

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32784
Docket No. MW-32435
98-3-95-3-334**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Railroad**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The suspension of Section Foreman A. K. Weaver for alleged violation of BN Maintenance of Way Operating Rules 1.6, 1.10 and 1.11 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-94-D070-18/MWA 94-10-5AE).**
- (2) As a consequence of the above-stated violation, Claimant A. K. Weaver's record shall be cleared of the charges leveled against him and he shall be compensated for all wages and benefits lost as a result of this wrongful suspension."**

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.

Claimant was originally dismissed following Carrier's determination that he had slept on duty at various times and dates, read newspapers at various times and dates, and conducted himself in an immoral or discourteous manner during the period from July 1 through July 22, 1994. After some seven months, Carrier unilaterally reinstated Claimant on a leniency basis. Neither Claimant nor the Organization had requested such a reinstatement. Accordingly, Claimant's seven-month loss of service remains under challenge.

The charges of misconduct leveled at Claimant arose solely from the allegations of one of the employees he supervised, Mr. Stan Jones. A bit of history is in order. During July 1994, Claimant became more and more concerned that Jones drove the Carrier's truck in an unsafe manner. He reported certain incidents to his Supervisor. In addition, Claimant refused to ride with Jones after the middle of the month. Based on Claimant's reports, Carrier held an Investigation to inquire into Jones' driving. Jones was suspended for violating Safety Rule 1 and this Board ruled on the matter in Third Division Award 32016.

According to the evidence in the instant dispute, Jones wrote certain statements to Claimant's Supervisor that reported the previously described misconduct by Claimant. It is uncontroverted that Jones wrote the allegations after Jones learned that Claimant had reported concerns about Jones' driving.

The only witnesses at the Investigation with first-hand knowledge of Claimant's alleged misconduct were Claimant, Jones, and a co-worker named Jennings.

The Organization raised a number of challenges, both procedural and substantive, to Carrier's discipline of Claimant. We have carefully reviewed the Organization's procedural allegations that Carrier failed to satisfy certain time limitations found in Rule 40. We find these objections to lack merit. The Investigation was held within 15 days after Carrier's official acquired first knowledge of Claimant's alleged misconduct. When asserting an affirmative defense, which is what a procedural challenge is, it is not enough to raise a mere possibility of a time limit violation. Both the precise date and content of the alleged verbal conversations must be proven. This was not done on this record. In addition, the evidence establishes that Claimant was mailed

notice of the Investigation in keeping with Rule 40 C. The Rule does not explicitly require actual receipt more than five days prior to the Hearing.

The Organization also raised an objection to the fairness and impartiality of the Investigation as well as the sufficiency of the evidence. After detailed review of the record, we also have concerns about these aspects of the dispute. In this matter, the Hearing Officer was also the charging official and the decision-maker. As Carrier admitted in its November 30, 1994 correspondence on the property, when it elects to use one person in overlapping roles, the "... Carrier increases the risk of reversal and invites close scrutiny of its procedures." The transcript of the Investigation reveals that the Hearing Officer used leading questions in connection with important points. In addition, the Hearing Officer substantially undermined the value of sequestering witnesses by allowing Jennings, the only apparently disinterested witness, to read Jones' written statement before being asked for his recollections.

Our greatest concern, however, lies with the sufficiency of the evidence. Claimant was found guilty of immoral or discourteous conduct as a result of relieving himself by a four foot square concrete block along the track right-of-way. The uncontroverted evidence establishes three important points. First, it is common practice for track workers to relieve themselves where they can, with discretion, when suitable facilities are unavailable. Second, Claimant used the concrete block as well as he could to block sight lines. Indeed, Jennings testified that he did not know what Claimant did behind the block. Third, aside from Jones, whose interest in implicating Claimant was apparent, there is no evidence that any other member of the public observed Claimant. It appears as though Claimant did as well as possible to conceal himself. Under these circumstances, we do not find there to be substantial evidence in support of the alleged violation of Rule 1.6, Parts 5 or 7.

Regarding the sleeping and newspaper reading charges, the testimony of Claimant and Jones was sharply conflicting. Claimant denied sleeping when he should have been on duty. On this property, a sleeping rule violation can arise from actual sleeping as well as reclining with eyes closed. Jennings provided no corroboration of the sleeping charge. He could not say he had ever seen Claimant sleeping. And although Jennings had seen Claimant in a reclining position, he did not testify that Claimant's eyes were closed. Moreover, the time of the observation, to rule out breaks and/or lunch periods, was not specifically established in the record. The context of the questions put

to Jennings covered working hours, which was the entire time frame between 7:30 A.M. and 4:00 P.M.

Claimant also denied reading newspapers when he should have been on duty. Jennings' testimony did not contradict him. Jennings did see Claimant working a crossword puzzle during working hours, but once again, the time was not established to rule out breaks or lunch periods. In this regard, Claimant admitted working crossword puzzles during his lunch break.

After careful and detailed review of the record, we are compelled to find that the Carrier's misconduct charges were not supported by substantial evidence in the record. Given this developments, we need not make specific findings about the fairness and impartiality of the Investigation beyond our previous comments.

AWARD

Claim sustained.

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 23rd day of September 1998.