reclined position, with his eyes closed, while on duty. The disciplinary suspension was issued after a formal Investigation was held on January 25, 1995.

Before considering the merits of the dispute, the Organization raised a procedural claim which must be addressed. The Organization contends that the Carrier failed to provide the Claimant with a specific charge. By letter dated January 20, 1995, the Carrier advised the Claimant that a formal Investigation would be held on January 25, 1995, and stated, in relevant part, the purpose of the Investigation as follows:

"This is in reference to an incident that occurred on January 15, 1995, near Kissimmee, Florida whereby you were allegedly found in your machine on the track in an inclined position with your eyes closed. . . ."

The Notice of Investigation did not include a reference to the Carrier's General Rules, paragraph D which states:

"Employees must not sleep while on duty. An employee lying down or in a reclining position with eyes closed, covered or concealed will be considered sleeping."

Despite the Carrier's failure to specifically refer to Rule D, the Board concludes that the Claimant was aware of the nature of the charge against him. The reference in the charge to finding him in his machine "on the track in an inclined position with your eyes closed" is sufficient to place the Claimant on notice that he was charged with sleeping on duty. Review of the Investigation transcript discloses that neither the Claimant nor his Representative was surprised or misled by Supervisor of Gangs R. G. Ferri's testimony with respect to Rule D. The Board concludes that the Claimant's right to a fair and impartial Hearing was not prejudiced because of the Carrier's failure to specify the violation of Rule D in its charge against the Claimant.

Turning to the merits of the dispute, on January 15, 1995 the Claimant was working as a Machine Operator on a Ballast Regulator under the direct supervision of Production Foreman Steve Gregory. Gregory happened to be driving by the Regulator and noticed that the windows "were steamed up . . . and the machine wasn't moving."

He also observed that the Claimant was "in a sleeping slant position" and "tilted back as if he were sleeping." He reported his observations to Ferri.

Before investigating the situation, Ferri requested D. K. Landis, another Supervisor of Gangs, to accompany him to the Ballast Regulator. When Ferri and Landis approached the Ballast Regulator, they mounted the machine and stood on the platform "outside the door and [they] looked inside." Ferri said that he observed the Claimant "in a reclined position with his feet propped up, and his eyes were closed."

Elaborating on his reclined position, Ferri stated: "He was slung back on the chair. His feet were propped up. He was probably in approximately a 45 degree angle, reclined position, kind of like sitting in a Lazy Boy or on a sofa." Landis corroborated the testimony of Ferri.

The Claimant testified that he did not remember "anyone approaching" his machine on January 15. He did not remember that he was in a reclined position with his eyes closed on that day, while he was in the Ballast Regulator. The Claimant said, in fact, that he did not have a recollection of the events which led to his 30 day suspension.

The Organization contends that none of the Carrier's witnesses testified that they were positive that the Claimant was asleep when they observed him on January 15, 1995. *In Public Law Board No. 5025, Award 1*, the following observation was set forth with respect to the nature of the offense of sleeping on duty:

"... Arbitral precedent has consistently held, in this industry, that for an employee to be asleep and/or in a sleep-like position is the same thing...."

It is undisputed that the Claimant was observed in a "reclined position, slung back on the chair", with his feet propped up "as if he were sitting in a Lazy Boy recliner or on a sofa." Accordingly, a reasonable basis exists to infer that the Claimant was asleep because he was in a sleep-like position.

The Organization submits that the Claimant "may have been somewhat reclining in the seat because he had been waiting for nearly five hours to begin performing work." The Organization goes on to state that the Claimant was attempting to get into a more comfortable position while awaiting the call to begin his regular work. There is nothing

in the record to support the Organization's explanation of the Claimant's "sleep-like position" which is based upon speculation rather than evidence.

Finally, a question has been raised by the Organization as to whether the Claimant's eyes were closed when he was observed in the Ballast Regulator. The Claimant said that he wore his safety glasses in the Regulator because they act as sunglasses, to shield his eyes from the sun coming through the big window of the Regulator. Gregory reportedly told Ferri that the Claimant had his safety glasses on when he observed him in the Ballast Regulator.

Both Ferri and Landis testified, however, that the Claimant was not wearing his safety glasses and they observed that his eyes were closed when they observed him in the Ballast Regulator. Ferri and Landis further testified that the Claimant put on his safety glasses as he descended the steps of the Regulator and Ferri asked him to take them off so that he could observe the condition of his eyes.

The Board finds the testimony of Ferri and Landis persuasive. By contrast the Claimant's testimony is unconvincing inasmuch as he stated that he was unable to recall the events of January 15.

Furthermore, there is no conflict in the testimony between Gregory and the testimony of Ferri and Landis. Gregory observed the Claimant several minutes before Ferri and Landis drove to the Regulator, mounted the machine and observed the Claimant. It is the Board's judgment that based upon the undisputed testimony of Ferri and Landis, the Claimant's eyes were closed when they observed him in the Ballast Regulator.

As previously stated, there is "arbitral authority in this industry", which states that whether an employee is asleep or in a sleep-like position is irrelevant. The offense is sleeping on duty. *Public Law Board No. 5025, Award 1. In Third Division Award 24365, the Board held:*

"We must also address the issue as to whether the discipline imposed was reasonable given the circumstances. Sleeping while on duty has long been held to be a 'dismissible offense'. (Third Division Awards 12811 and 10440). The very safety of not only the Carrier, but also fellow employees of the Claimant depends upon a work place where all employees are alert

and certainly awake. To permit or condone otherwise would permit serious safety hazards in the industry. This cannot be permitted or allowed. Therefore, we find that the discipline imposed upon the Claimant to be reasonable.”

The factors clearly set forth in Third Division Award 24365 establish the basis for concluding that sleeping on duty is a serious offense.

The Carrier proved by substantial evidence that on January 15, 1995 the Claimant was sleeping on duty in violation of Rule D. The Board is persuaded that the serious offense committed by the Claimant warrants no less than a 30 day suspension.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of January 1998.