Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37487
Docket No. MW-37860
05-3-03-3-234

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Foreman C. T. Jones for his alleged violation of IHB Engineering Safety Rules and Procedures Rule 60.2 and NORAC Rule D when he was observed sitting in Vehicle No. 132084 slumped in the seat with his head down and eyes closed while on duty and under pay at approximately 10:30 A.M. on Tuesday, June 25, 2002 was without just and sufficient cause, based on an unproven charge, arbitrary, capricious and in violation of the Agreement (Carrier's File MW-02-011).

(2) As a consequence of the violations referred to in Part (1) above, Foreman C. T. Jones shall be exonerated of the charge, have the discipline removed from his record and be compensated for all wages, credits and benefits lost due to his dismissal."

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, a Track Foreman with more than 23 years' seniority, was in charge of a small track gang on the 7:00 A.M. to 3:00 P.M. shift on June 25, 2002. Having arrived at the designated work location at about 8:15 A.M., the Claimant contacted the Dispatcher to obtain track clearance so that work could begin on a switch. After being advised that track clearance would not be provided until a scheduled train passed, the Claimant instructed his gang to do a small amount of prep work and then seek shade because of the 95 degree heat until track clearance was obtained. The Claimant and Laborer Dominguez went into the gang pickup truck, with the Claimant in the front passenger-side seat, and Dominguez in the rear driver-side seat.

At about 10:30 A.M., Assistant Production Engineer J. C. Majeski, the Claimant's second-level Supervisor, arrived at the work site, where he observed the Claimant slumped over, with his hands crossed and eyes closed, making no movement whatsoever. After watching the Claimant for about two to three minutes, during which time the Claimant did not move, Majeski shrugged his shoulders towards Dominguez, who responded by shrugging his own shoulders. Majeski then opened the front door, startling the Claimant, and asked him what he was doing. At first, the Claimant did not reply, and, shrugging his shoulders, simply stared back at Majeski. When Majeski asked him again what he was doing, the Claimant replied that he was waiting for track time. Then he said that he was cooling off because it was hot that day. Meanwhile, the rest of the gang could be seen sitting in the trailer, lying under the backhoe, and resting under a nearby shade tree. Majeski also saw a large amount of debris strewn about the area.

By letter dated July 1, the Carrier notified the Claimant of an Investigation on July 10 to determine his responsibility, if any, in connection with his having been observed on June 25, 2002 sitting in a truck, slumped over with his eyes shut in alleged violation of IHB Engineering Safety Rule 60.2 and NORAC Rule D, which provide in pertinent part:

> "Attending to Duties. Follow these precautions to prevent injury to yourself and others: 1. Be alert and attentive at all times when performing your duties. . . . 3. Give all your attention to your work. While you are on duty, do not: Sleep or assume the attitude of sleep. [Safety Rule 60.2.3].
>
> Employees must devote themselves exclusively to the company's service while on duty. . . . To remain in service, employees must refrain from conduct that adversely affects the performance of their duties, other employees, or the public. [NORAC Rule D]."

Following the Investigation, which was postponed at the Organization's request until August 12, the Carrier notified the Claimant by letter dated August 23, 2002 that he was dismissed from service. In a letter dated September 4, 2002 the Organization appealed the dismissal. The Carrier denied the appeal. The Claimant also filed a race discrimination claim challenging his dismissal. In Clemmie T. Jones v. Indiana Harbor Belt Railroad, (No. 2:03-cv-112, ND Ind. 8/30/2004), the United States District Court for the Northern District of Indiana denied the Claimant's claim without trial, granting the Carrier's motion for summary judgment.

The Organization contends that the Carrier should have called Laborer Dominguez to testify about whether the Claimant was asleep, relying on arbitral precedent holding that a Carrier should not base disciplinary action on the basis of the testimony of a single witness. (See Third Division Award 18551.) There, however, the Board did not sustain the discipline because the testimony of the Carrier's lone witness was uncorroborated and contrary to the testimony of the Claimant. By contrast, in the instant claim Majeski's testimony that he observed the Claimant with his eyes shut for a few minutes was not contested by the Claimant.

> "Q. Mr. Jones, Mr. Majeski says you were asleep. You said you were resting from being overheated and not feeling well. Were your eyes closed? He said they were?

A. My eyes were closed.

Q. Can that be understood that he thought you were asleep, then? Does that make sense to you?

A. He might have assumed, which I don't know whether he assumed because he didn't ask."

Thus, although the Claimant denied at the Investigation that he was sleeping, he freely admitted that he had closed his eyes because he was feeling the effects of the heat, his vision had become blurry and he had gotten sick the previous night. Importantly, Rule 60.2.3, which the Claimant was charged with violating, prohibits employees on duty from sleeping or appearing to be asleep: "While you are on duty, do not: Sleep or assume the attitude of sleep." Therefore, the Carrier met its burden of proving that the Claimant had his eyes shut, assuming "the attitude of sleep," for several minutes on the morning of June 25. Moreover, because Rule 60.2.3 prohibits employees from appearing to sleep, the Organization's reliance on arbitral precedent that a Carrier should not discipline an employee based on mere conjecture or speculation must be rejected. Given the wording of Rule 60.2.3, the Carrier did not have to speculate that the Claimant was actually sleeping.

Likewise, the Carrier proved that the Claimant violated NORAC Rule D, which prohibits employees from engaging in conduct that adversely affects their performance or that of other employees. The Claimant, who was Foreman of the gang, permitted employees under his supervision to remain idle for almost two hours waiting for track clearance. Meanwhile, it is undisputed that there was ample work to do, including cleaning up debris that was strewn about. The Claimant admitted that, after his gang had taken out the tools needed for performing track work, they performed no work for almost two hours. By failing to direct the employees under his supervision to engage in productive work for about two hours, the Claimant violated NORAC Rule D. Moreover, even had the Claimant been feeling unwell, as he claimed, he could have instructed the members of his gang to engage in productive work. Indeed, once track clearance was obtained shortly after Majeski had arrived at 10:30 A.M., the Claimant had no problem directing his charges to perform track work.

Importantly, when Majeski asked the Claimant what he was doing in the truck on June 25, the Claimant replied that he was waiting for track clearance, adding that he wanted to get out of the hot sun. Because the Claimant made no mention at the time that he had not been feeling well, his testimony at the Investigation that he was feeling sick on June 25 is simply not credible. This finding is supported by the fact that, after Majeski arrived, the Claimant leapt into action, directing his gang to clean up the debris.

Addressing the issue of remedy, the Organization argues that, even assuming, arguendo, that the Claimant engaged in the Rule violations with which he was charged, discharge was too severe in light of his "unblemished" record spanning about 23 years. The Organization's characterization of the Claimant's record, however, is inaccurate. Although the Carrier failed to introduce the Claimant's disciplinary record into evidence, there exist public documents showing that the Claimant had numerous disciplinary actions in his record. For example, in Fourth Division Award 4976, the Board found that the Claimant had engaged in time reporting inaccuracies, warranting a 15-day actual suspension in September 1995.

Likewise, in Public Law Board No. 6401, Case 4, a case involving a challenge of the Carrier's decision to demote the Claimant from a supervisor position, the Board, in denying the claim, noted that the Claimant's disciplinary record was "extensive, including a written reprimand and nine warning letters between August 1998 and January 2000."

In summary, the Carrier proved that the Claimant violated Rule 60.2.3 and NORAC Rule D. Because the Organization has been unable to cite any compelling mitigating circumstances, the Carrier's decision to dismiss the Claimant for these offenses cannot be termed arbitrary, capricious or an abuse of discretion.

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 19th day of April 2005.